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Cover Page Footnote

This essay is adapted from a John M. Olin Foundation lecture delivered at Fordham University Law School in the spring of 1992. It retains the informality of the lecture. Numerous lawyers and colleagues have offered useful comments on earlier versions of the essay; special thanks are due to Steve Shavell, Louis Kaplow, and Detlev Vagts.

ESSAYS

WHY SO MANY LAWYERS? ARE THEY GOOD OR BAD?*

DEAN ROBERT C. CLARK **

In this essay, Dean Clark examines the popular notion that the United States has too many lawyers and that this abundance burdens the nation. While acknowledging the great growth of law and lawyers in recent decades, Dean Clark argues that, before denouncing this trend, we should first seek to develop a fuller explanation of its causes and consequences. After discussing just what it is that lawyers do, Dean Clark critiques three current "cancerous growth" theories that attempt to explain why there has been such a great and unhealthy increase in the number of lawyers. Dean Clark then offers and analyzes four "benign growth" theories—theories based on the assumption that the increasing demand for lawyers' services is an understandable consequence of fundamental social, political, and economic changes. Throughout the essay, Dean Clark indicates areas where additional research may yield a deeper understanding of the forces that shape the roles that lawyers assume in society and the demand for legal services.

INTRODUCTION: THE PHENOMENON

IN 1960, there was one lawyer for every 627 people in the United States. In 1988, there was one lawyer for every 339 people.¹ During the last half of this twenty-eight year period, the number of lawyers in the United States increased at a rate that was more than five times faster than the rate of growth for the general population. We are now moving toward the landmark figure of one million U.S. lawyers. And although the recent recession was accompanied by a drop in the demand for legal services, in 1991, for the fifth consecutive year, the total enrollment at

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1. A fuller tabulation shows that the growth was not simply an artificial effect of the booming 1980s:

	<u>U.S. Population</u>	<u>Lawyers</u>	<u>P/L Ratio</u>
1960	179,323,000	285,933	627/1
1970	203,302,000	355,242	572/1
1980	226,546,000	542,205	418/1
1988	245,100,000	723,189	339/1

All figures except those for 1988 taken from Barbara A. Curran et al., American Bar Foundation, The Lawyer Statistical Report 4 (1985). U.S. population figure for 1988 obtained from the United States Dep't of Commerce, Bureau of the Census, U.S.A. Statistics in Brief: Statistical Abstract Supplement (1992). Lawyer number for 1988 obtained from Barbara A. Curran, American Bar Foundation.

ABA-approved law schools actually increased.² I calculate that if we keep going in this way, by the year 2023 there will be more lawyers than people.

Is this trend bad or good? Do we really understand why it has occurred? I intend to return to the latter question, but I first want to establish the magnitude of the phenomenon.

Not only has there been an extraordinary increase during the last three decades in the number of lawyers, both absolutely and relative to the general population, but there has also been great measurable growth in the amount of legal services consumed and in the amount of law. This growth is evident in a few facts marshalled by Marc Galanter and Thomas Palay in their important book, *The Tournament of Lawyers*:

- In the twenty-five year period after 1960, the population of the United States grew by 30%. Keep this 30% growth figure in mind as a benchmark for comparison. In the same period, the number of lawyers increased by almost 130%.
- In the same twenty-five year period, the percentage of GNP devoted to outside legal services more than doubled.
- In the same period, the amount of law increased exponentially, as suggested by these tidbits:
 - pages added annually to the Federal Register increased by 270%;
 - pages added annually to the West regional reporters grew by 149%;
 - pages added annually to the federal reporters grew by 336% (about 93,588 pages of federal cases added in 1985 alone, for example);
 - the full-time staff of the fifty-five major federal regulatory agencies grew 176%, and their budgets increased by 237%.³

The point to note about these figures is that they are all *much* greater than the growth of the population and the economy, and that this difference has prevailed for a long time—since World War II, actually—not just for the last few years, or during the booming 1980s. Furthermore, other evidence suggests that many other countries are becoming more, not less, like the United States in their reliance on law and lawyers.⁴ In Europe, for example, the continued growth and complexification of the institutions of the European Community have been accompanied by an upsurge in legal activity. Brussels has become like Washington, D.C.,

2. See American Bar Association, *A Review of Legal Education in the United States*, Fall 1991, at 67 (1992).

3. See Marc Galanter & Thomas M. Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* 37-48 (1992).

4. See, e.g., Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, 55 Mod. L. Rev. 1, 4 (1992) (showing how statistics for Canada, England, and Wales tell a similar story to those for the United States).

where everyone is presumed to be a lawyer until proven otherwise. In South Korea, Taiwan, and Japan the legal profession acts like a monopoly to hold down pass rates on the bar exam, but inexorable pressures have built up to increase the yield of formally denominated lawyers. In Eastern Europe and in the former Soviet Union, the demand for legal experts to help devise an infrastructure for democratically oriented market economies is almost insatiable. In sum, law and lawyers have become more important in our society and, in fact, throughout much of the world.

