

THE FUTURE OF AMERICAN LAWYERS*

by Stewart Macaulay**

An international audience might consider the future of American lawyers for several reasons: Bits of American culture constantly spread around the globe – the television program, «L.A. Law» and films such as «The Firm» have joined Coca Cola, McDonald's and rock and roll in many countries. These American exports can affect local practices. Also, America often is the extreme case. It reflects tendencies before they become prominent elsewhere. Moreover, even when there is little American influence elsewhere, we can ask how other societies solve problems that Americans cope with by rights and lawyers.

However, before we can consider the future, we must clarify the present. Fiction and ideology offer misinformation about what American lawyers do. Perhaps the stereotype of the American lawyer is the fictional character «Perry Mason» standing in a courtroom cross-examining a witness in a criminal case. However, prosecutors and criminal defense lawyers are but a small and largely distinct part of the American bar. Most lawyers seldom see a criminal case and spend little time in court actually trying criminal or civil actions.

Putting fiction and ideology aside, there are tasks commonly performed by American lawyers¹: Some lawyers do try cases, write briefs and argue appeals. More often they bargain in the shadow of the law. The likely or possible result if a case were to go to trial is part

* Dr. Jacqueline Macaulay took time from her law practice to edit this essay. All mistakes, of course, are mine.

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1. See S. Macaulay, «Lawyers and Consumer Protection Law», 14 *Law & Society Review*, 1979, 115.

of bargaining power. No one would pay the price of a law suit if they could solve their problems by a telephone call or a letter, perhaps backed with implicit threat of litigation. We can, to paraphrase a famous statement about war, see litigation as the continuation of diplomacy by other means. Lawyers also serve as translators, taking clients' often imprecise goals and restating them in legal terms². That is, lawyers produce documents such as wills, contracts, deeds, applications for licenses and permits and the like. Lawyers also consider clients' plans and tell them what they can and cannot do legally. They suggest ways to achieve clients' goals while reducing the risks of running afoul regulation or adverse tax consequences. Some lawyers sell their knowledge about and contacts with those who hold public and private power. They know whom to see and what to say, and they have the necessary relationships so they can gain access to those with power. Some lawyers also engage in efforts to change the law. They lobby before legislatures or administrative agencies or bring test cases before the courts.

Heinz and Laumann found that lawyers in Chicago worked in almost two distinct professions³. One group served large corporations and wealthy individuals. The other served small businesses and individuals who were not rich. Heinz and Laumann remind us that American lawyers play many different roles in that society. As a result, generalizations about one part of the bar may not hold for another.

1. Present Trends

To predict the future, we must look at present trends. What have been the significant developments concerning American lawyers over the past decade or two? The composition of the American bar and the structure of practice has changed markedly in this short period. One notable change is that from 1970 to 1980, the lawyer population grew at a rate without precedent in the previous 140 years⁴. In 1960, there were about 286,000 American lawyers; in 1980 the number had grown to 542,205 and it had reached almost 650,000 by 1984⁵. «Between 1965 and 1990, the number of American lawyers leaped from 296,000 to 800,000, increasing more than four times as fast

as the population of the United States»⁶.

During the same period, women entered the legal profession in ever growing numbers. In 1960, about 3.5% of the total students enrolled in American Bar Association-approved law schools were women. By 1986, women were 40% of the law students⁷. The proportion of minority law students grew from about 4% of the total in 1969 to about 10% in 1985⁸. The number of women lawyers practicing increased ten times over the last two decades while the number of male lawyers practicing doubled during the same period⁹. At the same time, a survey of law firms in the San Francisco Bay area showed that few firms had promoted women to partnerships¹⁰.

Another notable change has been the growth of the large American corporate law firm. For example, in 1968, about 2,500 lawyers worked in America's twenty largest law firms, and the average size of each firm was 128 lawyers. By 1987, about 10,500 lawyers worked in the twenty largest firms, and the average size of each firm was 527 lawyers. The largest firm in 1969 had 169 lawyers while the largest firm in 1987 had 946¹¹. As the firms grew in size, the amounts paid to lawyers in this kind of practice also grew rapidly. Large firms are willing to pay beginning lawyers with little or no experience from \$ 80,000 to \$ 120,000 a year. In 1992, five firms had profits per partner of \$ 1 million or more. The average profit for the 100 top-grossing firms was \$ 406,000 per partner¹².

In the 1960s corporate law firms usually were located in a single major business and financial center such as New York City. By the 1990s, many firms had expanded. Many of the largest firms have offices in several major United States cities and in foreign countries as well. As these corporate law firms grow and spread across both state and national borders, they usually carry with them what Galanter calls «megawlawyering»¹³. As compared to ordinary practice, megawlaw involves more elaborate legal research, more painstaking investigation, more innovative tactics and very large increases in the cost of resolving

6. *New York Times*, August 6, 1993, at A 29, col 2.

