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PURSuing JUSTICE IN AN UNJUST WORLD: ARJUNA IN AMERICA

MARC GALANTER¹

Let me begin with a story about justice that you probably heard and have forgotten. I first heard it in India many years ago when I was a student there, travelling about and observing courts and lawyers. The joke concerns a fresh and enthusiastic junior lawyer who was dispatched by his senior to argue his first case in a remote provincial town. At the hearing the young lawyer prevailed. Elated, he rushed to the telegraph office and wired his senior, "Justice is done." He retired, exhausted, to his hotel and fell into a deep sleep, from which he was rudely awakened by a pounding on the door. It was a messenger with a return telegram, which the young lawyer hastily tore open, to find a message, "Appeal at once."

For a long time, I thought this was a distinctively Indian story, but then I was told it both in America and in England. The story records the widely felt disjunction of law and justice. It reflects a resigned acknowledgment of the inability of the legal system to render justice. It suggests that those who occupy the higher reaches of the system can be expected to undo its results on the occasions when it does produce justice. It portrays veteran lawyers as cynical scoundrels and identifies them as active perverters of the system. At the same time, it observes ruefully the perpetual renewal of faith in the meshing of law and justice, doomed to be betrayed by experience.

The story is permeated by a feeling that law ought to be the institutionalized pursuit of justice. Its divergence from this proper state, suspected but painful to acknowledge, is the 'dirty little secret' that the joke reveals. But the joke is even more grim, for it shows us that youthful ignorance in eager pursuit of justice can itself be manipulated to serve the schemes of the unjust. Yet in depicting this nasty state of affairs, we are given a glimmer of hope. For a moment the veil is lifted; the injustice that parades as justice reveals itself. Presumably, along with the listener, the young lawyer gains insight into the nature of the system in which he is enmeshed. Perhaps he succumbs to despair and joins the army of the disillusioned. But perhaps, we are invited to hope, this dedicated young person is transformed by the experience. Armed with this hard-won knowledge, he can carry on the struggle for justice in a more measured and self-aware way.

Concealed in this cynical story is a message of hope: knowledge about how the legal system really works equips us to resist it, perhaps even to transform it. Let us suppose that this reveals itself to our young lawyer, who by this point

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deserves a name—and since I started off with the Indian version of the story, let us make him a young Asian-American named Arjuna. How, Arjuna asks, can one acquire this liberating knowledge? How can you use it to do justice? Can you make a living at it?

In the course of surveying the possibilities, Arjuna thinks, "maybe I will become a law professor, for law schools are places where knowledge about the legal system is acquired and transmitted." Arjuna filed his resume with the AALS and was soon on the law school recruitment circuit. As he made the rounds, Arjuna was told about the criteria for promotion and tenure, the trio of teaching, public service and scholarship. He visited schools where faculty members pursued good causes and where clinical programs engaged students directly in doing good works. Admiring the way that teachers supplied students with the concepts and skills to fight for various just causes, he could not help noticing that these same schools also prepared the lawyers who opposed these causes. Curious whether the scholarship component of being a law professor has anything to contribute to the quest for justice, Arjuna read many law review articles and was dazzled by the intricacy of their analyses and the ingenuity of their proposals. But most of this scholarship proceeded as if everything turned on someone—the courts or perhaps the reader—adopting just the right verbal formula. Arjuna found it hard to believe that the unjust practices he saw were problems of not finding precisely the right rule. He wondered how the authors were so certain that the rules they proposed would really make things better.

He was intrigued when he was told there is a second kind of legal scholarship that, instead of analyzing doctrine—or deconstructing old jokes!—sought to understand how the process worked. This second kind of legal learning did not view law in isolation but in its social, economic and political context; it was not looking for justification but for explanation. This second kind of learning about law, he discovered, was packaged under various labels: some was referred to as "law and society" work; some of it as law and economics, or critical legal studies, or feminist legal theory or critical race theory; some was even disguised as mainstream generic legal scholarship.

As he made his round of law schools, Arjuna asked his hosts what this learning told us about the legal process. On his return journey from each school he wrote down what he could remember of their replies. What follows are some excerpts from Arjuna's journal.

[W]e know much more about the working of the legal system than we did just a generation ago—more about the decisions of courts, about the operations of the police, about the organization of law firms, about the strategies of negotiators, about the deliberations of juries. And many hard lessons have been learned and re-learned: that the rules promulgated by courts do not penetrate evenly and costlessly to regulate behavior in society; that rules have unanticipated effects; that bargaining and negotiation are pervasive—what starts off to be adjudicated ends up being negotiated; that outcomes are influenced by many factors other than legal rules; that those possessed of other advantages can deflect unfavorable rules and take full advantage of favorable ones; that process is expensive and entails rationing and compromise, so that the law never delivers all that it promises.

