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ARTICLES

PREDATORS AND PARASITES: LAWYER-BASHING AND CIVIL JUSTICE*

*Marc Galanter***

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INTRODUCTION

When it comes to lawyer-bashing, there is not much new under the sun. Hostility toward lawyers is a perennial. Yet its expressions vary greatly. There is a great cultural repertoire of anti-lawyer observations and sentiments.¹ At any time one or another grievance may gain prominence. The changes in fashion are not random, but part of wider changes in sensibilities. I propose to examine the distinctive anti-lawyerism of the present to see what it tells us about our legal system, our society and ourselves.

I. A TAXONOMY OF ANTI-LAWYER THEMES

Before taking up the current discontent with lawyers, let me set out a very crude taxonomy of anti-lawyer themes. I have organized some of the common themes into four clusters of related complaints: that lawyers are (1) corrupters of discourse; (2) fomenters of strife; (3) betrayers of trust; or (4) economic predators.²

¹ See, e.g., Max Radin, *The Ancient Grudge: A Study in the Public Relations of the Legal Profession*, 32 VA. L. REV. 734, 740-52 (1946) (summarizing historical sources of lawyer-bashing from Ancient Greece to present).

² These four clusters summarize most of the prevalent substantive gripes about lawyers. However, the public discourse about lawyers includes several more general themes of condemnation that focus not on their deeds but on their character and standing. One brands lawyers as morally obtuse, lacking common decencies and deficient in common sentiments. Another identifies them as objects of scorn, to be despised precisely because they are such objects. While many of the prevalent anti-lawyer jokes refer to specific grievances about lawyers, there are others that allude to their general moral deficiency or celebrate the shared contempt for them (e.g., Q. "What do you call sixty thousand lawyers at the bottom of the

Corrupters of Discourse: The first of my four clusters blames lawyers for corrupting discourse by promoting needless complexity, mystifying matters by jargon and formalities, robbing life's dealings of their moral sense by recasting them in legal abstractions, and offending common sense by casuistry that makes black appear white and vice versa.

[C]asuistry is one of the diseases of a decadent order. . . . It is lawyers who can take a plain recitation of facts, turn it upside down, shake it, marinate it with doubts, and trundle it upstairs to a higher court for reconsideration.³

Fomenters of Strife: A second cluster portrays lawyers as aggressive, competitive hired guns, unprincipled mercenaries who foment strife and conflict by encouraging individual self-serving and self-assertion rather than cooperative problem solving. Examples are legion:

The entire legal profession . . . [has] become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. . . . Healers, not warriors. . . . Healers, not hired guns⁴

Lawyers have an economic interest in generating and prolonging conflict.⁵

[Lawyers] encourage their clients to think with selfish defensiveness, to imagine and prepare for the worst from everyone else.⁶

sea?" A. "A good start.")

³ William F. Buckley, Jr., *Nobody Loves Lawyers Any More*, WASH. STAR, Oct. 27, 1977, at A15.

⁴ Warren E. Burger, Annual Message on the Administration of Justice at the Midyear Meeting of the American Bar Association 13 (Feb. 12, 1984) [hereinafter Burger, Annual Message] (transcript on file with author).

⁵ Robert J. Samuelson, *Hustling the System*, WASH. POST, Dec. 23, 1992, at A17.

⁶ Charles Peters, *How Your Lawyer Does It*, WASH. MONTHLY, Feb. 1974, at 33, 37.

And then there is the old joke about the town with one lawyer who was starving, but when a second lawyer settled there, they both prospered.

Betrayers of Trust: A third cluster damns lawyers as betrayers of trust: they are opportunistic, manipulative, self-serving deceivers who, under color of pursuing large public responsibilities, take advantage not only of hapless opponents but of clients who entrust their fortunes to them.

An ancient, nearly blind old woman retained the local lawyer to draft her last will and testament, for which he charged her two hundred dollars. As she rose to leave, she took the money out of her purse and handed it over, enclosing a third hundred-dollar bill by mistake. Immediately the attorney realized he was faced with a crushing ethical question:

Should he tell his partner?⁷

Economic Predators: Finally, lawyers are economic predators; they are greedy, money-driven monopolists, who levy a tariff on matters of common right. They are parasitic rent-seekers who do not really produce anything, but merely batten on the productive members of society, often in alliance with the undeserving—opportunistic malingerers in some versions, the privileged and powerful in others.

There's a reason people hate lawyers. . . . It's because they have a monopoly on what rightfully belongs to everyone.⁸

These clusters overlap and reinforce each other: for example, mystification helps lawyers manipulate the unwary and shield their monopoly. Lawyers betray their clients by fomenting needless

⁷ Versions of this story may be found in virtually any collection of lawyer jokes. This one is taken from BLANCHE KNOTT, *TRULY TASTELESS LAWYER JOKES* 73 (1990).

⁸ Michael Castleman, *Just Say Nolo*, *CAL. LAWYER*, Aug. 1992, at 182, 184 (quoting Nolo Press founder Jake Warner).

conflict, and the resulting economic burdens directly benefit lawyers. And so on.

Each of these clusters is a composite, consisting of a number of specific and partially overlapping complaints. In each cluster, there is a range from complaints about mistreatment of specific individuals (clients, opponents) to wrongdoing that in the aggregate has larger public consequences. Thus, a lawyer can be accused of hoodwinking a client by mystification, or propelling that client into an unnecessary fight, or betraying that client's interest for self-serving reasons, or charging that client excessively for his services. These grievances are the private, individual versions of the four clusters. On the other hand, the complaint might be that lawyers' jargon and mystification obscure public understanding and diminish citizen participation; or that lawyer-induced excessive adversariness makes public life nasty and wasteful; or that lawyers misuse their authority to sustain illegitimate privilege and power; or, finally, that lawyers' exploitation of their monopoly is a drain on the economy, reducing growth and decreasing competitiveness. These are the aggregate, public, and systemic versions of the four clusters.

Each of these clusters points to the dark side of things that may otherwise appear as virtues or at least useful qualities of lawyers. In the sins of discourse we can recognize the inventiveness of lawyers and their obsession with precision and relevance. Fomenting conflict mirrors the lawyer's zealous advocacy and insistence on vindicating rights. In economic predation, we see appreciation of the lawyer's prowess as an agent of redistribution. The betrayal complaint proclaims regard for the lawyer as an ally coupled with fear and resentment that he is an undependable ally. The things for which lawyers are despised are closely related to the things for which they are esteemed.⁹

⁹ See generally Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987) (exploring the organization of "profoundly contradictory" popular attitudes toward lawyers). See also Marvin W. Mindes, *Trickster, Hero, Helper: A Report on the Lawyer Image*, 1982 AM. B. FOUND. RES. J. 177, 211 (empirically documenting tension among contradictory images of lawyers) ("[T]he lawyer finds himself in a conflicted world in which one must be both Tricky and Helpful to maximize admiration, while being Helpful requires that one is not Tricky and being Tricky requires that one is not Helpful.").

II. THE "PUBLIC JUSTICE" CRITIQUE

To appreciate the distinctiveness of the current discourse about lawyers, it is useful to look back to the pre-Reagan years. Fifteen years ago, President Jimmy Carter took the occasion of the 100th Anniversary dinner of the Los Angeles Bar Association to deliver a critique of the legal system.¹⁰ Beginning with an excerpt from *Bleak House*, President Carter excoriated delay, "excessive litigation and legal featherbedding,"¹¹ and chastised lawyers for aggravating rather than resolving conflict. We have heard much in recent years about these lawyer vices, but in Carter's critique these complaints were interwoven with another set of themes that have been notably absent from more recent presidential rhetoric about the legal system. President Carter declared that legal services were, more than any resource in our society, "wastefully [and] unfairly distributed."¹² Lawyers were particularly to blame for failing to make justice "blind to rank, power and position."¹³ He deplored that "lawyers of great influence and prestige led the fight against civil rights and economic justice."¹⁴ Devoted to the service of dominant groups, lawyers had failed to discharge their "heavy obligation to serve the ends of true justice."¹⁵ He called upon them to release "the enormous potential for good within an aroused legal profession."¹⁶ In short, lawyers had fallen woefully short of their calling to be votaries of justice in an imperfect world. He called on them to embrace the theme of "Access to Justice," which was the official theme of the American Bar Association for 1978.¹⁷ Although the tones were critical, the song was one of optimism and hope: rededication to their high calling combined with institutional redesign could vindicate the promise of connect-

¹⁰ President James E. Carter, Address at the 100th Anniversary Dinner of the Los Angeles Bar Association (May 4, 1978), reprinted in *President Carter's Attack on Lawyers, President Spann's Response, and the Chief Justice Burger's Remarks*, 64 A.B.A. J. 840 (1978) [hereinafter *Carter's Attack on Lawyers*].

¹¹ *Carter's Attack on Lawyers*, supra note 10, at 842.

¹² *Id.*

¹³ *Id.* at 843.

¹⁴ *Id.* at 842.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 844.

ing law to pursuit of a just society.¹⁸ Needless to say, the President's observations did not get a warm reception from the bar.¹⁹ The general press was quite unfavorable.²⁰ But the President's criticism of the bar met with general public approval.²¹

¹⁸ *Id.* at 846. Carter's address is the direct descendant of an unheralded Law Day speech at the University of Georgia School of Law, delivered four years earlier, when he was Governor of Georgia. In that speech, he traced his understanding about justice and "what's right and wrong in this society" to reading Reinhold Neibuhr and listening to the songs of Bob Dylan. Governor James E. Carter, Address at The University of Georgia School of Law, Law Day (1975) in ADDRESSES OF JIMMY CARTER (JAMES EARL CARTER), GOVERNOR OF GEORGIA, 1971-1975, at 261 (Ben W. Fortson, Jr., Sec. of State, ed., 1975). Cataloging the injustices of the legal system, he chastised lawyers for tolerating injustice, lacking fire to improve the system of which they were part, avoiding the obligation to "restore equity and justice and to preserve or enhance it," and being distracted from the pursuit of justice into self-serving concern for their own well-being and authority. *Id.* He closed with the reflection, echoed four years later, that the State could be transformed if the body of attorneys were deeply committed to abolish the inequities of the system. *Id.* Apparently the speech was from notes and there is no text. The version that appears in his book of addresses was apparently reconstructed from a tape recording.

Fortuitously, the audience that day included gonzo journalist Hunter Thompson, who reports Carter telling him in 1976, "[T]hat was probably the best speech I ever made." Hunter S. Thompson, *Fear and Loathing on the Campaign Trail '76, Third Rate Romance, Low Rent Rendezvous*, ROLLING STONE, June 3, 1976, at 54, 64. Viewing it as "the heaviest and most eloquent thing I have ever heard from the mouth of a politician," Thompson extended an enthusiastic endorsement of Carter's candidacy for the Democratic presidential nomination. *Id.*

¹⁹ Tom Goldstein, *Carter's Attack on Lawyers*, N.Y. TIMES, May 6, 1978, at 11 ("[L]eading lawyers around the country reacted with anger, bitterness, frustration and sadness yesterday to President Carter's assertion that the legal profession has been an impediment to social justice.") On behalf of the American Bar Association, its President, William B. Spann, responded that "we disagree sharply with the implications of the president's remarks" and accused him of "tak[ing] the popular course of attacking the professions" to distract attention from foreign problems, inflation, and his political vulnerability. *Carter's Attack on Lawyers*, *supra* note 10, at 841. In President Spann's view, Carter's speech was a simplistic distraction from the ceaseless and constructive efforts of lawyers to solve the problems of the justice system. *Id.*; see also 124 CONG. REC. H13939 (daily ed. May 16, 1978) (statement of Rep. Kastenmeier) (characterizing President's remarks as harsh and inaccurate).

²⁰ *E.g.*, *The Law's Delay*, WALL ST. J., May 10, 1978, at 24 (noting that since "Washington itself has become the fountainhead of unnecessary laws and litigation," the President should spend "less time lashing out at lawyers in general and more time asking the government's lawyers just what it is they are trying to do"); *Mr. Carter's Class Struggle*, WASH. POST, May 7, 1978, at C6 (dismissing President's remarks as "unfocused resentment").

²¹ Two-thirds of a national sample of registered voters polled by Yankelovich, Skelly and White thought the President's criticism of the legal profession was fair. Roper Center, Public Opinion Online, 1989, available in LEXIS, News, Arcnws Library (accession no. 0132789). A Roper poll of a national sample of adults found 53% who thought his criticisms were justified and another 16% who thought them partly justified. *Id.* (accession no. 0116933). The public was equally critical of doctors, whom Carter criticized in responding to questions

The organizing theme of the Carter critique was betrayal of trust. President Carter's speech was the culmination of a decade of attacks on lawyers for self-serving alliance with the powerful, attacks that acquired added credibility from the heavy representation of lawyers among the Watergate villains.²² Let me mention just a few of the landmarks of that trail. In a much cited 1967 article entitled "The Practice of Law as a Confidence Game," Abraham Blumberg indicted criminal lawyers for allowing themselves to become co-opted by the court organization so that they became "double agent[s]" cynically manipulating their clients.²³ In his 1968 best seller, *The Trouble With Lawyers*, Murray Teigh Bloom recounted the various ethical lapses of lawyers who abuse their clients by self-serving behavior.²⁴ In a 1977 Law Day address, the Chief Judge of New York's Court of Appeals warned that lawyers were increasingly motivated by "self interest rather than social responsibility."²⁵

Other critics recast the betrayal theme in terms of large public interests rather than individual lawyer-client relations.²⁶ In his highly regarded 1976 history, *Unequal Justice*, Jerold Auerbach condemned the elite of the legal profession for its subservience to

the day after his lawyer speech, as of lawyers. *Id.* (accession no. 0132788).