7. R. Abel, *American Lawyers*, cit., 285.

8. *Id.* at 288.

9. *Trial*, February, 1992.

10. *The Recorder*, August 29, 1991, at 1.

11. See R. Abel, *American Lawyers*, cit., 311.

12. *Wall Street Journal*, June 29, 1993.

13. M. Galanter, «Megawlaw and Mega-Lawyering in the Contemporary United States», in *Sociology of Doctors and Lawyers* (R. Dingwall & P.S.C. Lewis eds., 1982).

2. M. Cain, «The General Practice Lawyer and the Client: Toward a Radical Conception», 7 *International Journal of the Sociology of Law*, 1979, 331.

3. J. Heinz and E. Laumann, *Chicago Lawyers: The Social Structure of the Bar*, Russell Sage, New York 1982.

4. T. Halliday, «Six Score Years and Ten Demographic Transitions in the American Legal Profession, 1850-1980», 20 *Law & Society Review*, 1986, 53.

5. R. Abel, *American Lawyers*, Oxford U.P. 1988, 280.

disputes. Large-firm lawyers have a reputation for running up the costs of litigation and prolonging the process. This improves their bargaining position against opponents who cannot afford to invest in lawyering and wait patiently for results.

Megalawyering also creates strategies to minimize the burdens on corporate clients of complying with unwanted regulation. McBarnet, for example, discusses the use of highly technical legal arguments as a tactic to avoid complying with law¹⁴. Enforcement officials must consider whether they will spend the resource defeating such arguments. Instead of telling corporate clients how to comply with rules, megalawyers bargain with administrators about the level of compliance. A federal system or a supranational one such as the European Community with overlapping levels of law offers great opportunities for such strategies. Lawyers can always question which law applies, and they can offer interpretations of several laws that would limit the impact of regulation.

Changes in American society over the past few decades have affected the work done by American lawyers. For example, marriages are more fragile, and our divorce rate has climbed rapidly. Despite the adoption of some variety of no-fault divorce by most of our states, clients still bring many complex problems of property-division and child-custody and support to lawyers' offices. Even after divorce, these cases often return to the lawyers because one or both of the parties questions whether the other has met the obligations imposed by a court. More men and women live together without marriage. When their relationship ends, they may ask lawyers questions about the legal obligations of one to the other.

Another major change in the United States was the increasing crime rate. Politicians responded to and fanned public fear by staging «wars» on crime and on drugs. We increased the penalties for crime and built new prisons that we filled quickly. The work for lawyers increases as arrest rates rise. After the police arrest accused criminals, our process demands the services of both prosecuting attorneys and defense lawyers. Most cases are settled by plea bargaining, but a few must go to trial. After trial, a few cases are appealed to upper courts. Criminal trials and appeals may be lengthy and hard-fought. American society has been hard pressed to provide enough talented prosecutors and defense lawyers.

14. See D. McBarnet, «Whiter Than White Collar Crime: Tax, Fraud Insurance and the Management of Stigma», 42 *British Journal of Sociology*, 1991, 323. See also D. McBarnet, «Law, Policy and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies?» 15 *Journal of Law and Society*, 1988, 113.

Political changes also affect the subject of legal practice. From the 1950s to 1980, various groups sought to vindicate what they claimed were their rights before the courts. After winning and losing some major battles, they turned to the legislatures seeking statutes to broaden and implement these rights. Justice Thurgood Marshall, for example, gained prominence by attacking segregation of African-Americans as a lawyer arguing a series of cases. Justice Ruth Bader Ginsberg gained prominence a decade later by advocating women's rights in another series of cases. Statutes prohibiting discrimination based on race or gender and requiring affirmative action for women and minorities brought individual clients with complaints to lawyers' offices. As we might expect in an adversary system, most of these complaints were brought by one lawyer and required another lawyer to settle or defend the claim. Lawyers for businesses also sought to counsel clients on how to change practices to avoid such claims.

We then saw another great change after the election of President Reagan in 1980. He appointed many judges and administrative officials who were not sympathetic to claims of discrimination or the requirements of affirmative action. His appointees decreased the chances of winning such cases by restrictive interpretations of prior cases and statutes and by creating difficult-to-satisfy procedural requirements. President Bush's appointees were even more conservative in the area of civil rights and liberties than those of President Reagan¹⁵.

The election of President Clinton in 1992, and his judicial and administrative appointments, may expand the opportunities for plaintiffs in such cases once again. However, our judiciary changes more slowly than our executive. Presidents can appoint more federal trial judges than appellate judges and more intermediate appellate court judges than Justices of the Supreme Court. We may find that the new Clinton appointees will be more receptive to discrimination and affirmative action claims than the judges appointed by Presidents Reagan and Bush. This may prompt more litigation as civil rights lawyers see a greater chance to gain victories from the members of a judiciary holding sharply divided opinions.