During the thirty years or so in which this knowledge has accumulated, the legal world that it observes has undergone a tremendous enlargement: the amount and complexity of regulation; the frequency of litigation; the amount of authoritative legal material; the number, coordination and productivity of lawyers; the number of legal actors and the resources they devote to legal activity; the amount of information about law and the velocity with which it circulates—all of these have multiplied several times over.

Did more law bring with it more justice? Surely, yes, but paradoxically it also was accompanied by an increase in injustice. Injustice is something bad that someone ought to do something about. As the risks of everyday life have declined dramatically there is a sense that science and technology can produce solutions for the remaining problems. As more things are capable of being done by human institutions, the line between what is seen as unavoidable misfortune and what is seen as imposed injustice shifts. The realm of injustice is enlarged. Hurricanes are misfortunes; but bungled relief efforts are injustices. Once, having an incurable disease was an unalterable misfortune; now a perception of insufficient vigor in pursuing a cure can give rise to a claim of injustice. As the scope of possible interventions broadens, more and more terrible things become defined by the incidence of potential intervention. Thus poverty, disease and disability are not unalterable fate, but a matter of appropriate interventions. Our consciousness of injustice increases, not because the world is a worse place, but because it is in important ways a better, more just place.

As the legal system undertakes to address this expanding agenda, there is not enough justice to go around. The process of remedying justice consumes resources. We can let the cost fall on the parties, we can shift it all to one party, or we can shift it to the public, but it comes from somewhere. Society gets an increment of justice instead of designer ensembles or Patriot missiles or Headstart funds. Since the process of remedying injustice consumes resources, we can never redistribute benefits so as to align the outcome with the underlying, substantive merits.

These transaction costs, by the way, are mostly the costs of lawyers—our incomes. Contrary to their detractors, lawyers create value by securing better outcomes for their clients. But the presence of lawyers runs up the costs. And lawyers have goals and needs which do not align perfectly with those of their clients: financial incentives may induce lawyers to do too much or too little. The problem is not simply one of greed. Even the lawyer who eschews financial gain to devote himself to justice-seeking may be deflected by appetite for fame, honor, or for "interesting" work.

Beyond the costs in individual cases, the use of law to address injustices imposes another kind of cost as it cumulates into a thick layer of rules to be known about, permissions to be obtained, forms to be filled out, records to be kept—adding to expense and burdening

activity. But legalization has benefits as well as costs: victims may enjoy vindication or honor or a heightened sense of efficacy—goods that are not subject to the same zero-sum distributional rules as money. The legal process may generate public goods by crystallizing and broadcasting norms, preventing injustice by deterring and educating.

But whatever the returns on legal initiatives, the supply of injustice is endless, and there are attractive competitors to investment in justice-seeking, so that doing justice inevitably entails questions of rationing, priorities and efficiency.

The role of the lawyer is to obtain the best possible result for a particular client rather than to maximize the well-being of the whole set of similarly situated parties. For example, the good lawyer may advise a claimant to settle even when this aborts a decision that would benefit others. We celebrate the public-regarding officer-of-the-court aspect of the lawyer's role, but incentives and public expectations overwhelm it. Society wants lawyers to be a good priesthood upholding our shared values, but even more each of us wants his lawyer to be a determined fighter for our particular narrow interests.

Several features of American law schools militate against a justice-maximizing use of available resources. First, law schools, like lawyers, tend to emphasize individual over general solutions. Law schools teach lawyers to deal in individualized remedial justice, not to devise systematic structural arrangements for minimizing injustice. Like dentists, lawyers are trained to salvage specific situations with great craft and artistry. Drilling and filling may be the best response to a specific dental problem, but fluorides, nutrition and education may be more cost efficient in dealing with recurrent problems on a mass scale. When we teach about justice in law schools, we lavish attention on adjudication and spend little time on the aggregate, wholesale kinds of instruments—legislation, rulemaking, the re-design of social arrangements.

On the whole people are drawn to legal work by the attraction of craft and mastery rather than selfless service. Financial considerations aside, lawyers want work that challenges them and enables them to work at their technical best. But lawyers for the poor and oppressed do not routinely command the resources for optimum effort.

Of course we want justice to be institutionalized, so that it prevails routinely and without the need for heroic exertion and stunning breakthroughs. But the low monetary stakes and repetitiveness of much injustice and the need to devise systematic solutions run against the powerful pull of the craft satisfactions that attract people to legal work in the first place. Such routinization involves a series of complex problems of design—establishing viable classifications, trade-offs of individuation against low processing costs—and operation. But law schools tend to emphasize training in how to excel in complex individualized disputes; faculty research tends to be similarly focused on adjudicated matters rather than on systemic design. The

predilection of practitioners for labor-intensive high stakes individualized determinations is mirrored in law professors' preference for complex formulae for judicial decision-making .