Carter was not entirely lacking in elite support. In addition to the figures discussed below, his critique was defended by his Secretary of State, who called for "innovative approaches for making justice available for all." Peter Kihss, *Vance, at Fordham Law Graduation, Calls for 'Innovative' Justice*, N.Y. TIMES, May 29, 1978, at 9. Admiral Hyman J. Rickover also supported the President, attacking lawyers for "making a great negative contribution to our defense." Bernard Weinraub, *Rickover Asserts Lawyers' Tactics Hinder Military*, N.Y. TIMES, Mar. 31, 1979, at 22.

²² See, e.g., John W. Sheppard, *Ethics*, 49 FLA. B.J. 184 (1975) ("With the overflow of Watergate and the revelation that a great majority of the offenders were members of the legal profession, the public image of the Bar seems to have reached a low ebb. . . . There seems to be a rising tide of resentment to the entire profession who [sic] guides the legal system in our country.")

²³ Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15 (1967).

²⁴ MURRAY TEIGH BLOOM, *THE TROUBLE WITH LAWYERS* (1968).

²⁵ Linda Greenhouse, *Breitel Tells Lawyers that Greed is Undermining Their Profession*, N.Y. TIMES, May 3, 1977, at 1 (quoting New York State Court of Appeals Chief Justice Charles Breitel).

²⁶ See MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980) (critiquing public justice and faulting lawyers for serving their clients with such obdurate partisanship as to eclipse their duties to the wider system of justice). Frankel was a member of the Kutak Commission, discussed *infra* note 36.

the powerful and privileged, and its failure to implement equal justice.²⁷ That year at the American Bar Association convention, Secretary of Transportation William T. Coleman, Jr. "accused the organized bar . . . of having 'failed the American public' by turning its back on people unable to afford high-priced lawyers."²⁸ In response, Chesterfield Smith, a former ABA president, called for

a system of dues going to public interest law; and a change in the profession's ethical canons to require at least some public interest work by each lawyer.

"You need someone who can represent the general interest," he said.²⁹

Ralph Nader attacked the "endemic malaise" of lawyers' acquiescing in a maldistribution of their services that fortified powerful interests.³⁰ Lawyers evaded the duties to the broader public that flowed from their status as officers of the court and evaded their obligation to secure justice by hiding behind canons of behavior that protected their self-interest.³¹ Similarly, Jethro K. Lieberman's 1978 critique argued that the "unethical ethics" of the legal profession undermined its role as a "public profession."³²

The "public interest law"³³ and "access to justice"³⁴ movements that flourished during the 1970s, seeking to give voice to unrep-

²⁷ JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1992).

²⁸ Lesley Oelsner, *Coleman Asserts Bar Fails Public*, N.Y. TIMES, Aug. 8, 1976, at 25 (quoting Secretary of Transportation William Coleman).

²⁹ *Id.* (quoting former ABA President Chesterfield Smith).

³⁰ Ralph Nader, *Overview to VERDICTS ON LAWYERS* vii, viii (Ralph Nader and Mark Green eds., 1976).

³¹ *Id.* at ix.

³² JETHRO K. LIEBERMAN, *CRISIS AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT* (1978).

³³ See generally BURTON A. WEISBROD, JOEL F. HANDLER & NEIL K. KOMESAR, *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* (1978) (providing economic and institutional analysis of public interest movement); COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* (1976) (discussing potential approaches to funding public interest law).

³⁴ See generally the multi-volume *ACCESS TO JUSTICE* (Mauro Cappelletti, ed., 1978); *ACCESS TO JUSTICE AND THE WELFARE SYSTEM* (Mauro Cappelletti, ed., 1981).

resented groups and to enlarge the modalities for securing justice, called for lawyers to embrace these neglected responsibilities. Some adherents of the public justice critique called for formation of a "National Legal Service" to make legal services freely available to all.³⁵

The public justice critique culminated in the work of the Kutak Commission, set up in 1977 to revise the rules of ethical conduct for lawyers.³⁶ The major theme of the new Model Rules proposed by the Commission was enlargement of the public duties of lawyers and limitation of their license for adversary combat.³⁷ The Commission sought to accentuate the duties of lawyers that transcended their responsibilities to clients—for example, by limiting confidentiality to enable lawyers to blow the whistle on client wrongdoing, imposing a duty of fairness in negotiations by requiring disclosure of material facts, and requiring lawyers to devote a portion of their time to *pro bono publico* work.³⁸ The Commission's proposals aroused fierce opposition from various sectors of the bar and were vitiated at a series of ABA meetings in 1982 and 1983.³⁹ Notwithstanding, echoes of the public justice

³⁵ *E.g.*, FRANKEL, *supra* note 26, at 124; PHILIP M. STERN, *LAWYERS ON TRIAL* 199 (1980).

³⁶ The American Bar Association's Special Commission on Evaluation of Professional Standards was known as the Kutak Commission. The impetus for a new ethics code came in part from the damage to the bar's public image occasioned by Watergate. See William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, *BAR LEADER*, Nov.-Dec. 1977, at 2 (relating ABA President's charge to Kutak Commission).

³⁷ Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 *LAW & SOC. INQUIRY* 677 (1989).

³⁸ *Id.*

³⁹ Gerald J. Clark, *Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules*, 17 *SUFFOLK U. L. REV.* 79, 85 (1983). Ted Schneyer points out that, although a number of the Commission's major innovations were jettisoned, the Model Rules in many ways accommodated elements of the public justice critique:

They . . . invite lawyers . . . to take their own values into account. They permit lawyers to refuse on moral grounds to represent would-be clients; authorize lawyers to "limit the objectives" of representation by excluding aims they find "repugnant or imprudent"; and in a remarkable concession to lawyers' sensibilities allow them to withdraw whenever "a client insists upon pursuing an objective the lawyer considers repugnant or imprudent"—even if the client's interest will be "adversely affected" by the withdrawal!

Schneyer, *supra* note 37, at 736 (footnotes omitted).

critique are audible from time to time in bar precincts.⁴⁰

The dominant pre-Reagan critique was that lawyers were blameworthy for failing to meet their professional obligations. The relatively apolitical Murray Teigh Bloom focused on the failure of lawyers to fulfill their obligations to clients. The broader, more political versions of Carter, Auerbach, and Nader emphasized lawyers' deflection from promotion of justice due to their co-optation by the powerful. In each case, it is lawyers' misdeeds and omissions that attract reproach, not the legal enterprise as such.

III. CONTEMPORARY LAWYER-BASHING

At the very time that the notion of justice underserved by its disloyal servants was being elaborated, other currents were reshaping attitudes toward the state of the civil justice system. Eminent judges, lawyers, and academics opined that American society was suffering from an excess of law in the form of "legal pollution" or a "litigation explosion." The popular press echoed this concern, reporting that "Americans in all walks of life are being buried under an avalanche of lawsuits."⁴¹ The Chief Justice of the United States criticized lawyers for commercialism, for incompetence, and for excessive adversariness that produced court congestion and runaway litigation.⁴² He mounted a broad attack aimed at curtailing litigation and replacing adversarial confrontation by

⁴⁰ Thus, in the mid-1980s, the ABA's Commission on Professionalism recommended:

A far greater emphasis must be placed by the Bar on the role of the lawyer as both an officer of the court and, more broadly, as an officer of the system of justice. . . . [L]awyers must avoid identifying too closely with their clients.

ABA COMMISSION ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE (1986) [hereinafter STANLEY REPORT] (known as the *Stanley Report*, for Chair Justin Stanley).

⁴¹ *Why Everybody is Suing Everybody*, U.S. NEWS & WORLD REP., Dec. 4, 1978, at 50.

⁴² Chief Justice Warren E. Burger, Agenda for 2000 A.D.—A Need for Systematic Anticipation, Address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), in 70 F.R.D. 79 (1976) [known as the Pound Conference, after Roscoe Pound's 1906 address of the same title. Like Pound, his 1976 successors propounded "popular" perceptions unaided by any discernable consultation of the broader public.].

a "better way."⁴³

Concern about mounting costs and expanding frontiers of liability led to sustained campaigns for "tort reform."⁴⁴ The thrust for increased "access to justice"⁴⁵ was transformed from a desire to multiply the paths to justice to a movement to curtail litigation by diverting disputes into alternative dispute resolution.⁴⁶ Typically, the performance of these alternatives was assessed in terms of efficiency rather than superior justice.

By the mid-1980s, the discourse about lawyers and civil justice in America was dominated by what I call the "jaundiced view." Our civil justice system was widely condemned as pathological and destructive, producing untold harm. A series of factoids or macro-anecdotes about litigation became the received wisdom: America

⁴³ These concerns antedate Carter's 1978 speech. Burger's Address to the 1976 Pound Conference contains faint echoes of the public justice critique in the Chief Justice's observation of "the loss of public confidence caused by lawyers' using the courts for their own ends rather than with a consideration of the public interest." *Id.* But the predominant theme of the Chief Justice's address is not a shortage of justice, but surfeit of law. *Id.* at 91. Just a year later, the Chief Justice was warning that "unless we devise substitutes for the courtroom processes—and do so quickly—we may well be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated." Chief Justice Warren E. Burger, Remarks at the American Bar Association Minor Disputes Resolution Conference (May 27, 1977).

⁴⁴ See generally Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990); Eliot Martin Blake, Comment, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401 (1988).

⁴⁵ See generally ACCESS TO JUSTICE, *supra* note 34; ACCESS TO JUSTICE AND THE WELFARE SYSTEM, *supra* note 34.

⁴⁶ "Alternatives" were very much part of the Access to Justice repertoire. The General Report of the great multi-volume compendium on Access to Justice includes a section on "Devising Alternative Methods to Decide Legal Claims" that discusses arbitration, conciliation, and settlement. Mauro Cappelletti & Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective, A General Report*, in 1 ACCESS TO JUSTICE, *supra* note 45, at 3, 59-107; see also Richard Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STANFORD L. REV. 1 (1973) (analyzing concept of decentralized criminal justice system as means to provide access to justice); Richard Danzig & Michael J. Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675, 685-87 (1975) (calling for supplementation of ineffective court system by informal, non-coercive "community moots").

Although these themes of enlarging justice occasionally surface in current discourse on alternatives, they are vastly overshadowed by concerns to expedite case processing, deflect institutional burdens, and curtail exposure to liability. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991) (providing eloquent response to this shift in concerns).

is the most litigious society in the course of all human history; Americans sue at the drop of a hat; the courts are brimming over with frivolous lawsuits; resort to courts is a first rather than a last resort; runaway juries make capricious awards to undeserving claimants; immense punitive damage awards are routine; litigation is undermining our ability to compete economically.⁴⁷

Although a litigious populace and activist judges were blamed, lawyers, as the promoters, beneficiaries, and protectors of this pathological system, were prominent among the culprits. Then, in the early 1990s, attacks on lawyers escalated sharply. Older themes of suspicion of and disdain for lawyers reappeared in new guises.

A. TOO MANY LAWYERS

It is widely believed that the United States is cursed with a population of lawyers that is vastly disproportionate to any possible usefulness. This notion achieved extraordinary prominence in August 1991, when Vice President Quayle ended his speech on the wrongs of our legal system with the rhetorical question, "Does America really need 70% of the world's lawyers?"⁴⁸

⁴⁷ These larger assertions about the civil justice system were embodied in oft-related atrocity stories about outrageous claims and monstrous decisions. See Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform*, 52 LAW & CONTEMP. PROBS. 269, 292-97 (1989); Robert M. Hayden, *The Cultural Logic of a Political Crisis*, STUD. IN L. POL. & SOC'Y 95, 104-08 (1991); Steven Brill & James Lyons, *The Not-so-Simple Crisis*, AM. LAW., May 1, 1986, at 1; Fred Strasser, *Tort Tales: Old Stories Never Die*, NAT'L L.J., Feb. 16, 1987, at 39.

⁴⁸ The Council on Competitiveness did not include the 70% figure in its *Agenda*, PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991), but apparently there had been some consideration of it in the preparation of the Vice President's August 13 speech, for a week earlier "a Quayle spokesman" was reported as having "noted that the United States has 70 percent of the world's lawyers, and that the rising tide of litigation 'is a burden on our economy.'" Saundra Torry, *BCCI Scandal a Windfall for Attorneys Unlike Any Other*, WASH. POST, Aug. 12, 1991, at F5. The drafters of the Council's *Agenda* had reason to be aware that seventy percent was a falsehood. On page one of the *Agenda*, there is an approving reference to, but not citation for, "a recent report by a Professor of Finance at the University of Texas . . . [that] estimated that the average lawyer takes \$1 million a year from the country's output of goods and services." The report referred to is chapter eight of STEPHEN P. MAGEE ET AL., BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY 111-21 (1989). That source contains an incomplete listing of the number of lawyers in some 34 countries as of 1983. *Id.* at 120-21. Even this inadequate

The origins of this seventy percent figure are mysterious. The notion that the United States had "two thirds of the world's lawyers" had surfaced a decade earlier, although it had no ascertainable origin in research—scholarly, journalistic or otherwise.⁴⁹ This item was retailed by Chief Justice Burger as part of his indictment of litigious America, and was repeated by a few judges and law school deans, but gained no currency in wider circles.⁵⁰ A few years later, in contrast, the Vice President's seventy percent figure was immediately parroted by many political figures and media experts.⁵¹ It was eventually inscribed in the 1992 Republi-

enumeration showed American lawyers as just 45% of the total. *Id.* One can conclude that the Council staff either did not examine the source they approvingly cite, or that they were aware that there was good reason to believe the seventy percent figure was spurious.