These political changes have had a similar impact in the area of regulation of business. During the 1960s and 1970s, our federal and state legislatures passed many statutes designed to protect the environment, the health and safety of industrial workers, and the interests of consumers. President Reagan's and Bush's judges and administrative

15. See R. Carp, D. Songer, C. Rowland, R. Stidham and L. Richey-Tracy, «The Voting Behavior of Judges Appointed by President Bush», 76 *Judicature*, 1993, 298.

officials managed to lighten the burden of these statutes on business. Immediately after President Clinton's election, many corporate lawyers began to reexamine their companies' programs of compliance with federal statutes and administrative regulations¹⁶.

Shifting political fortunes similarly affected the liability of industry to consumers who were physically injured by their products and the liability of doctors for injuries to patients. During the 1950s and early 1960s, many judges had been appointed by governors who were Democrats or liberal Republicans, and often they were more pro-plaintiff than in the past. They changed the case law in the areas of products liability and malpractice. It became far easier for an injured plaintiff to win a very large award of damages, including compensation for pain and suffering. Contingent fee agreements usually finance such cases. Under this system, lawyers are paid by a percentage of the amount courts award to their clients.

Insurance companies and major corporations responded by fashioning a campaign against what they called «the litigation explosion»¹⁷. President Bush's Vice President, Dan Quayle, championed their cause. Much of our public debate has been characterized by misstatements of fact¹⁸. The reformers' arguments tacitly assume that all victims' complaints are without merit. Some of those seeking to change the law want to shift losses to victims to cut the costs of business. The American Trial Lawyers Association and state and local bar associations have fought business and insurance interests to preserve the existing system. Those who sought to curb «the litigation explosion» have won victories in some states, and they continue to battle to limit victims' rights elsewhere.

Changes in the economy also have affected American lawyers' practices, particularly since the rise of OPEC in the early 1970s. Americans

16. M. Fisk, «Girding for Change», *The National Law Journal*, Dec. 14, 1992, at S1.

17. Galanter has pointed out that some are concerned about increasing litigation in the United States because less-powerful individuals have succeeded in holding powerful organizations accountable to social norms. Manufacturers would prefer to have consumers bear the risk of defective products; doctors would prefer that patients take the risk of medical mistakes; those who discriminate on the basis of race or gender would prefer to be free to do so without consequence; insurance companies would prefer to collect premiums rather than pay claims. They argue that victims should accept their fate stoically rather than fight back through litigation. See M. Galanter, «The Day After the Litigation Explosion», 46 *Maryland Law Review*, 1986, 3, 38. This ability of the less-powerful to gain power by invoking law is one reason that reformers in other countries find the American legal system attractive.

18. M. Galanter, «News from Nowhere: The Debated Debate on Civil Justice», forthcoming in the *University of Denver Law Review*. («Public discussion of our civil justice system resounds with a litany of quartertruths...»).

began buying imported goods in place of products made in the U.S.A. American firms moved production and sought financing abroad. This restructuring of the American economy shatters long-term continuing relations between manufacturers and suppliers, and firms abandoned their historic disinclination to sue other¹⁹. Buyers and sellers, for example, sued when drastic fluctuations in the cost of energy pushed contracts outside the zones of risk tacitly assumed. Many companies reacted to increased competition by firing large numbers of workers. In response, many former employees sued under a variety of legal theories. Both individuals who lost jobs and corporations in trouble declared bankruptcy in increasing numbers. Stronger corporations took over weaker ones by mergers and acquisitions. All of these changes expanded the corporate need for legal advice. As corporate finance and production became more international, at least some lawyers expanded their practice to match. Some American firms, for example, advised their clients on European Community law from offices in Brussels, London or Paris.

Finally, changing technology has affected American lawyers. Much of this technology involves ideas that lawyers try to protect and defend. Can, for example, competitors sell copies of Intel's 486 computer chip? Can Apple stop Microsoft's Windows program from coming too close to the appearance of a Macintosh screen? New technology also prompted problems such as who is responsible when applications of computers fail to produce the benefits that the buyer alleges the seller promised? Questions such as these have produced much redrafting of standard form contracts and litigation.

American lawyers also increasingly use technology in their practice. In most law offices word processors have replaced typewriters. The photocopier has replaced carbon paper. Instead of doing legal research in books, lawyers look to computer data bases of cases, statutes, regulations, law review articles and newspaper reports available via a modem or through a CD-Rom disk. Complex and expensive computer programs now help lawyers manage the documents and testimony needed in trials. Some lawyers use large-screen television presentations before juries. Such presentations may make arguments vivid and more convincing. For example, in an antitrust trial, lawyers used such a television screen controlled by a computer. «Attorneys thus were able to display

19. See M. Galanter, S. Macaulay, T. Palay and J. Rogers, «The Transformation of American Business Disputing: A Sketch of the Wisconsin Project», 12 *Oñati Proceedings: Disputes and Litigation*, 1991, 153.

for the jury portions of documents, videotaped depositions, and charts and graphs with the flick of a light wand, a pen-sized instrument that read bar codes assigned to each of the thousands of exhibits introduced during trial»²⁰.