Consider the very striking changes that law schools have undergone in the past thirty years: taken collectively, they have doubled in size, recast their recruitment of students to include forty percent women and ten to fifteen percent minorities; reduced reliance on the Socratic method and incorporated a lot of non-case materials into the curriculum, while leaving appellate courts and their opinions as the central axis of study; abandoned the required curriculum in the second and third years and substituted a varied smorgasbord of electives and seminars; become home to lively movements that reject the view of law as autonomous and self-contained; provided clinics and skills training for a minority of students, while sending almost all students out to intensive legal work experiences that Roger Cramton called "the new apprenticeship," and tied themselves closely to the world of large firm practice by serving as hiring halls for recruitment into large law firms.

Law schools have changed a great deal in the past thirty years—in size, in makeup of the student body, in curricular form, if not content, in teaching methods, in the relation to the market for legal services and in relation to the larger currents of intellectual life.

These changes were not part of anyone's plan. It is hard to imagine that any of them originated in policies deliberately adopted by actors within the law school realm, with the possible exception of the development of clinics. These changes reflect the growth of the population and the economy, increasing investment in education in the society at large, the changing organization of legal practice, reflecting changes in the market for legal services, and intellectual currents in the academy, from hard core Chicago economics to soft core critical Marxism, which flowed around and eventually into, the law schools. Throughout these changes, the law schools have been reactive, derivative—they have been on the receiving end of a whole set of influences to which they have adapted very successfully. It is less clear that they have done very much to shape the legal world and the larger social world that surround them.

This history commends a modest estimate of what law schools can do to shape society through changing the way law is practiced or courts operate. Law schools can not decree changes in the basic architectural features of American legal institutions. They just can't do much directly to change such major features as adversarial processes, the high ratio of lawyers to judges, the specialization of lawyers by types of clients, the disparity of client resources, the close attachment of lawyers to clients, weak control by guild organizations, the organization of business lawyers in large hierarchical firms, and the gravitation of most disputes to resolution by bargaining. These things

are not likely to be altered by enhanced clinics, pro bono programs, or sensitizing students to justice considerations.

Where law schools may have some indirect leverage is where they have a comparative advantage—in generating ideas and information about the legal system. Other legal institutions tend to invest little in research and development. Lawyers do lots of legal research—that is, research *in* law, but they do almost no research *about* law. They do not even support research about themselves. The organized bar does little to support systematic inquiry (with the notable exception of its support of the American Bar Foundation). There are a few noteworthy and productive research institutions outside the law school world. But taken as a whole, the legal world scandalously underinvests in R&D. The bar looks to law schools for its labor supply but has been indifferent to their role as producers of knowledge about the legal process. Compared to medical or economic research, not to mention defense, research about legal processes (especially civil) is ludicrously thin, so thin that it is perfectly routine for far-reaching policy proposals to be advanced on the basis a few tendentious anecdotes.

The thinness of the knowledge base is vividly apparent in relation to the current proposals for far-reaching changes in civil justice. Not only do these proposals proceed from an inadequate factual foundation, but the bar, whose supposed misdeeds are a major target, has only a slightly better basis for contending with these proposals. After decades of lip service to interdisciplinary research, one might think the law schools would have a fund of research findings relevant to this challenge. But it is pretty sparse. And much of the fund that is available, it should be noted, was accumulated not by law professors but by social scientists—some affiliated and supported by law schools, but many not—or by practitioners of the new legal journalism that, since the late 1970s, has greatly increased the circulation of information. Most of the large, systematic research has been done at institutions outside the academy, like the Rand Corporation's Institute for Civil Justice. In the law schools, research on how the system works is scattered and intermittent. The legal academy's principal publications are indifferent or hostile to this research. Abetted by the bar, law schools have largely abrogated their responsibility to be contributors to knowledge about the working of the legal process.

This underinvestment in research throughout the legal world seriously constricts the possibilities for justice. Law schools are well-situated to study professional life in order to identify possibilities for change—for example, by exploring new formats for providing legal services to ordinary people. They can be places where we learn about the conditions of professional satisfaction and about what stimulates and diminishes the justice motives in lawyers' practices.

As Arjuna contemplated these possibilities he recognized that pursuing justice through scholarship was like pursuing it through advocacy—a chancy undertaking, in which you never have the whole truth and in which your work

is subject to misreading and manipulation. The knowledge that emerges from research, he realized, is not automatically translated into policy, but becomes part of a political struggle. But deepening that struggle by challenging our understandings and liberating us from false problems and false solutions is one of the things that law schools can do for justice.

The quest for justice is a political quest. In his stirring essay, *Politics as a Vocation*,² surely one of the most profound examinations of the nature of political action, Max Weber tells us that the political vocation demands passion, responsibility and something more: "... the decisive psychological quality of the Politician [is] his ability to let realities work upon him with inner concentration and calmness."³ Hence the need for distance. "'Lack of distance' *per se* is one of the deadly sins of [politics]."⁴ Justice seeking is about how the world is and what is possible. The law school cannot be a plenary actor for justice until it accepts its responsibility to cultivate that knowledge continuously and cumulatively.

² Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY (Hans Heinrich Gerth & C. Wright Mills eds., 1958).

³ *Id.* at 115.

⁴ *Id.* at 115.