⁴⁹ Among the earliest sightings was a news magazine report that "[t]he U.S. has 610,000 lawyers, two thirds of the world's total . . . About 70 percent are in private practice." *The Pervasive Influence of Lawyers*, U.S. NEWS & WORLD REP., Nov. 1, 1982, at 55. [Could this be the origin of the 70% figure?] A few months earlier, James Spensley, a lecturer at the University of Denver Law School, was quoted as saying "[T]he U.S. has become the world's most litigious society, employing over two thirds of the world's lawyers." David F. Salisbury, *Colorado's Quality of Life Fades in a Changing West*, CHRISTIAN SCI. MONITOR, July 30, 1982, at 4.

⁵⁰ See Burger, Annual Message, *supra* note 4. The Chief Justice stated: "[I]t has been reported that about two-thirds of all the lawyers in the world are in the United States and of those, one-third have come into practice in the past five years." *Id.* A very similar item appeared a few months earlier in a contribution to *Legal Times* by New York lawyer Peter Megargee Brown, who stated that "two-thirds of all the lawyers in the world are in the United States. One-third of all lawyers in this country have been in practice less than five years." Peter Megargee Brown, *Profession Endangered by Rush to Business Ethic*, LEGAL TIMES, Sept. 26, 1983, at 10.

The Chief Justice's "two-thirds" observation was taken as factual by a sympathetic *Washington Post*. *Bench to Bar: Shape Up*, WASH. POST, Feb. 14, 1984, at A18. It was subsequently used by Justice O'Connor and others. Milly McLean, UPI, Apr. 9, 1984, available in LEXIS, News Library, UPSTAT File. Similarly, a law school dean noted in an op-ed in the *Wall Street Journal* that "two-thirds of the world's lawyers now practice in this country, and one-third of these were graduated during the past five years." Ernest Gellhorn, *Too Much Law, Too Many Lawyers, Not Enough Justice*, WALL ST. J., June 7, 1984, at 28. This item became part of the speeches of Governor Lamm of Colorado about America's descent to doom. See, e.g., Richard W. Larsen, *Time to Restore Logic to Public Policies*, SEATTLE TIMES, Oct. 14, 1990, at A18; John J. Sanko, *Governor Addresses Businessmen*, UPI, Nov. 3, 1983, available in LEXIS, News Library, UPSTAT File.

⁵¹ For example, cabinet members Mossbacher and Sullivan, and Senators Dole, McConnell, and Grassley, among many others. See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. L. REV. 77 (1993) [hereinafter Galanter, *News from Nowhere*]. This figure was also solemnly reported as fact by several media experts, such as David Gergen. David Gergen, *America's Legal Mess*, U.S. NEWS & WORLD REP., Aug. 19, 1991, at 72. Likewise, William Buckley noted that Quayle's speech "reminded us that

can platform, reappeared in Vice President Quayle's acceptance speech, and surfaced during the presidential campaign.

Counting lawyers cross-nationally is a daunting undertaking, plagued by poor data and a bushel of apples and oranges problems. However these problems are resolved, it is clear that the seventy percent figure is very far from the mark. An informed guess would be something less than half of that. Counting conservatively, American lawyers probably make up somewhere between twenty-five and thirty-five percent of all the world's lawyers, using that term to refer to all those in jobs that American lawyers do (including judges, prosecutors, government lawyers and in-house corporate lawyers).⁵²

But "seventy percent" is not just a matter of mistaken statistics. Seventy percent is an accusation of monstrous disproportion. It suggests that America has departed from the normal model of development and that the national body is disfigured by a cancerous excrescence that requires to be excised.⁵³ America needs to be "de-lawyered."⁵⁴

B. THE DRAG ON THE ECONOMY

Why is having all these lawyers such a bad thing? Contemporary critics concur on one central charge: these lawyers are a drag on the economy. This takes several forms. First, legal careers simply

70 percent of the lawyers in the world are American." William Buckley, *Invisible Hand Tripped Up by Burden of Lawyer Glut*, AUSTIN AM.-STATESMAN, Oct. 30, 1991, at A19. In the May, 1992 issue of *Commentary*, Francis Fukuyama wrote that "there is something wrong with an economy that employs 70 percent of the world's lawyers." Paul L. Berger et al., *Is America on the Way Down? (Round Two)*, COMMENTARY, May 1992, at 20, 21.

⁵² See Galanter, *News from Nowhere*, *supra* note 51, at 79 n.10 (presenting calculation and documentation).

⁵³ "I don't think it is healthy for the United States to have 70 percent of the world's lawyers. We have only 5 percent of the world's population. There ought to be a more equitable balance between population and the number of lawyers." Press Conference with Vice President J. Danforth Quayle, FED. NEWS SERVICE, Feb. 4, 1992, available in LEXIS, News Library, FEDNEW File [hereinafter Vice President Quayle, Press Conference].

⁵⁴ Gergen, *supra* note 51, at 72. "Clearly, we need to de-lawyer our society." *Id.* Governor Lamm had various proposals to "de-lawyer" the American system. See Larson, *supra* note 50, at A18.

divert high grade talent into unproductive work.⁵⁵ Second, not only are these scarce talents squandered, but they are transformed into enemies of productivity. The principal intellectual foundation for the view that lawyers hurt the economy is the work of University of Texas finance professor Stephen Magee. Magee has tried to show that the countries with the highest lawyer populations⁵⁶ suffer from impaired economic growth. Magee's conclusion is wrong; its first version was shown to be false,⁵⁷ and its latest version is no stronger. The best research on the topic reaches entirely different conclusions.⁵⁸

In Magee's first take on this issue, he claimed that all lawyers are economically destructive.⁵⁹ Apart from being silly on its face, that conclusion resulted from an empirical analysis containing major methodological errors. His analysis compared the lawyer populations and economic growth rates of thirty-four countries and concluded that the more lawyers a country has, the lower is its rate of growth.⁶⁰ That analysis is shot through with problems. First, Magee relied on poor lawyer data—his lawyer figures for several countries were substantially incorrect. Second, he employed a peculiar research design that used lawyer data in 1983 to predict

⁵⁵ The nuanced version of this diversion argument was put forward in 1983 by Derek Bok. Derek C. Bok, *A Flawed System*, 85(5) HARV. MAG. 38 (1983). He spoke of "a massive diversion of exceptional talent into pursuits that often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit." *Id.* at 41. Like Carter and unlike many later critics, Bok was also concerned with issues of maldistribution of law: "[T]here is far too much law for those who can afford it and far too little for those who cannot." *Id.* at 38-39. The "other great problem of our legal system [is] lack of access for the poor and the middle class." *Id.* at 41.

⁵⁶ In Magee's research, the lawyer population is measured as a ratio to either doctors or white collar workers, which are both taken as to reflect the size of the productive work force of a society.

⁵⁷ Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645 (1992) [hereinafter Cross, *First Thing*].

⁵⁸ Charles R. Epp, *Do Lawyers Impair Economic Growth?* 17 LAW & SOC. INQUIRY 585 (1992) [hereinafter Epp, *Do Lawyers*]; Charles R. Epp, *Toward New Research on Lawyers and the Economy*, 17 LAW & SOC. INQUIRY 695 (1992) [hereinafter Epp, *New Research*]; Cross, *First Thing*, *supra* note 57.

⁵⁹ Stephen P. Magee, *The Invisible Foot and the Waste of Nations: Lawyers as Negative Externalities*, in STEPHEN P. MAGEE ET AL., *BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY: POLITICAL ECONOMY IN GENERAL EQUILIBRIUM* (1989).

⁶⁰ *Id.*

economic growth from 1960 to 1985—even though his own figures showed that the number of lawyers in 1983 bore little relation to the number in 1960. Third, Magee's research did not take into account ("control for") any other known influences on economic growth, including such powerful influences as a country's level of political instability. Finally, the conclusion resulted in large part from the coincidence of low economic growth rates and high lawyer populations in two "outliers" (Argentina and Nepal), whose legal systems and economies bear little relation to our own.

After critics pointed out those failings, Magee refurbished his research and now claims that only lawyers above a certain optimal number hurt an economy.⁶¹ Stated that simply, the view has an intuitive plausibility: surely if all Americans were lawyers and did nothing else, our economy would have problems. Magee's leap to the conclusion that there are, in fact, too many lawyers in the United States is a different matter.

Like the first version, Magee's latest research is deeply flawed, and probably would not merit discussion were it not getting so much publicity. In attempting to determine the economic effect of lawyers, he now takes into account known influences on economic growth.⁶² But his conclusions still rely primarily on 1983 lawyer data to predict prior economic growth, and they still rest on flawed lawyer data. For example, he estimates that there are 43,100 lawyers in West Germany; but if we include not only lawyers in private practice but also government lawyers, corporate lawyers, judges and law teachers—all included in the United States lawyer count—the total number of German lawyers in 1985 was 115,900.⁶³ That produces a lawyer-to-white-collar worker ratio of twenty-nine per thousand, not the eleven per thousand that Professor Magee asserts. Inaccuracies of this magnitude are not minor details. In his most recent response to these criticisms, he declares that lawyer data corrected for such errors still support his

⁶¹ According to Magee's calculations, the optimal number in 1983 was 23 lawyers per 1,000 white collar workers; the U.S. had about 38/1,000 in that year. Stephen P. Magee, *Letter to the Editor*, WALL ST. J., Sept. 24, 1992, at A17.

⁶² *Id.*

⁶³ David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1807 (1988).

conclusion.⁶⁴ But that is true only if the lawyer data are used to "predict" prior economic growth—an unjustifiable research strategy; the same data contradict Magee's results when they are employed to analyze subsequent economic growth.⁶⁵ In addition, Magee's latest conclusion, like his earlier one, rests on the coincidence of slow growth and high lawyer populations in a few idiosyncratic countries, now Uruguay and Chile.

As a corollary, Magee claims that lawyers have captured the United States political system, evidenced by the fact that forty-two percent of United States Representatives and sixty-one percent of Senators are lawyers.⁶⁶ But that hardly means the legal profession has captured the political system: those lawyers in Congress are Democrats and Republicans, liberals and conservatives, proponents of regulation and enemies of regulation. As a bloc, they share no discernible interest; a range of studies finds no difference between the voting patterns of lawyer-legislators and those of nonlawyer-legislators.⁶⁷

Careful analyses of the effect of lawyers on the economy find no support for the Magee hypothesis; indeed, they find that lawyers have no significant effect at all on overall economic growth.⁶⁸ The Magee analysis rests on many of the familiar but unproven contentions about the civil justice system. He assumes that the

⁶⁴ Stephen P. Magee, *The Optimum Number of Lawyers: A Reply to Epp*, 17 LAW & SOC. INQUIRY 667 (1992). In that article, Magee also presents statistical results using lawyer data for a number of countries from 1975. Epp shows that those results are very tenuous, depending on one outlier (the United States); if that outlier is removed from the sample of countries, Magee's discovered relationship between lawyers and growth disappears. Yet one country cannot justifiably be used as the basis for statistical conclusions. Epp demonstrates that Magee's 1975 lawyer data are "largely his own creation" and are "no better than a guess." Epp, *New Research*, *supra* note 58, at 702.

⁶⁵ *E.g.*, Epp, *Do Lawyers*, *supra* note 58; Epp, *New Research*, *supra* note 58.

⁶⁶ Magee, *supra* note 64, at 675.

⁶⁷ The research on lawyers in legislative bodies is cited by Epp. He finds "[t]he most persuasive explanations for the overrepresentation of lawyers in U.S. legislatures have nothing to do with the legal profession's ostensible interest in capturing the legislative process. Those explanations relate to the structure of political recruitment in the United States, where parties are weak and not class-based, and where entrepreneurial skills are important for political office, and to the advantage legislative service provides for lawyers seeking to advance their careers within the legal bureaucracy." Epp, *Do Lawyers*, *supra* note 58, at 590.

⁶⁸ *E.g.*, Epp, *Do Lawyers*, *supra* note 58; Epp, *New Research*, *supra* note 58; Cross, *First Thing*, *supra* note 57.

presence of “excess” lawyers is evidenced by the presence of “predatory” litigation, as distinguished from justified or beneficial litigation. But he provides no evidence of the frequency of bad litigation that is independent of the conclusion that there are too many lawyers.

Notwithstanding the absence of reliable evidence, Magee—or at least his point about the economic predation of lawyers—is widely believed by those who should know better. Thus a former chair of the President’s Council of Economic Advisors, lamenting slow growth, says:

Law schools have been flooding the nation with graduates who are suffocating the economy with a litigation epidemic of bubonic plague proportions.⁶⁹

His successor as chair of the Council of Economic Advisors told the National Economists Club that our legal system has become:

an albatross around productivity . . . we spend more time and more resources actively suing each other or taking defensive actions to prevent lawsuits that could be generated toward or diverted toward productive social uses. . . . And I think we badly need to do that. I think part of the problem lies in the nature of our civil justice system, and everything from malpractice reform to product liability reform to changing the basic nature of our civil justice system, some of these economic incentives, that we get more of a balance into our civil justice system to stop some of the frivolous lawsuits.⁷⁰

The thrust here is that lawyers impair America’s economic competitiveness and the principal means by which they do so is by promoting bad litigation. “With 70% of the world’s lawyers, it is

⁶⁹ Paul W. McCracken, *The Big Domestic Issue: Slow Growth*, WALL ST. J., Oct. 4, 1991, at A12.