Manufacturers always promise great gains in long-term efficiency, but in the end, the cost of legal services increase as lawyers replace a mere 286 computer with the latest 486 model, pay for print-shop quality printers, and incur on-line charges assessed by legal databases such as LEXIS or WESTLAW. Moreover, technology may confront lawyers with the problem of information overload. Clients may not be able to afford to pay lawyers to process all the discoveries that a data base search will yield. Or, even more troublesome, poor plaintiffs may not be able to pay while rich defendants can.

2. *Will the Trends Continue?*

Are these trends likely to continue? Will large law firms continue to grow and spread internationally? Will American law schools continue to attract large numbers of students? Will American lawyers continue to employ tactics to reduce the impact of regulation? Will more legislatures consider limiting products liability? All of these things seem likely. We can expect to see in the immediate future what we have seen in the immediate past²¹.

To expect important changes, we must point to something that might prompt them. Much turns on American politics. If President Clinton is successful enough to win reelection, we are likely to see more economic regulation, more civil rights litigation, and a limit on attempts to contain the alleged litigation explosion. If the American economy continues to be battered by international competition, we can expect several consequences: Employees are likely to continue challenging job losses. Firms will continue seeking protection in bankruptcy while creditors will try to maneuver to come closer to satisfying their claims. And as production and financing move overseas, American-style megalaw will continue to follow.

In theory, we could limit the scope of law practice by finding ways to avoid the problems about which lawyers now litigate. The legal

staffs of large automobile manufacturers work with their firm's engineers to design cars and production processes to minimize product liability claims. If, for example, doctors made fewer mistakes or questionable decisions, they would injure fewer patients. The risk of malpractice litigation probably has provoked greater care by doctors and nurses to avoid mistakes. However, problem avoidance seldom will be so successful as to remove all opportunities for making claims on behalf of those injured.

Lawyers' tasks would change if Americans subject to regulation accepted the decision and commands of regulators without challenge. This is unlikely to happen, at least soon. American administrative officials do not command the respect that bureaucrats do in other societies. As a group, they do not receive educations designed to prepare them to run the economy. American politicians have transformed the term «bureaucrat» into a perjorative expression. Although corporations regularly seek to influence decisions about law creation and enforcement, America is not a corporatist society. Policy does not emerge from a consensus of the powerful acting together. As a result, corporations seldom become committed to following governmental policies. They seek to avoid legal trouble but avoid costly efforts to comply with regulation. Corporate lawyers long have sold their skills as the way to attack regulation. Long practiced habits are hard to break.

The practice of American lawyers also has changed as other professions and occupations offered cheaper solutions to client's problems. For example, real estate agents do much of the conveyancing that once was a major focus of lawyers' work. Accountants prepare tax returns and offer advice on planning to avoid taxes while charging less than lawyers. Middle and working class people turn to tax-preparing services. Such organizations reduce legal complexity to standardized routines that they market at a price lower than would interest most lawyers.

Yves Dezalay's work suggests that transnational lawyers are competing with the major international accounting firms for the job of advising large corporations seeking to cope with such matters as European Community regulations. The accountants are in place while the lawyers are the latecomers. However, American-style large corporate law firms offer a greater variety of services than most accounting firms. Professor Goebel, for example, argues that American-style transnational lawyers help clients bridge the cultural gap among differing

20. *Wall Street Journal*, August 20, 1993, at B1, col. 3, B2, col. 3.

21. See Jones, «The Challenge of Change: The Practice of Law in the Year 2000», 41, *Vanderbilt Law Review*, 1988, 683.

social, political and economic systems²². Professor Garth²³, on the other hand, notes that transnational lawyers serve an ideology of free trade, minimal government regulation and a common understanding of how conflict should be resolved. He stresses that this is a political project, seeking to undercut local and national goals embodied in regulation.

Many have proposed that problems could be better settled by alternative dispute resolution – arbitration and mediation – than by litigation. While lawyers can and do practice ADR, others claim such skills as well. Today, for example, social workers often advocate mediation to reach a cooperative solution to property division and child custody problems arising upon divorce. Some academics argue that mediated outcomes necessarily must reflect existing patterns of power and often put women without business experience at a disadvantage. Moreover, parties going through divorce often want to fight to prove that they are right and their spouse is wrong. Mediation does not assign blame, and it will not work as long as this is the goal of one of the parties. Perhaps the high cost of lawyers and battles about property and children may prompt people to seek a less adversary approach, but there is little evidence of such a trend now.