⁷⁰ Michael Boskin, Remarks to the National Economists Club, Washington, D.C., FED. NEWS SERVICE, Mar. 31, 1992, available in LEXIS, News Library.

not surprising that America has experienced a litigation explosion.⁷¹ In the words of Vice President Quayle:

[T]he American people sense that something is wrong with our legal system. They believe there are too many lawsuits, . . . too many excessive damage awards. They believe there is too much litigation and this is hurting the American economy. They believe too much litigation is costing American jobs. They believe that too much litigation is driving up the cost of financing federal and state and local government, that it's driving up the cost of liability insurance and the key factor, is driving up health care.⁷²

President Bush told the American Business Conference:

Over the last several years, dead weights have begun to slow the engine of growth, inefficiencies a competitive economy simply cannot tolerate. . . . Let me begin with the crying need to reform our country's civil justice system. Every American has heard stories of bizarre or frivolous lawsuits. But most of you have lived with them, tales that could have been torn from the pages of Kafka.⁷³

Implicit in much of this talk is a folkloric image of plaintiffs' lawyers working for contingency fees, seeking immense damages on behalf of malingering or opportunistic clients, bringing frivolous lawsuits based on "junk science" against deep pocket defendants, and goading capricious juries to award excessive damages—

⁷¹ The White House, Office of the Press Secretary, Fact Sheet: Access to Justice Act of 1992 (Feb. 4, 1992).

⁷² Vice President Quayle, Press Conference, *supra* note 53.

⁷³ President George Bush, Remarks to the American Business Conference, Washington, D.C., FED. NEWS SERVICE, April 7, 1992, available in LEXIS, News Library, FEDNEW file [hereinafter President Bush, April 7, 1992 Remarks].

especially immense and arbitrary punitive damages.⁷⁴ Litigation explosion lore gives top billing to this figure of the "tassel-loafeder" lawyer.⁷⁵ But complaints about the number and increase of lawyers make no distinctions. All lawyers are inculpated for promoting adversarialism, fostering complexity and uncertainty, and sharing in the vast and undeserved profits generated by this excessive litigation.⁷⁶ This broader indictment is given clear expression in a critique by Richard Weise, General Counsel of Motorola: "America is awash with lawyers who make mischief. . . . They are forced to innovate, to develop new legal products so they can usefully fill their time, that usually means thinking of ways to separate American corporations from their money."⁷⁷ He includes not only securities class actions, but cases about wrongful termina-

⁷⁴ "[T]he civil justice reform is aimed at taking away the incentives that contingency fee plaintiff lawyers have to bring cases based on junk science." L. Gordon Crovitz, *Legal Limits: Prescription for Change; Historical Roots*, on *McNeil-Lehrer News Hour* (PBS television broadcast, Feb. 10, 1992).

⁷⁵ "[M]y opponent's campaign is being backed by practically every trial lawyer who ever wore a tasseled loafer." George Bush, Acceptance Speech at the Republican National Convention, in *N.Y. TIMES*, Aug. 22, 1992, at 9.

⁷⁶ Crovitz, *supra* note 74. The centrality of the plaintiffs' lawyer as demon is preserved by the theory that the bad sort of lawyers are the source of a spreading contamination of professional life. Thus Walter Olson speaks of the way that "the influx of contingency-fee lawyers into commercial and family litigation has begun to transform the style of practice in those fields." WALTER OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 232* (1991). Olson seems unaware that corporate litigators need little instruction in hardball lawyering from "contingency-fee lawyers." For one of many possible examples, see the account of Thomas Austern, whose scorched earth tactics delayed issuance of an FDA order on the labelling of peanut butter for twelve years. MARK J. GREEN, *THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS*, ch. 6 (1975). Nor does Olson offer reliable guidance on the onset of such practices. He presents an excerpt from one of the classic accounts of hardball lawyering, referring to events half a century ago, as if it were evidence of novel conditions. Cravath litigator Bruce Bromley told Stanford law students in 1958:

I quickly realized in my early days at the bar that I could take the simplest antitrust case . . . and protract it for the defense almost to infinity.

Bruce Bromley, *Judicial Control of Antitrust Cases*, 23 F.R.D. 417, 417 (1958). Olson borrows an excerpt of the Bromley talk from a 1978 *Time Magazine* article, omitting the date of Bromley's talk. OLSON, *supra*, at 231, 366.

⁷⁷ Ronald E. Yates, *Lawyers Not Exempt from Quality Crusade*, CHI. TRIB., Dec. 1, 1991, (Business), at 1 (quoting Richard Weise, General Counsel of Motorola). Weise also noted: "The root of America's penchant for litigation can be found in the nation's prolific law schools, which are admitting students and turning out lawyers at a rate well in excess of the nation's ability to employ them." *Id.*

tion and employee-benefit fraud. "The drain on corporate assets and energy is tremendous. . . . While cases are being litigated, corporate America often can't do anything innovative because executives are too absorbed in and exhausted by the legal process."⁷⁸

This portrays the lawyer as a parasite, feasting on productive corporations. In its simple form, the "parasite" critique is that lawyers do not "make" anything; but then neither do bankers, insurers, accountants, diversified financial services companies, police, pollution inspectors, etc. The spectacle of economists, journalists, senators, and executives disparaging lawyers because they do not *make* anything exposes a deep vein of anxiety about the meaning of productivity in our information age. Beneath this anxiety lies a genuine question: Do "services"—particularly those that are concerned with the regulation and facilitation of transactions—contribute anything of value to society?

As the Weise quotation above indicates, it often is assumed that the regulatory regime that envelops these corporations, manifested in laws, administrative enforcement, litigation, and preventive lawyering, imposes costs but engenders no benefits to society. The estimates of costs that have figured prominently in the "too much lawyering" discourse have been based on unsubstantiated conjecture, have vacillated about just what is being measured, and have conflated costs and transfers.⁷⁹

Beyond these infirmities, exclusive concentration on costs has distracted the critics from looking at the benefits that might offset or even surpass those costs. Our accounts should reflect not only

⁷⁸ *Id.*

⁷⁹ Galanter, *News from Nowhere*, *supra* note 51. A significant portion of the wealth that flows through the litigation system is justified compensation delivered to creditors and wronged parties. The Institute for Civil Justice estimated that the net compensation to plaintiffs in tort cases in 1985 was roughly half of the dollars spent on tort litigation. But the portion received by plaintiffs varied with the type of litigation: it was 52% in automobile torts, 43% in non-automobile torts, and only 37% in asbestos cases. DEBORAH R. HENSLER ET AL., *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* 29 (1987). I know of no data about the ratio of recoveries to total expenditures in non-tort litigation. This half (or more) of the supposed cost is a cost to defendants, but it is not a cost of the system or a cost to the country, for the wealth is not lost, but only transferred to different hands. Controlling these inordinate transaction costs is a worthy project that should not be confounded with reducing the rights of claimants.

the costs but also the benefits of enforcing such transfers, which afford vindication, induce investments in safety, and deter undesirable behavior. For instance, the sums transferred by successful patent infringement litigation not only are not lost, but maintain the credibility of the patent system, which in turn has powerful incentive effects. To put forward estimates of gross costs—even ones that are not make-believe—as a guide to policy displays indifference to the vital functions that the law performs. America's institutions of remedy and accountability and the lawyers that staff them are portrayed as burdensome afflictions. They are viewed as costs and thus as deadweight losses.⁸⁰

It is much more difficult to measure benefits than costs. But several studies suggest that the presence of lawyers does confer real benefits on their societies. Lawyers, concluded Robert Clark, are specialists in normative ordering, and the increased demand for their services is attributable to more intense and diverse interaction, greater diversity, changes in wealth levels, and the burgeoning of formal organizations.⁸¹ Stephen Bundy and Einer Elhauge argue that lawyers' advice to clients results in an overall improvement in the working of tribunals.⁸² Frank Cross argues that, in addition to promoting significant non-market benefits such as civil liberties and political democracy, the presence of lawyers promotes efficient allocation by helping to internalize externalities and by facilitating transactions among dispersed, interdependent, produc-

⁸⁰ The costs attributable to present institutional arrangements are made to loom menacingly large by ignoring the costs of alternative arrangements for obtaining equivalent benefits. For example, if we were to forego the tort system's contribution to accident prevention, presumably people and businesses would make other expenditures to prevent and minimize injury. The savings from completely abolishing the tort system would not be all the billions that flow through it—nor even all the billions spent on it—but only that increment beyond what would be spent on the alternative means of protection. Therefore, a genuine assessment of the legal system would have to consider not only its costs, but both the benefits it produces and the cost of producing such benefits by alternative means. See Neil K. Komisar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23 (1990); see also Peter L. Kahn, *Pricing the U.S. Legal System*, CHRISTIAN SCI. MONITOR, Sept. 11, 1992, at 19.

⁸¹ Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?* 61 FORDHAM L. REV. 275 (1992).

⁸² Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313 (1991).

tive units.⁸³ Ron Gilson argues that business lawyers create value by acting as "transaction cost engineer[s]."⁸⁴ In a pioneering field study of business lawyering, Mark Suchman and Mia Cahill found that:

Silicon Valley lawyers both absorb uncertainty and increase the efficiency of venture capital financing by promoting the elaboration of community norms. Through their distinctive inter-organizational position, lawyers help to create, transmit, sustain and enforce the social structure of the Silicon Valley venture capital market.⁸⁵

A full assessment of the benefits, testing hypotheses about linkages between what lawyers do and the occurrence of these favorable things, must wait for another day. My point is that the parasite argument is not closely dependent on evidence and that it resonates with a deeper resentment of lawyers. Even if our system of civil justice does produce benefits that outweigh its costs, critics ask, why should lawyers be able to "farm" it for their personal advantage? Here we turn to earlier polemicists who articulated this theme.

C. THE JUSTICE TARIFF

Just 150 years ago, Georgian John W. Pitts published a little book that both anticipates and illuminates current discontents.⁸⁶ Pitts thinks lawyers are driven by self-interest both to make laws prolix and complicated and to "excite strife, confusion and debate."⁸⁷ Lawyer legislators make law complex and generate a

⁸³ Cross, *First Thing*, *supra* note 57.

⁸⁴ Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

⁸⁵ Mark C. Suchman & Mia L. Cahill, *The Hired-Gun as Conciliator: Lawyers and the Suppression of Business Dispute in Silicon Valley* 17-18 (Nov. 20, 1993) (unpublished paper presented to the University of Wisconsin Institute for Legal Studies Conference on Changing Patterns of Business Lawyers).

⁸⁶ JOHN W. PITTS, *ELEVEN NUMBERS AGAINST LAWYER LEGISLATION AND FEES AT THE BAR* (n.p., 1843).

⁸⁷ *Id.* at 11, 13.

need for lawyers to vindicate rights.⁸⁸ These rights are then diminished, however, by the very need for professional lawyers, who extract fees for securing these rights for their clients. The justice they secure is thus flawed and incomplete, for a portion of the clients' entitlement is diverted to the lawyers, who add no value. Thus, for Pitts, every legal entitlement is diminished by the presence of an occupational group that is paid for vindicating it. This "justice tariff" [my phrase, not his] is an affront to liberty, which is "the power of enjoying rights without paying for them."⁸⁹

Fees at the bar, from their first institution up to this hour, have been the source of more numerous and more malignant evils in the countries where they have been tolerated than all the wars, pestilences, famines, tornadoes & earthquakes that ever harassed these lands.⁹⁰

Beneath Pitts's bluster lie some of the deep roots of resentment of lawyers, growing from the necessity of using and paying lawyers to secure what people regard as already rightfully theirs.

Max Radin discerns an ancient theme that "justice is a man's right. That is what society is for. It should be free as air."⁹¹ In his review of "Antilawyer Sentiment in the Early Republic," Maxwell Bloomfield reports widespread suspicion of the lawyer as an intruder who inserts himself into a self-regulating, harmonious community, displacing substantive justice with artificial formality, self-interest, and high fees.⁹² As an influential anti-lawyer tract of the early 19th century complains:

⁸⁸ *Id.* at 42. His argument that "lawyer legislating" is a major cause of bad policy anticipates Magee's concern. For a discussion of Magee's research, see *supra* notes 56-69 and accompanying text.

⁸⁹ PITTS, *supra* note 86, at 5.

⁹⁰ *Id.* at 33.

⁹¹ Radin, *supra* note 1, at 748.

⁹² MAXWELL H. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* (1976).

God never intended his creature man, should be under the necessity to carry a written book in his pocket, or a lawyer by his side, to tell him what is just and lawful; he wrote it on his mind.⁹³

As one contemporary critic puts it, "There's a reason people hate lawyers . . . It's because they have a monopoly on what rightfully belongs to everyone."⁹⁴ A long tradition holds that the need for lawyer intermediaries is not natural, but is itself an outgrowth of the lawyers' corruption of legal discourse. It is because lawyers have made law complex and mysterious that they can levy the justice tariff.

D. THE LAW TRAP: ENTANGLEMENT IN LEGAL MYTH

So the charge of economic predation has led us back to the sins of discourse, for the justice tariff is supported by lawyers' successful mystification of the law. In a famous polemic, Yale law professor Fred Rodell decried the law as a pretense, a fraud, a hoax, mumbo-jumbo, "a scheme of contradictory and nonsensical principles built of inherently meaningless abstractions" that exercises a superstitious hold over the populace.⁹⁵ "The legal trade . . . is nothing but a high-class racket."⁹⁶ Lawyers are soothsayers, modern medicine men,⁹⁷ "purveyors of streamlined voodoo," priests of mystification.⁹⁸

Rodell thinks that most business affairs "run off smoothly of their own accord."⁹⁹ By introducing legalities, lawyers "no doubt increase, instead of decreasing, the number of transactions that end up in dispute and litigation."¹⁰⁰ Yet lawyers can be narrowly

⁹³ JESSE HIGGINS, *SAMPSON AGAINST THE PHILISTINES* 92 (2d ed. 1805), *quoted in* BLOOMFIELD, *supra* note 92, at 48.

⁹⁴ Castelman, *supra* note 8, at 182, 184 (quoting Jake Warner, one of the founders of Nolo Press, a leading publisher of do-it-yourself legal material).

⁹⁵ FRED RODELL, *WOE UNTO YOU, LAWYERS!* 166 (2d ed. 1957).

⁹⁶ *Id.* at 16.

⁹⁷ This characterization was particularly appealing to Rodell's most recent admirer: Rennard Strickland, *The Lawyer as Modern Medicine Man*, 11 S. ILL. U. L.J. 203, 208 (1986).

⁹⁸ RODELL, *supra* note 95, at 19.

⁹⁹ *Id.* at 121.

¹⁰⁰ *Id.*

useful. The law tends to favor the rich and powerful because its fraudulent character can be manipulated by lawyers:

It makes it worth-while for those with money enough to afford it to buy the court services and the pre-court advice of those mumbo-jumbo chanters and scribblers who can best wring desired results out of legal language and legal principles.¹⁰¹

Rodell vacillates on the culpability of lawyers for this state of affairs. At times he portrays them as self-deceived: "[T]he lawyers, taken as a whole, cannot by any means be accused of *deliberately* hoodwinking the public. . . . They, too, are blissfully unaware that the sounds they make are essentially empty of meaning."¹⁰² Yet elsewhere they are portrayed as knowing conspirators:

For the lawyers know it would be woe unto the lawyers if the non-lawyers ever got wise to the fact that their lives were run, not by The Law, not by any rigid and impersonal and automatically applied code of rules, but instead by a comparatively small group of men, smart, smooth, and smug—the lawyers.¹⁰³

Rodell has his technocratic version of that abiding faith in a simple, natural, accessible system of social regulation. He would abolish law and replace it with a practical, comprehensible system of common-sense decisionmaking by experts.¹⁰⁴ Where critics like

¹⁰¹ *Id.* at 164.

¹⁰² *Id.* at 131. *But see id.* at 16 (accusing lawyers of being part of a "racket").

¹⁰³ *Id.* at 108.

¹⁰⁴ Robells' prescriptions for change are found in Chapter XI. The following passages give a sample of their flavor:

The answer is to get rid of the lawyers and . . . run our civilization according to practical and comprehensible rules, dedicated to non-legal justice, to common-or-garden fairness that the ordinary man can understand, in the regulation of human affairs.

. . . .

A mining engineer could handle a dispute centering around the value of a coal-mine much more intelligently and therefore more fairly than any judge, untrained in engineering, can handle it. A doctor could handle a dispute involving a physical injury much more intelligently and

President Carter portrayed lawyers as errant priests of the true church of social justice, Rodell portrays them as the idolatrous priests of a false religion, which he thinks can be dismantled by eliminating lawyers.

This dark vision of law as fraudulent mystification runs from Pitts to Rodell to contemporary anti-lawyer polemicists,¹⁰⁶ and reappears as a component of the new "economic" anti-lawyerism that dominates current discourse about lawyers. Rodell's portrayal of lawyers as the source of the mythic reification of legal rules and as captives of the law's empty mysteries makes important empirical claims about the beliefs and behavior of lawyers and lay people, claims that I suspect are at least incomplete and very likely seriously mistaken. Forty years ago, David Riesman observed that lawyers

are feared and disliked—but needed—because of their matter-of-factness, their sense of relevance, their refusal to be impressed by magical "solutions" to people's problems. Conceivably, if this hypothesis

therefore more fairly than any judge. . . .

. . . .

As a matter of fact, abolition of the lawyers and their Law might eventually lead to the virtual disappearance of courts as we know them today. Every written law—written, you remember, in comprehensible language—might be entrusted to a body of technical experts, to administer and apply it and make specific decisions under it. . . . [E]ach state would have, say, a Killing Commission to apply its laws about what are now called murder and manslaughter. Moreover, the decision of the technical experts who make up each commission would be final. There would be no appeals. . . .

Id. at 167, 169-70, 176.

¹⁰⁶ For example, the contemporary Texas anti-lawyer polemicist Alfred Adask states:

Our entire judicial system has become an extortion racket designed to enrich lawyers at the expense of productive members of society. Almost every licensed, practicing lawyer is a beneficiary and co-conspirator in that extortion racket. . . .

Lawyers are "political racketeers," "economic cannibals," and "social parasites" who "help . . . destroy America for a buck." Lawyers are:

98% bad people, lousy Americans, ethical cowards, professional socio-paths who are almost certainly the primary cause of the social and economic decline of this nation.

Alfred Adask, *Daddy, Why Doesn't the Vice President Like You?*, ANTI-SHYSTER, Jan. 1992, at 12-13.

is right, the ceremonial and mystification of the legal profession are, to a considerable degree, veils or protections underneath which this rational, all too rational, work of the lawyer gets done.¹⁰⁶

Jethro Lieberman suggests that lawyers are not votaries of illusory certainty, but rather technicians of indeterminacy:

The only secret that the lawyer really possesses about the law is that no one can ever be certain of what the law is. . . . The lawyer is accustomed to the ways of bending and changing rules to suit his (or his client's) purposes, to dance in the shadows of the law's ambiguities. Rules hold no particular terror for the lawyer, just as the sight of blood holds no terror for the surgeon. Because he operates a system of rules, the lawyer becomes indifferent to them in the way that a doctor becomes indifferent to the humanity of the body that is lying on the operating table.¹⁰⁷

These observations raise the question whether it is lawyers' bloody-mindedness that irks people rather than, or along with, their penchant for mystification. Answering that question requires close analysis of professional and popular perceptions of the law, how these views shape and are shaped by lawyer-client interaction,¹⁰⁸

¹⁰⁶ David Riesman, *Toward an Anthropological Science of Law and the Legal Profession*, in *INDIVIDUALISM RECONSIDERED AND OTHER ESSAYS* 450 (1954). Compare Sally Engel Merry's observation in a contemporary urban court:

If a case progresses to a pretrial conference or to a trial, the prosecutors and defense attorneys play a critical role in translating complex, emotional problems into narrow legal cases. They serve as the front line, cleansing problems of their emotionally chaotic elements and reducing them to cold rational issues.

SALLY ENGEL MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 148 (1990) [hereinafter MERRY, *GETTING JUSTICE*].

¹⁰⁷ LIEBERMAN, *supra* note 32, at 208-09.

¹⁰⁸ In at least some settings, lawyers spend considerable effort reducing their clients' sense of the determinacy and predictability of the law. For a contemporary example, see Austin Sarat & William L.F. Felstiner, *Law And Strategy In The Divorce Lawyer's Office*, 20 *LAW & SOC'Y REV.* 93 (1986).

how this varies from setting to setting, and how it has changed over time. Whether the public perceives lawyers as genuine or bogus votaries of the law's mysteries and the extent to which it subscribes to those mysteries is deeply problematic.¹⁰⁹

IV. THE DISTRIBUTION OF VIEWS ABOUT LAWYERS

The new economic anti-lawyerism is closely connected to what I have called the "jaundiced view" of our civil justice system expressed by political, media, and business elites. How does this strain of anti-lawyer feeling relate to the array of attitudes toward lawyers in American society? Unfortunately, we do not have a comprehensive profile of the attitudes and beliefs of the public regarding lawyers; nor do we know how these views have changed over time. A scatter of public opinion data, however, enables us to get a sense of the general contours and some inkling of recent trends.¹¹⁰

¹⁰⁹ For example, most Americans believe that "[t]he legal system favors the rich and powerful over everyone else" and that "[l]awyers will (not) work as hard for poor clients as for clients who are rich and important." BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 234 (1977). Sally Merry observes that her working class American court-users

do not accept that the system is always fair, just, or even-handed. Experience in court leads them to think that the institution is erratic, unreliable, and sometimes ineffectual. For many, a sense of legal entitlement coexists with cynicism about power and influence within the government and the court system.

MERRY, *GETTING JUSTICE*, *supra* note 106, at 170. A comparable skepticism is displayed in surveys from Canada, where most respondents think of lawyers as manipulators who "are always finding loopholes to get around the law," Robert J. Moore, *Reflections of Canadians on the Law and the Legal System: Legal Research Institute Survey of Respondents in Montreal, Toronto and Winnipeg*, in *LAW IN A CYNICAL SOCIETY? OPINION AND THE LAW IN THE 1980S* 41, 53 (Dale Gibson & Janet K. Baldwin eds., 1985), and in England, where respondents think lawyers "[f]or a price . . . will use every trick in the book to help their clients," BRIAN ABEL-SMITH ET AL., *LEGAL PROBLEMS AND THE CITIZEN* 249-50 (1973).

¹¹⁰ Much of the survey data reported in this section is derived from three national sample surveys, each conducted by telephone. Two of these surveys were conducted for the *National Law Journal*, the first in 1986 and the second in 1993. The third major survey was conducted for the American Bar Association in 1993.

The first of the *National Law Journal* surveys (n=1004) was published in David A. Kaplan, *The NLJ Poll Results: Take Heed, Lawyers*, *NAT'L L.J.*, Aug. 18, 1986, at S-2 [hereinafter Kaplan, *NLJ Poll*]. A second survey (n=815), which largely replicates the 1986 survey and thus provides a useful reading of recent changes, was conducted for the *National Law Journal* and the West Publishing Company by Penn & Schoen Associates, Inc. This survey

Most Americans who have used lawyers think well of them. In a 1986 *National Law Journal* (NLJ) poll, almost half of American adults reported professional contact with a lawyer within the preceding five years.¹¹¹ Well over half of these users reported themselves "very satisfied" with the lawyer's performance and another quarter were "somewhat satisfied."¹¹² By 1993, the number who had used a lawyer had risen to 68%.¹¹³ In comparison, 67% of the respondents in the 1993 ABA survey reported using a lawyer in the last ten years.¹¹⁴ Even with all these novice customers, the level of dissatisfaction was only slightly higher.¹¹⁵ About two-thirds of the ABA respondents who used lawyers were satisfied.¹¹⁶

But when asked about lawyers in the aggregate, the public views them less favorably. Lawyers' ethical standards and practices are thought to be middling by most people, with a much larger contingent regarding them as poor (21%) than as excellent (3%).¹¹⁷ Those who thought lawyers less honest than most people rose from 17% in 1986 to 31% in 1993.¹¹⁸ The ABA poll reports that "[h]alf the public thinks that about one-third or more of lawyers are dishonest, including one in four Americans who believe that a *majority* of lawyers are dishonest."¹¹⁹ Over the past decade, general estimations of lawyers have fallen. In the 1993

was published in Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L. J., Aug. 9, 1993, at 1 [hereinafter Samborn, *Anti-Lawyer*].

The other 1993 survey (n=1202) was conducted by Peter D. Hart Research Associates, Inc., for the American Bar Association. It was reported in Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60 [hereinafter Hengstler, *Vox Populi*]. More extensive data can be found in PETER D. HART RESEARCH ASSOCIATES, *A SURVEY OF ATTITUDES NATIONWIDE TOWARD LAWYERS AND THE LEGAL SYSTEM* (Jan. 1993) [hereinafter HART SURVEY].

¹¹¹ Kaplan, *NLJ Poll*, *supra* note 110, at Table 4.

¹¹² *Id.* at Table 6.

¹¹³ Samborn, *Anti-Lawyer*, *supra* note 110, at Graphs 4-5.

¹¹⁴ HART SURVEY, *supra* note 110, at 25.

¹¹⁵ Samborn, *Anti-Lawyer*, *supra* note 110 (containing a steady number of "very satisfied" responses).

¹¹⁶ HART SURVEY, *supra* note 110, at 25.

¹¹⁷ ABC News/*Washington Post* Survey, May 1989 (on file with author).

¹¹⁸ Samborn, *Anti-Lawyer*, *supra* note 110, at 20. Samborn reviews figures from Gallup and Roper polls that suggest a downward trend in estimations of the ethical character of lawyers since the mid-1970s. *Id.*

¹¹⁹ HART SURVEY, *supra* note 110, at 5.

NLJ survey, 36% of the respondents said their image of lawyers had "gotten worse" and only 8% said it had "improved."¹²⁰

Disapproval of lawyers is not distributed uniformly, and there is a pronounced pattern to the disparities:

By and large, those who see lawyers in a more favorable light than average tend to be downscale, women, minorities, and young. . . .