Today major corporations are making great efforts to contain costs. As American corporations have faced extreme competitive pressures over the past few decades, they looked for ways to cut expenses. In the past, most of these firms had a general counsel who offered day-to-day advice and sent legal problems to a large firm with which they had long-term relationships. However, the major corporate law firms produce an expensive custom-made product, and businesses are learning that they do not always need to pay for such service. Over the past two decades, corporate general counsel have played a much more active role in solving legal problems. An expanded corporate legal staff handles recurring problems which no longer go to outside lawyers. When companies must go to outside firms for skills and experience their internal legal staff lacks, general counsel push large corporate law firms to compete for business, and they move business from one firm to another.

This new competitive environment has changed the conditions of

practice in the large law firms. Partners who no longer contribute significantly to firm profits have fired or pushed into retirement. Firms hire star lawyers away from other firms, and firms merge to form large associations of lawyers that offer a wide array of services in many cities and states. Young lawyers – associates who are not yet partners – may be paid close to \$ 100,000 a year as beginners, but they no longer go through a lengthy training process. Now they must produce «billable hours» as soon as possible. As Galanter and Palay²⁴ show, major law firms are partnerships that sell intellectual capital. Firms make money by selling partners' time and by charging clients more for associate's services than the firm pays the associates. To induce associates to work long hours, firms must promote some associates to partnership. This means that firms must grow. They must create new partners to provide incentives for associates to compete for these positions. But new partners also must have their own associates whose labor they can sell to clients for more than the firm pays them. When the economy is strong and clients are willing to accept increasing fees, the system works. Now the economy is weak, and clients are cutting costs. When clients examine firm billing item by item, life in the large firms becomes far less comfortable. «Downsizing» has become a fact of life for large law firms as well as large corporations. Firms appraise the contributions of all members toward bringing in fees or cutting costs.

The trend toward greater diversity in the legal profession is unclear. Competitive pressure arose just as women were entering the profession in increasing numbers. Some women lawyers have enough contacts to direct business to the firm. Some young women work as long and with as much skill as the young men hired by the firm. However, women are less likely than men to win promotion to partner in large firms. Women talk of a «glass ceiling» that cannot be seen but which limits their advancement. Firms fear that women will not attract business as well as men. Some women have been victims of discrimination by firms and by clients. If a female associate has children, she may not be able to work sixty or seventy hours a week for a firm. Whatever the claims for equal responsibility, in the United States the major burden of child care still falls to women. However, the firm expects associates' unqualified devotion as part of the consideration for the

22. R. Goebel, «Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap», 63, *Tulane Law Review*, 1989, 443.

23. B. Garth, «Transnational Legal Practice and Professional Ideology, 7 Issues of Transnational Legal Practice», 1985 *Michigan Year Book of International Studies*, 1985, 3.

24. M. Galanter and T. Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm*, University of Chicago Press, Chicago and London 1992.

large salary and the change to compete for a partnership. Many women lawyers have demanded that large law firms accommodate child bearing and rearing. Some male lawyers spend more time with their young children rather than devote most of the day to competing with other associates in their firm. These feminist demands have met with success to date.

The large firms have responded to these cross-pressures in many ways. They compete for business, and make presentations to present and potential clients. They have looked for new services they can offer and ways to cut costs. They are hiring fewer young lawyers, and some allow alternative career patterns. Some firms now offer positions as permanent associates who will not be promoted to partnerships. Some offer maternity leaves and time off for family emergencies. As law firms have grown, some have become more bureaucratic in their internal management²⁵. Instead of tacit assumptions about hours at the firm, leaves and like, there are rules and procedures. As in any organization, a firm's general rule applied to particular cases often are senseless. However, bureaucracy may make life more predictable in large firms, and this may help parents plan for child-care. Nonetheless, bureaucracies can have formal rules opposed by the real, but unspoken, rules. For example, the rules may say that young lawyers may take time off for children's emergencies, but using that right may cost them a reputation for placing their children ahead of the firm.

A group of Canadian researchers considered the great number of women who begin as associates but leave major Toronto firms without being promoted to partner²⁶. They found that this practice helps major firms control «the spiraling demands for rewards». Outside demands on women make it hard for them to work the long hours year after year until they reach the stage where associates are considered for partnership. Women may be a highly educated and talented but compliant pool of labor. Whether this exploitation of women will help solve the firm's structural problems or will produce such dissatisfaction as to change the organization of large firm practice remains to be seen.

Increasing costs also affect smaller firms that serve individuals and small or medium-size business. Cost barriers have long rationed legal

services to members of the middle and working classes as well as the poor. Individual Americans have many legal rights celebrated in the culture, but most know that they cannot exercise these rights without a lawyer. They think, usually with good reason, that lawyers are very expensive. Individuals can vindicate certain rights by hiring lawyers on contingent fees — the lawyers keep a percentage of what they win. Under a contingent fee agreement, lawyers are paid only if they win. If only a relatively small amount of damages are likely to be recovered, lawyers will not see the case worth taking on this basis. As a result, lawyers accept contingent fee cases only after careful appraisal of their chances of producing a large return or of litigating under a civil rights or consumer protection statute that allows an award of reasonable attorneys fee to be paid by the defendant.