* * * *

. . . Americans who are more critical than average tend to be more establishment, upscale, and male. The higher the family income and socioeconomic status, the more critical the adults are. Pluralities of college graduates feel unfavorably toward lawyers, while pluralities of non-college graduates feel favorably.¹²¹

More and more Americans believe that there are too many lawyers. In 1986, 55% of the NLJ respondents believed that there were too many lawyers; in 1993 this number had increased to 73%.¹²² The ABA survey asked people to volunteer criticism of lawyers: only five percent volunteered that they were too numerous.¹²³ This sense of the superfluity of lawyers is more intense among "top" people.¹²⁴ While 55% of all respondents to the 1986 NLJ survey agreed that the country had too many lawyers, this sentiment was shared by 69% of college graduates, 68% of those earning over \$50,000 annually, and 64% of the occupational

¹²⁰ Samborn, *Anti-Lawyer*, *supra* note 110, at 1.

¹²¹ HART SURVEY, *supra* note 110, at 4-5.

¹²² Samborn, *Anti-Lawyer*, *supra* note 110, at 1.

¹²³ HART SURVEY, *supra* note 110, at 13.

¹²⁴ This pattern is not unique to present day America. In early modern England, antagonism to lawyers and blaming them for excessive litigation was highest among top people. C.W. BROOKS, *PETTIFOGGERS AND VIPERS OF THE COMMONWEALTH: THE 'LOWER BRANCH' OF THE LEGAL PROFESSION IN EARLY MODERN ENGLAND* 136 (1986); WILFRED R. PREST, *THE RISE OF THE BARRISTERS: A SOCIAL HISTORY OF THE ENGLISH BAR 1590-1640*, at 313 (1986).

category made up of professionals, executives, and managers.¹²⁵

A 57% majority thought lawyers had "too much influence and power in society."¹²⁶ Again, distribution was skewed with more prosperous and powerful groups high (college graduates, 64%, professionals, 60%) and outsider groups low (blacks, 39%).¹²⁷

"Top" groups were also the most likely to attribute to lawyers principal responsibility for a litigation explosion in the United States.¹²⁸ Curiously, however, the members of these categories were at least as highly satisfied with the performance of their own lawyers as were respondents overall.¹²⁹

This profile of elite concern is reflected in a 1992 survey of executives by *Business Week*, which found that 62% felt "that the U.S. civil justice system significantly hampers the ability of U.S. companies to compete with Japanese and European companies."¹³⁰ Over 80% believed that the fear of lawsuits was growing.¹³¹ Elites, including lawyers, seem to hold exaggerated views of the prevalence of litigation, the size of awards, and the incidence of punitive damages.¹³² More generally, perceptions of the menace of product liability litigation have intensified during a period in which many indicators suggest that the world of product liability is contracting rather than expanding.¹³³ Folklore about the

¹²⁵ Kaplan, *NLJ Poll*, *supra* note 110, at Table 9.

¹²⁶ Samborn, *Anti-Lawyer*, *supra* note 110, at Question 4.

¹²⁷ *Id.*

¹²⁸ *Id.* at Question 22.

¹²⁹ *Id.* at Table 6. They were among the most knowledgeable, least enthusiastic about mandatory pro bono service for lawyers, and most opposed to an elective federal judiciary. *Id.*

¹³⁰ Mark N. Vamos, *The Verdict from the Corner Office*, *BUS. WK.*, Apr. 13, 1992, at 66. This was a survey conducted by Louis Harris & Associates, in early 1992, of 400 senior executives drawn from the "Business Week Top 1000" companies. *Id.*

¹³¹ *Id.*

¹³² A survey of how the working of tort law was perceived by three elite groups in South Carolina (doctors, lawyers, and legislators) found that all of them overestimated the incidence of litigation, the percentage of cases that went to jury trial, the proportion of jury trials that were won by plaintiffs, and the size of judicial awards. Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 *S.C. L. REV.* 585 (1988).

¹³³ Fewer non-asbestos product liability cases are filed, plaintiffs have been less successful at trial, defendants have secured favorable opinions from the courts in an increasing number of cases, the number of punitive damage awards in product liability cases has decreased, and claims per dollar of product liability premium have fallen. See generally Galanter, *News*

spectre of runaway litigation abounds, augmented and amplified by a small but vigorous industry.¹³⁴

But the broad public subscribes to much of the jaundiced view. Over half thought it a fair criticism of *most* lawyers that “[t]hey file too many lawsuits and tie up the court system.”¹³⁵ And when asked whether it was a fair criticism that lawyers’ “excessive costs and lawsuits make America less able to compete against foreign countries,” only 31% thought it was an unfair criticism—although another 28% thought it should be confined to a minority of lawyers.¹³⁶ A resounding 74% agreed that “the amount of litigation in America today is hampering this country’s economic recovery.”¹³⁷ But only 25% thought lawyers “played the largest role” in contributing to the liability crisis, trailing insurers (34%).¹³⁸ (In spite of falling estimations of lawyers, the public attribution of the litigation explosion and the liability crisis to lawyers declined slightly from 1986 to 1993, while rising slightly for insurers and manufacturers.) Traces of the public justice critique surface in these broad public soundings: “The public contends that lawyers have suffered the greatest decline in the areas of defending the underdog, providing leadership in the community, and seeking justice.”¹³⁹

It appears that the jaundiced view, which sees lawyers as fostering a civil justice system that is devouring American business, is more intense and more widespread among elites—i.e., among those with more wealth, education, and power. For all their misgivings about lawyers, other survey evidence suggests that most Americans (also) hold very different views of the legal system.

from *Nowhere*, *supra* note 51.

¹³⁴ In addition to eager consumers of folklore about litigation and lawyers, there are eager suppliers who have an interest in promoting lore about the litigation menace. *See, e.g.*, Daniels, *supra* note 47 (discussing insurance industry civil-justice campaign); Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC’Y REV. 47 (1992) (finding exaggerated pessimistic lore about the dangers to corporations of employment discrimination suits promoted by personnel and legal professionals); Kenneth J. Chesebro, *Galileo’s Retort: Peter Huber’s Junk Scholarship*, 42 AM. U. L. REV. 1637, 1705-22 (1992-93) (Manhattan Institute promotion of civil justice lore).

¹³⁵ HART SURVEY, *supra* note 110, at 16.

¹³⁶ *Id.*

¹³⁷ Samborn, *Anti-Lawyer*, *supra* note 110, at Question 23.

¹³⁸ *Id.* at Question 22.

¹³⁹ HART SURVEY, *supra* note 110, at 18.

Although they do not express a high degree of confidence in the legal system, their qualms do not seem to involve the system's oppression of business. When asked whether "[t]he justice system in the United States mainly favors the rich" or "treats all Americans as equally as possible," 57% of respondents chose the "favored the rich" response and only 39% the "equally" response.¹⁴⁰ Similarly, 59% of a national sample agreed that "the legal system favors the rich and powerful over everyone else."¹⁴¹ When asked which types of people were "not apt to be treated fairly by the law," respondents identified the poor (54%), uneducated (47%), and blacks (33%); only 5% thought "top business executives" were treated unfairly.¹⁴² Indeed, when asked which types of persons "the courts are too lenient with," government officials and top business executives ranked, along with heroin users and frequent offenders, just below dope peddlers.¹⁴³

The grievances of ordinary people are quite different from those that constitute the jaundiced view. An examination of the publications of HALT, a reform organization founded in 1977, indicates the kind of issues that engage that small section of the public that devotes attention and energy to challenging lawyers' practices.¹⁴⁴ They are concerned about excessive fees, particularly exactions like fixed percentage probate fees. They are concerned with the weakness of lawyer discipline and call for the abolition of self-regulation and the establishment of an open public procedure for grievances against lawyers. They want plain language, do-it-yourself provisions, and higher small claims court limits—all to permit citizens to pursue their legal business without lawyers; they

¹⁴⁰ ABC News/Washington Post Survey, June 1985 (USACWP.196.R24) (on file with author).

¹⁴¹ CURRAN, *supra* note 109, at 234.

¹⁴² Roper Report 87-7, July, 1987 (on file with author).

¹⁴³ *Id.*

¹⁴⁴ HALT was founded in 1977. The name was originally an acronym for "Help Abolish Legal Tyranny," but this was displaced by the less combative "An Organization of Americans for Legal Reform." In early 1988, it was reported that the organization had a staff of 26 and nearly 150,000 "members." *Help from HALT*, WASH. POST, Jan. 21, 1988, at B5. Since then, economic constraints have led to closing the field offices and cutting the staff to about a dozen; in 1992, membership was said to be about 100,000. Martha Middleton, *HALT: Rebels at a Crossroad*, STUDENT LAW., Sept. 1992, at 21, 22. Grassroots and militant offshoots such as Justice for All and the National Congress for Legal Reform charged HALT with being unresponsive to its membership and too amicable with the bar. *Id.*

oppose the lawyer monopoly, enthusiastically urging nonlawyer practice. It is a consumerist perspective in which access is a major theme: they want a system that is user-friendly for ordinary people. Overall, problems are visualized as impositions on individual users rather than in the aggregate perspective that is part of the jaundiced view.

The gulf between the jaundiced view and this more consumerist take on lawyers is revealed by the response of HALT leadership to Dan Quayle's campaign against the civil justice system. HALT officials welcomed Quayle's ABA speech as a boost "for the visibility of the legal reform movement" and for putting reform on the front burner, but criticized the Quayle proposals as "either too superficial or too one-sided."¹⁴⁵ Invoking the access theme, the organization's Executive Director took a cool view of the Council on Competitiveness reforms, which "tend to be aimed at reducing litigation for the sake of reducing litigation, without addressing the impact these proposals will have on obtaining justice."¹⁴⁶ A few months later, comparing the reform proposals of the ABA and the Bush administration, HALT's Deputy Director criticized the ABA proposal as "too lawyer-dominated—it equates access to justice with finding an attorney—and fails to take into account the consumer perspective."¹⁴⁷ The administration's legislation, on the other hand, "is too one sided and is aimed more at reducing litigation than ensuring justice."¹⁴⁸ There is no indication here of any objection to the substantive justice afforded by the system—what is wanted is expanded access to it. If the HALT view is at all reflective of what ordinary people want, then we can understand how the anti-lawyer strategy of the 1992 Bush campaign mistakenly conflated distinct kinds of anti-lawyer sentiment. Attacks on the litigation explosion, which caught fire with elite audiences, were expected to ignite the grievances and resentments of the wider public.¹⁴⁹ But the wider public's concern about the legal system

¹⁴⁵ *On the Front Burner*, THE LEGAL REFORMER 12(1)1 (Oct.-Dec. 1991).

¹⁴⁶ *Id.*

¹⁴⁷ *White House, ABA Offer Tort Reforms*, THE LEGAL REFORMER 12(3)6 (Apr.-Jun, 1992).

¹⁴⁸ *Id.*

¹⁴⁹ See Karen Riley, *Measure To Limit Product Lawsuits Shelved in Senate for this Session*, WASH. TIMES, Sept. 11, 1992, at C3 (stating President Bush's "attacks on the litigation system and on trial lawyers have consistently drawn some of the loudest cheers

includes the theme of access to the remedies and protections of the legal system.

To business people, who feel accused of responsibility for America's flagging economic performance and lack of competitiveness, it is reassuring to know that the fault is not theirs and that they are the victims of predatory lawyers, activist judges, and biased jurors.¹⁵⁰ But the evidence that the liability system actually impairs the economic competitiveness of American corporations is vanishingly thin.¹⁵¹ The focus on lawyers and civil liability as a major source of business distress does not seem to be the product of calculating examination of balance sheets. Instead it seems to proceed from, or at least implicate, the resentments of lawyers discussed earlier.

V. AMERICAN EXCEPTIONALISM

A. ONLY IN AMERICA?

In the jaundiced view, America's legal malaise is not an expression of its essential character, but is part of a falling away from the true America. The jaundiced view mourns the loss of a time when society was benignly self-regulating, law was clear, certain and reasonable, judges applied it dutifully and eschewed activism, lawyers were upright paragons of civic virtue, and litigation was

in his recent campaign stops").

¹⁵⁰ Business and other elites are not exempt from the current cultural style of finding solace and justification by displaying oneself as a victim. Popular strains of victimism are widely deplored. See, e.g., CHARLES J. SYKES, *A NATION OF VICTIMS: THE DECAY OF AMERICAN CHARACTER* (1992); John Taylor, *Don't Blame Me: The New Culture of Victimization*, NEW YORK, June 3, 1991, at 26; Jesse Birnbaum, *Crybabies: Eternal Victims*, TIME, Aug. 12, 1991, at 16 (asserting that this is the "age of the victim"). Higher status varieties are less celebrated. Sally Power, *They Did It!*, BUS. ETHICS, Sept./Oct. 1993, at 22 ("One might argue business itself has come to see itself as a victim, blaming the courts, the media, and the legal system for placing companies at risk.").

¹⁵¹ This evidence is assessed in Galanter, *News from Nowhere*, *supra* note 51, at 90-99. The supposed bias of jurors against corporations is examined in Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85 (1992).

rare.¹⁵² Nostalgia for this normal, orderly world flourishes in many sectors of American life.¹⁵³ Within the legal profession itself, many share the sense that law has declined from a noble profession infused with civic virtue to commercialism.¹⁵⁴ This sense of decline has been a recurrent theme for at least a hundred years. Distress about lost virtue has been a constant accompaniment of elite law practice since the formation of the large firm a hundred years ago.¹⁵⁵ The time when virtue prevailed is just over the receding horizon of personal experience. Lawyers' sense of decline reflects the gap between practice and professional ideology: in the flesh, working life is experienced as more mundane, routine, business-like, commercial, money-driven, client-dominated, and

¹⁵² In the most elaborated version of the jaundiced view, OLSON, *supra* note 76, there is recurrent reference to "the old legal system"—a normal orderly world in which the law was clear, judges were restrained, lawyers were upright, and litigation was rare. *Id.* at 3; *see also id.* at 142, 145, 155-56, 168, 216-19, 340. *See also* PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988). Huber's book is premised on the notion that "we are living in an altogether new legal environment, created in little more than twenty years, and profoundly different from what existed in this country and in England for six centuries before." *Id.* at 10. Huber makes references to the more rational and benign conditions that prevailed under "the old law." *E.g., id.* at 21, 23, 71, 96, 97, 116-19, 186.