Another major change in law practice came in 1977, when the Supreme Court overturned prohibitions against advertising by attorneys. Some writers predicted that this would lead to price competition among lawyers which would lower legal fees. Lowered fees, in turn, would lead to more efficient legal practice as lawyers cut costs. In large part, lawyers were expected to achieve efficiency by greater standardization. Highly trained and experienced lawyers could delegate more functions to younger lawyers and workers lacking formal legal training. Solo and small firm practice would give way to legal clinics which could realize the benefits of standardization and the economies of scale. In this way, lawyers would lower cost barriers, and people of modest means would have greater accesses to justice.

Most of these developments have not occurred. Advertising has provoked some competition among lawyers, and some legal clinics exist. Nonetheless, the solo practitioner and the small firm are still with us in the 1990s. Lawyers find it hard to advertise specific prices for specific services because most human problems do not come in discrete standardized packages. Moreover, clients often do not want efficient standardized lawyering. Muris and McChesney²⁷ illustrate cost reduction through the use of paralegal workers within a systems approach to divorce practice. Paralegals, who earn far less than a lawyer, ask clients standard questions and fill in blanks on a form document. In this system, the lawyer does not see the client until trial. Client contacts involve lawyer time, and the more time the lawyer spends with client, the higher the fee. Some clients find the process

25. See R. Nelson, «The Changing Structure of Opportunity: Recruitment and Careers in Large Law Firms», 1983 *American Bar Foundation Research Journal*, 109.

26. See J. Hagan, M. Zatz, B. Arnold and F. Kay, «Cultural Capital, Gender, and the Structural Transformation of Legal Practice», 25 *Law & Society Review*, 1991, 239.

27. T. Muris and F. McChesney, «Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics», 1979 *American Bar Foundation Research Journal*, 179.

described to be unacceptable. Clients want more than a standardized legal result. They want a lawyer whom they know and trust. Indeed, discovering what clients want or what they will accept as the best that they can get, may be a major part of practicing law. Nonetheless, as costs increase, clients may have to accept more standardization and a more impersonal treatment than they would like.

Lawyer advertising may be one factor that has provoked more Americans to use lawyers. In a poll conducted by the *National Law Journal* and the West Publishing Company in July of 1993, seven out of ten people reported having had personal or business contact with a lawyer during the past five years. When they conducted a similar survey in 1986, only 52 percent of the respondents reported seeing a lawyer during the preceding five years²⁸. Lower – and middle – income people reported increasing use of lawyers. Those with incomes below \$ 20,000 were more likely to report contact with a lawyer than those with incomes above \$ 75,000²⁹.

3. *The Status of the Profession and Social Mobility*

Americans have long been ambivalent about lawyers. About 150 years ago, Alexis de Tocqueville visited the United States and wrote about his impressions of the new democracy³⁰. His may be the most positive comments about American lawyers ever made. He reported that American lawyers were a «privileged intellectual class». People in a democracy know that lawyers serve the democratic cause because their skills are tied to rights and procedures. Americans distrust the wealthy. «Lawyers, forming the only enlightened class not distrusted by the people, are naturally called on to fill most public functions»³¹. Twentieth Century Americans do turn to lawyers to fill both elective and appointive offices. Indeed, during my lifetime four of our presidents (and five defeated candidates for this office) and countless senators, representatives and governors of states were lawyers.

Moreover, our popular culture has celebrated the brave defense lawyer struggling to represent an innocent defendant against the bias or mistakes of police and prosecutors. Television programs such as «Perry

28. *National Law Journal*, August 9, 1993, at 1.

29. *New York Times*, August 14, 1993, at A32, col 1.

30. A. de Tocqueville, *Democracy in America* (Lawrence trans. 1969).

31. *Id.* at. 269.

Mason» and «L.A. Law» offer romanticized versions of this side of law practice. We also celebrate lawyers such as Thurgood Marshall using law rather than revolution to overthrow racial segregation. Reason and principle were Marshall's tools to deal with social problems. Polls often show Supreme Court Justices to be one of the groups of people most respected by Americans.

Popular imagery also connects lawyers with wealth and power, and Americans honor success. The large number of young people who in recent years have pressed for a place in our law schools, may dream of battling for justice or social harmony, but they expect to be well paid and respected for it at the same time.