¹⁵³ *See, e.g.,* David Engel, *The Oven Bird's Song: Insiders, Outsiders and Personal Injuries in an American Community*, 18 *LAW & SOC'Y REV.* 551, 551-52 (1984). Engel studied a small Illinois county in which concern about litigiousness was high, although there was relatively little litigation. *Id.* at 551. Although contract actions were almost ten times as frequent as personal injury cases, it was the latter that provoked concern because they controverted core community values of self-sufficiency and stoic endurance. *Id.* at 574-75. Engel concluded that denunciation of tort litigation was "significant mainly as a symbolic effort by members of the traditional community to preserve a sense of meaning and coherence in the face of social changes they found threatening and confusing." *Id.* at 580.

¹⁵⁴ The latest entry is SOL. M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994). But the literature is vast. *See, e.g.,* Arlin M. Adams, *The Legal Profession: A Critical Evaluation*, 93 *DICK. L. REV.* 643, 652 (1989) ("[T]he . . . most pervasive manifestation of the chance in the legal climate is the decline of professionalism and its replacement with commercialism."); Norman Bowie, *The Law: From a Profession to a Business*, 41 *VAND. L. REV.* 741 (1988); Lincoln Caplan, *The Lawyers' Race to the Bottom*, *N.Y. TIMES*, Aug. 6, 1993, at A-29. A dyspeptic version of the declension theme is PETER MEGARGEE BROWN, *RASCALS: THE SELLING OF THE LEGAL PROFESSION* (1989). A recent scholarly and theoretical account of professional decline is ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993). The bar's "official" account of the danger of commercialization is the STANLEY REPORT, *supra* note 40.

¹⁵⁵ MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 11, 36 (1991); Robert Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1 (1988).

conflict-laden than it is supposed to be. It is easy to believe that the way it is supposed to be is the way that it used to be.¹⁵⁶

This nostalgia is fused to a sense that America has taken a wrong turn. The contemporary critique of lawyers as economic predators is pervaded by a sense of the uniqueness of the American predicament. Vice President Quayle's "seventy percent" probed a sensitive spot precisely because it served as shorthand for the sense that we are radically different and have departed the trodden path along a perilous detour. While other industrial democracies flourished with few lawyers and less litigation, we carried a crushing legal burden. Japan was Exhibit A, displaying the inverse relation of lawyers to economic vigor.¹⁵⁷ As fortunes change and the United States is again regarded as outperforming its economic rivals,¹⁵⁸ it remains to be seen how many of those who were so outspoken about the deleterious effect of lawyers will retain their conviction of the close linkage of legal activity to economic performance.

A media pundit tells us, "It's an 'only in America' spectacle that we have here where products that are later proven to be perfectly safe are driven off the market by lawyers."¹⁵⁹ President Bush, lamenting the debilitating effects of litigation against corporations, stresses that "[o]nly the United States has seen the number of

¹⁵⁶ Lawyers are not the only legal actors beguiled by nostalgic reconstruction of the past. See Marc Galanter, *The Life and Times of the Big Six: Or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921 (misperception by Supreme Court Justice of change in Federal Court Dockets.).

¹⁵⁷ The relative absence of lawyers in Japan is noted with commendation by many observers. See, e.g., Warren Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 94 (1976); Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, REGULATION, Mar.-Apr. 1978, at 15, 21 ("[P]erhaps some measure of the competitive advantage that Japan and some European nations seem to enjoy vis-a-vis the United States is attributable to their much less intrusive use of lawyers."); William Chapman, *Japan: the Land of Few Lawyers*, WASH. POST, Apr. 19, 1981, at C5 (noting comparatively few lawyers in Japan); Laurence H. Tribe, *Too Much Law, Too Little Justice: An Argument for Delegalizing America*, ATLANTIC MONTHLY, July 1979, at 25 (noting that the United States has twenty times more lawyers per capita than Japan); Steve Lohr, *Tokyo Air Crash: Why Japanese Do Not Sue*, N.Y. TIMES, Mar. 10, 1982, at 1 (discussing Japan's lack of litigiousness).

¹⁵⁸ E.g., Sylvia Nasar, *The American Economy: Back on Top*, N.Y. TIMES, Feb. 27, 1994, § 3, at 1 (noting America's economic prosperity).

¹⁵⁹ Crovitz, *supra* note 74.

lawyers double over a 20 year period.¹⁶⁰ Actually, lawyer populations have been growing even faster elsewhere. Between the years 1965 and 1985, the number of lawyers in the United States roughly doubled. But the rate of growth of the legal profession was higher in Canada, England, France, and Germany, to take only a few places for which data is readily available.¹⁶¹ In other respects as well, other industrial democracies seem less different from the United States. All have taken part in a tremendous enlargement of the legal world: 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.¹⁶²

Comparisons with supposedly less legalistic and contentious populations elsewhere do not invariably show Americans to be more litigious and legalistic.¹⁶³ Several recent and detailed compari-

¹⁶⁰ President Bush, April 7, 1992, Remarks, *supra* note 73.

¹⁶¹ Richard L. Abel, *Comparative Sociology of Legal Professions*, in 3 *LAWYERS IN SOCIETY*, at Table 3.2 (Richard L. Abel & Philip S.C. Lewis eds., 1988).

¹⁶² Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, 55 *MOD. L. REV.* 1 (1992) [hereinafter Galanter, *Law Abounding*].

¹⁶³ British respondents are more likely to seek legal assistance in connection with work accidents than are Americans. DEBORAH R. HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* 129 (1991) (suggesting disparity might reflect fact that, in Great Britain, injured workers can sue employers, while in the United States they may not). Auto accident victims in Ontario were found "slightly more likely to seek professional legal help in dealing with compensation-related issues than are victims in the United States." Herbert Kritzer et al., *The Aftermath of Injury: Compensation Seeking in Canada and the United States* 37 (Working Paper 10-4, Institute for Legal Studies, Disputes Processing Research Program, University of Wisconsin-Madison). A comparison of Australian and American disputing found Australians to be "substantially more likely to complain of troubles than are their U.S. counterparts and somewhat more likely to engage in an actual dispute," but fewer of these disputes reached the courts. Jeffrey FitzGerald, *Grievances, Disputes & Outcomes: A Comparison of Australia and the United States*, in 1 *LAW IN CONTEXT* 15, 30 (1983).

Explanations for the observed differences range from incentives that derive from substantive or procedural rules to the general character of the compensation system to the wider culture with its views of adversity, misfortune, assertion, recompense, and so forth. Patrick Atiyah attributes the greater incidence of tort cases in the United States to more favorable law, higher awards, lower risks, and fewer alternatives to litigation. P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 *DUKE L. J.* 1002,

sons place more emphasis on the similarities that interlace the differences in litigation patterns. A study comparing tort litigation in the United States, Britain, and Germany concludes with the surmise that "the differences that exist between the systems are much less spectacular than they are commonly believed to be once allowance has been made for differences in cost of medical care, standard of living and the cost and method of funding litigation."¹⁶⁴ A study of medical malpractice claims in the United States, Canada, and England takes up the "similar growth in malpractice litigation during the 1970s and 1980s" and takes this "parallelism [to] suggest . . . that this growth must arise less from isolated doctrinal changes in one country than from changes in medical practice and social mores, which occur roughly simultaneously in most Western countries."¹⁶⁵ These convergences are more remarkable because the other countries place far less reliance on courts and litigation to deal with compensation for injury than is the case in the United States.¹⁶⁶

1016-25. The focus on incentives is shared by Robert Pritchard, who emphasizes the primacy of rules about costs and fees. Robert S. Pritchard, *A Systematic Approach to Comparative Law: The Effect of Cost, Fee and Financing Rules on the Development of the Substantive Law*, 17 J. LEGAL STUD. 451, 456-60 (1988). Herbert Kritzer argues that "the kinds of incentive-based factors advanced by Atiyah and Pritchard cannot explain more than a small part of the blaming and claiming gaps" and emphasizes the expectations that frame the legal activity, leaving open the question of how much these "arise from the compensation systems themselves and . . . [how much they are] much more deeply ingrained in the semiotic spiral that define[s] different cultures?" Herbert Kritzer, *The Propensity to Sue in England and the United States: Blaming and Claiming in Tort Cases* 36 (1991) (Working Paper DPRP 10-5, Institute for Legal Studies, Disputes Processing Research Program, University of Wisconsin-Madison). To Robert Kagan, who contrasts English legal culture that sees law as an authoritative ideal with American legal culture that takes a more instrumental and political view of law, these views reflect the organization of social and political life in the two countries. Robert A. Kagan, *What Makes Uncle Sammy Sue?* 21 LAW & SOC'Y REV. 717 (1988).

¹⁶⁴ Basil Markesinis, *Litigation-Mania in England, Germany and the USA: Are We So Very Different?*, 49 CAMBRIDGE L.J. 233, 273-74 (1990).

¹⁶⁵ Donald N. Dewees et al., *The Medical Malpractice Crisis: A Comparative Empirical Perspective* 54 LAW & CONTEMP. PROBS. 217, 250 (Winter & Spring 1991).

¹⁶⁶ See WERNER PFENNIGSTORF & DONALD G. GIFFORD, *A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES* 129 (Donald G. Gifford & William M. Richman eds. 1991) (noting less frequent resort to tort system in other industrialized democracies is due to presence of public entitlement systems or to public and private insurance). The authors point out that these "alternative compensation sources do much of the work that is accomplished under the tort system in the United States." *Id.* On the scantier coverage and lesser coordination of American social

Swift and incessant currents of American influence are flowing through the legal systems of the industrialized world and spilling over into ex-second and third worlds. As one European observer sums it up, "almost all fundamental and far-reaching changes in European law and understanding of law during the post-war period have started from America."¹⁶⁷ American styles of structuring business relations, drafting contracts, regulating financial markets, and protecting injury victims have infiltrated into European legal practice.¹⁶⁸ There is massive borrowing of American institutional devices from constitutionalism and judicial review¹⁶⁹ to the large business law firm,¹⁷⁰ alternative dispute resolution,¹⁷¹ and public interest law.¹⁷² The lopsided infusion of procedural and substantive law, of general concepts and perspectives, of new

security schemes, see P.R. KAIM-CAUDLE, *COMPARATIVE SOCIAL POLICY AND SOCIAL SECURITY: A TEN-COUNTY PERSPECTIVE* (1973); John M. Grana, *Disability Allowances for Long-Term Care in Western Europe and the United States* 36 INT'L SOC. SECURITY REV. 207 (1983). Cf. ALFRED KAHN, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, *SOCIAL SERVICES IN INTERNATIONAL PERSPECTIVE* tbl. 2.2 (1976).

¹⁶⁷ Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 232 (1991).

¹⁶⁸ *Id.* at 235-42.

¹⁶⁹ See, e.g., JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE (Kenneth M. Holland ed., 1991); ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* (1992); Guido Calabresi, *Thayer's Clear Mistake*, 88 N.W. U. L. REV. 269 (1993); Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice,"* 35 CATH. U. L. REV. 1 (1985); Mary L. Volcansek, *Politics, Courts and Judges in Western Europe*, (unpublished paper presented at the 1992 Annual Meeting of the American Political Science Association).

¹⁷⁰ See, e.g., Yves Dezalay, *Territorial Battles and Tribal Disputes*, 54 MOD. L. REV. 792 (1991); Yves Dezalay, *The Big Bang and the Law: The Internationalization and Restructuration of the Legal Field*, 7 THEORY, CULTURE & SOC'Y 279 (1990); John Flood, *Megalaw in the U.K.: Professionalism or Corporatism? A Preliminary Report*, 64 IND. L. J. 569 (1988-1989); R. G. Lee, *From Profession to Business: The Rise and Rise of the City Law Firm*, 19 J. L. & SOC'Y 31 (1992).

While the large business law firm is the most prominent organizational borrowing, there is also some borrowing of devices such as the formation of litigation groups by plaintiffs' lawyers in mass disaster cases. See STUART M. SPEISER, *LAWYERS AND THE AMERICAN DREAM* 344-64 (1993) (discussing formation of litigation groups in United Kingdom).

¹⁷¹ See, e.g., BEYOND DISPUTING: EXPLORING LEGAL CULTURES IN FIVE EUROPEAN COUNTRIES (Konstanze Plett & Catherine Meschievitz eds., 1991); THOMAS E. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTION* (1989); Mauro Cappelletti, *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement*, 56 MOD. L. REV. 282 (1993); Simon Roberts, *Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship*, 56 MOD. L. REV. 452 (1993).

¹⁷² See, e.g., JEREMY COOPER, *KEYGUIDE TO INFORMATION SOURCES IN PUBLIC INTEREST LAW* (1991).

images of lawyering, and of new organizational forms has provoked European observers to compare the contemporary wave of Americanization to the transformative reception of Roman law that produced modern European law.¹⁷³

B. CHARACTERIZING AMERICAN DISTINCTIVENESS

When we discount for exaggerated notions of American uniqueness and for the enticements of cultural nostalgia, America is different and some things *have* changed. Beneath the illusion and caricature of these “only in America” and “good old days” fantasies lie genuine and serious questions about the distinctive character of American legal life.

The nostalgic component of the jaundiced view points to real changes as well as imaginary ones. Before World War II, American law in practice provided little remedy for have-nots against dominant groups. Lawrence Friedman described the late nineteenth century tort system as a “system of non-compensation” in which few claims were brought and plaintiffs faced an array of doctrinal, practical, and cultural barriers to recovery.¹⁷⁴ Studying personal injury cases in New York City over a forty-year period, Randolph Bergstrom concludes that “[t]he injured had few reasons to think that lawsuits would offer a ready source of sustenance in 1870, less still in 1910.”¹⁷⁵ My own review of pre-World War II

¹⁷³ E.g., Wiegand, *supra* note 167, at 230. Cf. J. Gillis Wetter, *The Case for International Law Schools and an International Legal Profession*, 29 INT'L & COMP. L. Q. 206, 217 (1980) (suggesting that we are living in midst of a “singular movement,” comparable to reception of Roman law in Europe, which is characterized by “the adoption and absorption throughout the world of a less clearly defined legal heritage in which many characteristic elements can be traced back to the common law, with an American flavour”). Wiegand elaborates his observations in Wolfgang Wiegand, *Reception of American Law in Europe—A Second Thought*, (unpublished paper presented at the Conference on Legal Cultures and the Legal Profession, Berkeley, California, May 7-8, 1993).

¹⁷⁴ Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351, 355 (1987); see also Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-1910*, 34 AM. J. LEGAL HIST. 295 (1990).

¹⁷⁵ RANDOLPH E. BERGSTROM, *COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870-1910*, at 157 (1992).

disasters shows that compensation was uncertain and meager.¹⁷⁶ Successful claims by those in subordinate positions—workers, minorities, prisoners—against bosses and authorities were few and far between.

In this respect, law has changed. Compensation for many of life's troubles has become routine, through social insurance (ranging from social security disability payments to federal insurance of bank deposits) and through use of the litigation system.¹⁷⁷ Expectations of remedy and compensation have risen.¹⁷⁸ Legal representation of victims is more available and more competent.¹⁷⁹ There is more "litigation up" by outsiders and clients and dependents against authorities and managers of established institutions. The leeways and immunities from legal accountability of the powerful have shrunk, and there is a sense of enhanced and oppressive exposure. It is this exposure that excites much of the reproach of our litigious society. To many members of the elite, lawyers are no longer pillars of the established order but are recast as enemies of established interests. Thus a *Wall Street Journal* columnist observed that "lawyers are replacing trade unions as the main scourge of the business community."¹⁸⁰ In a situation where many elite groups feel threatened by social and legal changes, the underlying and ineradicable themes of hostility toward lawyers are

¹⁷⁶ Marc Galanter, *Bhopals, Past and Present: the Changing Legal Response to Mass Disaster*, 10 WINDSOR Y.B. ACCESS TO JUST. 151 (1990) [hereinafter Galanter, *Bhopals*].

¹⁷⁷ A reading of the magnitude of this change is provided by the analysis of Tillinghast, a firm of actuarial consultants, which has compiled data on the gross cost of the tort liability system and of other social systems from the 1930s to the present. Tillinghast found that "[u]ntil shortly after World War II, growth in both tort costs and the GNP ran fairly parallel. Only in the late 1940s and early 1950s did the two diverge. TILLINGHAST, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE 4 (1992). Tort costs have risen dramatically from 0.6% of gross domestic product in 1950 to 2.3% of gross domestic product in 1991. *Id.* at 13. This includes the cost of insurance and self-insurance. Only a fraction of this goes to victims; Tillinghast estimates 25 percent. *Id.* at 10. The compensation received is only a fraction of the economic losses of victims, leaving aside all other forms of loss, pain and suffering, etc. For example, a study of recoveries by victims of air crash fatalities from 1970 to 1984 found that decedents recovered about one-fourth of their economic loss and survivors about one-half of theirs. ELIZABETH M. KING & JAMES P. SMITH, ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS viii (1988).

¹⁷⁸ LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 42 (1985).

¹⁷⁹ Galanter, *Bhopals*, *supra* note 176, at 164; SPEISER, *supra* note 170.

¹⁸⁰ Paul A. Gigot, *Bill Clinton Bellies Up to the Tort Bar*, WALL ST. J., Apr. 10, 1992, at A-16.

available to decipher and explain these troubling developments.

Enlarged responsiveness to the concerns of ordinary people does not imply a lessening of legal attention to the concerns of dominant groups. The system is more inclusive, but all parts of it have grown. During the era of expanding responsiveness to victims and outsiders, there was even greater growth in legal activity on behalf of dominant groups: litigation by businesses increased more rapidly than litigation by individuals;¹⁸¹ legal expenditures by businesses and government increased more rapidly than expenditures by individuals;¹⁸² the large firm sector of the legal profession that provides services for corporations and large organizations grew and prospered more than the small firm sector that services individuals.¹⁸³

America is a society that absorbs huge amounts of law and lawyering—both absolutely and compared to other industrial democracies. Even when we adjust for the different occupational structure and nomenclature of providers of legal services, it is clear that the United States supports far more lawyers per capita than do other industrial democracies.¹⁸⁴ I would argue that this reliance on lawyers is the effect, rather than the cause of a decentralized legal regime in which any activity is subject to multiple bodies of regulation; where the application of those rules depends on complex and perhaps unknowable states of fact; where

¹⁸¹ Marc Galanter & Joel Rogers, *A Transformation of American Business Disputing? Some Preliminary Observations* (1991) (Working Paper DPRP 10-3, Institute for Legal Studies, University of Wisconsin-Madison).

¹⁸² From 1967 to 1987, the portion of the receipts of the legal services industry contributed by businesses increased from 39% to 51% of a much enlarged total, while the share purchased by individuals dropped from 55% to 42%. U.S. DEPT OF COMMERCE, BUREAU OF CENSUS, *CENSUS OF SERVICE INDUSTRIES: LEGAL SERVICES* Table 3 (1972); Table 9 (1977); Table 30 (1982); Table 42 (1987). Figures for 1967 are estimates from Richard Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 *LAW & SOC. INQUIRY* 435, 441 (1989).

¹⁸³ GALANTER & PALAY, *supra* note 155, at ch. 4; Sander & Williams, *supra* note 182.

¹⁸⁴ Marc Galanter, *Adjudication, Litigation and Related Phenomena*, in *LAW AND THE SOCIAL SCIENCES* 151, 166 (L. Lipson & S. Wheeler eds., 1986). A calculation that the U.S. has fewer "law providers" per capita than many other nations, Ray August, *The Mythical Kingdom of Lawyers*, A.B.A. J., Sept. 1992, at 72, is seriously flawed. See Marc Galanter, *Re-entering the Mythical Kingdom*, A.B.A. J., Nov. 1992, at 118. Based on international data on enrollment in law courses, it makes insufficient adjustment for differential rates at which students in various countries graduate and graduates become and remain suppliers of legal services. *Id.*

decision-makers produce not definitive and immutable rulings but contingent temporary resolutions that are open to further challenge; where outcomes are subject to contestation in multiple forums by an expanding legion of organized and persistent players who invest increasing amounts in more technically sophisticated legal services. The allegiance of the lawyers that provide these services is less to their guild than to their clients, whose views they absorb and whose interests they champion. Mark Osiel points out that American lawyers are different not only in their "unqualified partisanship" but also in the kind of knowledge that comprises their expertise.¹⁸⁵ They provide not only technical mastery of legal texts but "practical judgement: discernment in predicting how courts will balance, in light of underlying policy and principle, the relative significance of particular features of a complex factual configuration."¹⁸⁶ The distinctive scope and role of American lawyers underlies their prominence in the American political and cultural scene. As the myth of lawyers undermining American competitiveness attests, they are seen as major actors responsible for major problems.

Through this decentralized, endlessly receptive, and very expensive system, we attempt to pursue our multiple and colliding individual and social visions of substantive justice.¹⁸⁷ We want our legal institutions to yield both comprehensive policy embodying shared public values and facilities for the relentless pursuit of individual interests. But we are suspicious of the concentrated authority required for the former and reluctant to support the elaborated public machinery required to provide the latter routinely

¹⁸⁵ Mark Osiel, *Historical Roots of Adversarial Legalism* (May, 1993) (unpublished remarks at Annual Meeting of the Law and Society Association, Chicago). Mark Osiel observes that "The especially stringent duties of client loyalty now widely taken for granted by American lawyers, and embodied in their ethics codes, developed from the alliance struck in the late 19th century between large law firms and large companies." *Id.*

¹⁸⁶ *Id.* See also Mark J. Osiel, *Lawyers as Monopolists, Aristocrats and Entrepreneurs*, 103 HARV. L. REV. 2056-64 (1990).

¹⁸⁷ Atiyah and Summers regard the quest for substantive justice as a characteristic distinguishing American law from English law. P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* (1987). Cf. Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL. ANALYSIS & MGMT. 369, 392 (1991) (observing the inherent mismatch of attempting "to articulate and implement the socially transformative policies of an activist, regulatory welfare state through the legal structures of a reactive, decentralized, nonhierarchical governmental system").

to ordinary citizens. We prefer fragmented government and reactive legal institutions with limited resources, so that in large measure both the making of public policy and the vindication of individual claims are delegated to the parties themselves who are left to fend according to their own resources. In such a complex system, lawyers form a major component of these resources. But lawyers, each attached to her own client, cannot fulfill the fatally divided promise of substantive justice.¹⁸⁸

Does this more capacious and more complex law bring with it more justice? Surely, yes, but paradoxically it is simultaneously 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 widespread sense that science, technology, and government can produce solutions for many of the remaining problems.¹⁸⁹ 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.¹⁹⁰ The realm of injustice is enlarged. Hurricanes are misfortunes; but inadequate warning, insufficient preparation, and bungled relief efforts may be injustices. Once, having an incurable disease was an unalterable misfortune; now a perception of treatment withheld or 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.

Just as our longer and healthier lives call for more medical attention, every addition to human capacity for control and remedy enlarges the legal world. It can safely be predicted that health care delivery, genetic engineering, and the information superhighway—to pick just a few matters from today's headlines—will, at the same time that they address old needs, spawn vast thickets of new

¹⁸⁸ Post, *supra* note 9.

¹⁸⁹ FRIEDMAN, *supra* note 178, at 42.

¹⁹⁰ JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 5 (1990).

law and create new needs. As resources increase and expectations rise and new claims for remedy are vindicated, new vistas of injustice unfold.

The American legal setting—in which decisions responding to claims based on our competing commitments are fragmented among multiple regulators, superintended but not controlled by independent courts—gives full play to the ambiguities and strains in the lawyer role. As lawyers devise more complex public structures and embellish innovative pursuit of conflicting client interests within and around those public structures, the inevitable tensions of the lawyer's role are accentuated. Lawyers seem to be ushering us ever further from the legal idyll of substantive justice that is direct, simple, and accessible. It comes as no surprise that they are blamed for both a surfeit of law and a shortage of justice.

How distinctive are these American developments? Is America on an idiosyncratic detour, or is it launched on a pioneering excursion into territory that will soon be common ground? Will this fluid, flexible, ubiquitous law, responsive to enhanced expectations for justice, prove to have a general and transforming appeal in other societies in the way that the (now transnational) consumer culture has? Or will these American formations turn out to be just one of the legal idioms through which the life of modern societies can be conducted?

Some would take the extensive borrowing of American institutions and devices as an indication that America is leading the way to a convergent transnational legal culture. But legal cultures, like languages, can absorb huge amounts of foreign material while preserving a distinctive structure and flavor. Yet even as the various legal cultures remain distinct, they seem to be driven by similar demands to address many of the same problems and increasingly they draw upon a common repertoire of responses.

The enlargement of the legal world is not an exclusively American phenomenon, but a general one.¹⁹¹ Other nations seem to be moving toward this soft, pluralized, participative, expensive law, with more lawyers who play a more central and expansive role.¹⁹² As these lawyers become more adaptable and more useful to an

¹⁹¹ Galanter, *Law Abounding*, *supra* note 162.

¹⁹² *Id.*

enlarged cast of legal actors, they may well join their American counterparts as targets of discontent.

Anti-lawyer feeling varies in both intensity and focus. Of course, episodes of elevated anti-lawyer feeling are never entirely new; they draw on old themes. But they are never just reruns. Such episodes are about more than lawyers: they are about people's responses to the legal system and the wider society in which it is set. The level of discontent with lawyers may be sharply elevated and intensified by groundless panic about the legal system. The most recent round of American lawyer-bashing exhibits elite reaction to the pervasiveness and expense of law and to its new inclusiveness and accountability. This "too much law" critique supplanted the earlier "not enough justice" critique that focused on lawyers' betrayal of their public duties. To my knowledge, no prescient analyst predicted this shift in the most visible and vehement critique of the legal profession. This should induce modesty about imagining that we know what is coming next. None of the basic themes of criticism is going to disappear, since they are rooted in the lawyer's role. As we expect ever more of the law and become ever more aware of its shortcomings,¹⁹³ the focus of discontent with lawyers may shift once again, but there is little reason to think that its intensity will abate more than temporarily.

¹⁹³ See HART SURVEY, *supra* note 110, at 4-5 (reporting that those most knowledgeable about the system are most negative toward lawyers).