Any group honored in our culture can expect to be «cut down to size». Lawyers are no exception³². My colleague, Marc Galanter has been collecting and analyzing jokes about lawyers, many of which are very nasty³³. He finds attacks on lawyers blame them for robbing life of a moral sense by recasting matters in legal abstractions and offending common sense. They are seen as unprincipled mercenaries who foment strife rather than foster cooperation. They take advantage of clients and others by using their skills in a self-serving fashion. They are economic predators who are tools of the undeserving.

While television programs such as «L.A. Law» romanticize lawyers, films such as «The Firm» show that American audiences equally accept lawyers as evil villains³⁴. President Bush tried to make the al-

32. One of the classic attacks on lawyers is by the poet, Carl Sandburg:
The work of a bricklayer goes to the blue.

The knack of a mason outlasts a moon.

The hands of a plasterer hold a room together.

The land of a farmer wishes him back again.

Singers of songs and dreamers of plays

Build a house no wind blows over.

The lawyers – tell me why a hearse horse snickers
hauling a lawyer's bones.

C. Sandburg, *The Lawyers Know Too Much*, in *Smoke and Steel* (copyright 1920 by Harcourt Brace Jovanovich, Inc.; copyright 1948 by Carl Sandburg).

33. M. Galanter, *The Recoil From Adversary Legalism: The Anti-Lawyer Dimension. Paper given at the Conference on Legal Cultures and the Legal Profession*. May 7-8, 1993. Berkeley, California.

34. D. Margolick, «The Cinematic Law Firm of Greedy, Vain & Immoral», *New York Times*, July 4, 1993, at §2, 9, cols. 1-5, 14, cols. 5-6; «[F]ilm makers who once idealized lawyers have gleefully joined in the bar-bashing... [Negative public attitudes] explain why moviegoers, who once applauded lawyers immortalized by Mr. Peck, James Stewart and Spencer Tracy, now cheer when a Tyrannosaurus rex consumes a cowering

leged «litigation explosion» and the contribution of greedy plaintiffs' lawyers to American economic problems, an issue in the 1990 campaign. Moreover, many Americans remember the part that lawyers played in the Watergate scandal that drove President Nixon from office. Rather than defending the law, Americans are aware that some lawyers manipulate the law for base causes.

These attacks on lawyers may have had impact. The *National Law Journal*/West Publishing Company poll taken in July of 1993, found:

52 percent said their image of lawyers has stayed the same, a startling 36 percent said that «gotten worse», and only 8 percent said it has «improved». Forty-seven percent of people earning between \$ 50,000 and \$ 74,999 said their image of lawyers has gotten worse, compared to only 27 percent of people earning less than \$ 20,000 annually.

The poll also indicates a racial divide – blacks view lawyers more favorably than whites. Fifty-one percent of blacks say their overall impression of lawyers is «good», compared to 26 percent of whites...

Respect for the legal profession, as with most other professions, is declining. Just 2 percent of respondents, down from 5 percent in 1986, said they have the most respect for lawyers among 10 professions... Other professions ranking near the bottom include journalists, corporate executives and elected officials³⁵.

Why should anyone care whether the American public loves or hates lawyers? A certain amount of skepticism is healthy, particularly when we read de Tocqueville's rhapsodies about the profession. «Buyer beware» makes good sense for consumers. Insofar as attitudes towards lawyers reflect respect for our democratic institutions, however, too much cynicism could endanger the network of tacit assumptions that holds the system together. In large part, lawyers are the defenders of such things as the Bill of Rights, the rule of law, due process and the like. Cynicism about the legal profession may undercut the legitimacy of the legal system itself. It is hard to listen to lawyers giving speeches at ceremonies honoring the rule of law if the public sees it as but a tool for unprincipled lawyers to sabotage regulation or to rob from the poor to give to the rich. As Professor Robert Gordon of the Stanford Law School said: «The lawyer under... an

ethical regime [based on an unlimited duty of zealous advocacy for the client] is by vocation someone who helps clients find ways around the law', although the outcome may be unsavory»³⁶. Americans do not admire those who help the powerful beat the system, and, to the extent that lawyers are seen to succeed in this task, it may undercut claims that the system is just.

Moreover, cynicism about law may undercut another social function of the role of American lawyers. Law has long served as one of the ladders of social mobility in American society. David Reisman asserted:

[T]he law remains par excellence the career open to talent. Librarian of Congress, President of Chrysler, Secretary of State, and at less exalted levels insurance executive, realtor, publisher – almost any managerial, commercial, or nonspecialized intellectual job you can think of – are within the reach of the law-trained ... [person]. It is arguable that this escalator that the law provides is at least as important as a function of legal training as the functions more frequently discussed; arguable that the criminal law, or the sanctioning, legitimating, and interpreting functions... have no greater impact on the social order than this function of keeping open the channels of mobility for the boy [or girl] who can talk, who is not too narrowly self-defined – who... can and does go anywhere³⁷.

An important American folk story involves Abraham Lincoln. He worked as a common laborer, but he studied law by the fire light in the evening after work and rose to be President. Groups in our society gain recognition and status when one of their members first become a judge of a high court – the first Jewish, the first African-American and the first woman Justice of the Supreme Court were considered milestones for each group. There are many stories of fathers working their way through law school at night, succeeding in practice and then sending their sons, and now daughters, to elite law schools.

Will law continue to serve social mobility? We can catalogue some of the threats to this function: Law school has become more and more expensive, and those at the bottom of the social ladder may not be able to afford it. Even those who can get loans or scholarships must give up the chance to earn money while they gain this education. After at least twenty years of effort, relatively few African-Americans,

36. *New York Times*, August 6, 1993, at A 29, col. 3.

37. D. Riesman, «Law and Sociology: Recruitment, Training and Collegueship», in W. Evan (ed.), *Law and Sociology*, The Free Press of Glencoe, New York 1962, 17-18.

lawyer in «Jurassic Park»». Margolick classifies the film depiction of lawyers as: (1) At the top their form; (2) Valiant; (3) Venal; (4) Driven lawyer, reformed; (5) Drunk/Debilitated/Incompetent/Down on Their Luck; (6) Cheating husbands; (7) Kiskboxing lawyer; (8) High-powered/top-notch/no-nonsense woman lawyers.

35. *National Law Journal*, August 9, 1993, at 1.

for example, enter and complete law school. Cost may be part of the explanation.

Furthermore, we can wonder if the profession is as honored today as in the past. Law claims to be a system based on merit, but women have discovered that some large firms discriminate against them. Many men and women who flocked to law schools in the 1970s, left the profession because they were highly dissatisfied by the contrast between the reality and the image of practice. Moreover, as the number of lawyers has increased rapidly, perhaps admission to the bar isn't special an event as in the past. Law is less of a mystery now. Marc Galanter has noted that we live in a time of legal realism for everyone³⁸. Investigative journalists seek to tell us what really goes on at the Supreme Court. The Senate Judiciary Committee's hearing on the confirmation of Robert Bork's and Clarence Thomas' nominations to the Court became media events that did little to honor the profession. Finally, President Clinton's official campaign film did not follow the Abraham Lincoln pattern. While the film stressed Clinton's humble childhood, those attempting to fashion Clinton's image minimized his education at an elite school and his service as Arkansas' Attorney General.

Lawyers claim status as independent professionals — they are not merely agents of whatever clients they happen to find³⁹. Indeed, some have argued that lawyers influence clients to comply with the law and to act within the legal and political system rather than subvert it. Richard Abel, however, argues:

[T]he greatest obstacle to public respect... [is] the widespread identification of lawyers with the flawed character and reprehensible actions of their clients... Lawyers must stop denying the identification and embrace it. Instead of seeking to justify their actions by reference to process values that allegedly produce truth and justice, lawyers must concede — indeed, affirm — that they actively promote the objectives of their clients and justify their own behavior in terms of the substantive justice of their clients' goals⁴⁰.

Abel's prescription may not be easy for the profession to swallow in a competitive market. Client's goals often are little more than in-

creased wealth. Americans both support the pursuit of wealth and are very suspicious of those who win this game. Moreover, lawyers' power to affect clients' goals is very limited⁴¹. Indeed, precisely in those few situations when lawyers have transformed clients' wicked purposes to benign ones, wise lawyers who want to keep their clients will be very quiet about what they have done.

Nonetheless, much remains of the positive, indeed romanticized, picture of the profession. «The Firm» tells the story of a law firm controlled by organized crime, but an idealistic young lawyer brings it down. Parents continue to send their sons and daughters to law school. Women lawyers, such as Attorney General Janet Reno, are well-regarded by public⁴². Lawyer jokes may be an attack on the profession, but lawyers tell as many of them as anyone. Perhaps these jokes symbolize a profession so secure in its status that it can afford to laugh at itself. Whatever a cynic might argue, the profession still is associated with the preservation of democracy and justice. At the same time, people see lawyers as connected to wealth and power. These are powerful status claims for the profession. As long as these positive elements remain, the profession is likely to continue to offer steps on the ladder of social mobility.

38. See M. Galanter, «Law Abounding: Legislation Around the North Atlantic», 55 *Modern Law Review*, 1, 14-17, 22-23 (1992).

39. See R. Nelson, D. Trubek & R. Solomon (eds.), *Lawyers' Ideals/Lawyers' Practices: Transformation in the American Legal Profession*, Cornell University Press, Ithaca, N.Y., 1992.

40. Richard L. Abel, *American Lawyers*, cit., 247.

41. See S. Macaulay, «Control, Influence, and Attitudes: A Comment on Nelson», 37 *Stanford Law Review*, 1985, 553.

42. See *National Law Journal*, August 9, 1993, at 1; Reuters News Agency dispatch, August 11, 1993.