In addition to changes in the number of lawyers, there were interesting and profound changes in the organization of the profession. On average, law firms became bigger and were more likely to have branches in multiple cities, both in the United States and abroad. For example, from 1975 to 1989, the top fifty American law firms went from an average of 133 attorneys per firm to an average of 476.⁵ Galanter summarizes these trends as follows:

In the course of a generation, there has been a dramatic change in scale of many aspects of the legal world: the amount and complexity of legal regulation; the frequency of litigation; the amount and tenor 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.⁶

I. INTERPRETATION AND EVALUATION

How should we regard these trends? To many observers and commentators, it has seemed clear that something rotten and unhealthy has been going on. Vice President Quayle caused a stir in the national media by suggesting that there are too many lawyers and too much litigation, and that something should be done about it.⁷ Commentator Walter Olson published a book entitled *The Litigation Explosion*,⁸ and many others

5. Computed from survey information reported in *National Law Firm Survey*, Nat'l L.J., Aug. 7, 1978, at 12-13, and *The NLJ* 250, Nat'l L.J., Sept. 18, 1989, at S4-S7.

6. Galanter, *supra* note 4, at 2.

7. See, e.g., Julie Johnson & Ratu Kamlini, *Do We Have Too Many Lawyers?*, Time, Aug. 26, 1991, at 54 (commenting on Vice President Quayle's speech at the 1991 annual meeting of the American Bar Association).

8. See Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991); see also Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (1988) (criticizing the explosive growth in personal injury litigation); Warren E. Burger, *Too Many Lawyers, Too Many Suits*, N.Y. Times Book Rev., May 12, 1991, at 12 (reviewing Olson).

Claims of a litigation explosion have not gone without serious challenge based on close examination of available evidence. See, e.g., 1 American Law Institute, Reporter's Study, Enterprise Responsibility for Personal Injury: The Institutional Framework 5 (1991) ("More systematic analysis of claims trends has demonstrated either that there never was a true general explosion in tort litigation, or at least that any incipient trend has definitely subsided."); Marc Galanter, *Reading the Landscape of Disputes: What We Know and*

have used the phrase, typically with an indignant tone. Derek Bok, the former president of Harvard University, has written and spoken of the regrettable situation that has resulted from the luring of the best and brightest young minds away from science, engineering, education, and public service and into the legal profession and business.⁹

My view, however, is that it is premature to denounce the growth of law and lawyers. We should first seek to *understand* the causes and consequences of this growth far better than we currently do. Most of the popular explanations of the trend are not carefully thought through, and most are not tested against evidence or competing explanations. It is my intent here, not to offer a definitive theory or set of explanations, but rather to put forward some explanatory hypotheses that may stimulate further inquiry along lines now being neglected. I cannot give you a theory that is fully specified and fully tested. I only hope to offer hypotheses that are somewhat definite, that are tied to some intuitively understandable causal mechanisms, and that are linked to enough first-order factual data to make them at least plausible, so that further argument and testing seems worthwhile, and rash theories are put into question.

A. *The Need for Interpretation and Explanation*

At this point, some may ask whether it is really important to look for causes. Why, after all, should we look hard for a truly sustainable explanation of the growth of law and lawyers? Regardless of why the growth occurred, it may be argued, we can still assess the trend critically.

In a narrow sense, this response is correct. In particular areas of law, we may indeed be able to analyze legal rules and processes and imagine better ways of handling the underlying problems without really understanding how we got to where we are. For example, consider the arguments for reform of medical malpractice law explored by Professor Paul Weiler in light of a Harvard group's massive empirical study of malpractice.¹⁰ Those who accept the study's findings of fact and description of the problems in the system might well be led to conclude that, regardless of how the current situation came about, we should shift from tort litigation to a no-fault system of responding to medical injuries, since such a shift would lower the costs of processing claims, increase the ratio of medically injured people who receive compensation, and increase the chance that net compensation is adequate, while not really creating a risk of more malpractice.

I do not mean to deny that there may be much room for improvements

Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 37 (1983) (empirical evidence suggesting that number of lawsuits brought in federal courts had not increased appreciably in recent years compared to population growth).

9. See, e.g., Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. Legal Educ. 570 (1983).

10. See Paul C. Weiler, *Medical Malpractice on Trial* 114-58 (1991).

of this sort in our legal system. However, critical analyses of this type do not justify a sweepingly negative view of the growth of law and lawyers, and they do not justify calls for "de-legalizing" society or for steering bright students away from law schools. Basically, this is the case because such reform analyses do not explain how our society came to have so much law, or whether the growth was bad compared to what had been happening.

B. *Armchair Comparativism*

Nevertheless, there are many spirited attempts to criticize the growth of law in general, without explaining how the growth happened. The most familiar attack is that of the armchair comparativist. Probably every reader has heard this argument: The Japanese do not have nearly as many lawyers in relation to the size of their population, yet they have (or, at least until recently, did have) a thriving economy and polity. Ergo, there must be something wrong with our society, and our high spending on legal services is inherently wasteful.

Since this intended grenade of an argument—why do we need so many lawyers if the Japanese do not?—has been lobbed into debates countless times, there are by now some standard responses to it. One is that we face different conditions. The Japanese are a relatively homogeneous people. In contrast, the United States contains a heterogeneity of diverse and conflicting subgroups, the interrelationships of which need to be regulated by the rule of law rather than by universally accepted social custom.

Another response to the denunciatory armchair comparativist has to do with comparative advantage. The United States (and perhaps some other countries inheriting the common law tradition, or some other Western democracies) is particularly good at using law and lawyers to help organize its economy and social relations; Japan is particularly good at other methods of management and organization, such as instilling a cooperative attitude in its citizens. There is no assurance that trying to imitate the Japanese in this respect would be a good move for us.

In addition to these points about different conditions and different comparative advantages, there is a less frequently raised point that is much more important for my present analysis. This point is that comparing "lawyers" in the United States and in Japan is like comparing apples and oranges.¹¹ When counting lawyers in the United States, one typically considers persons who have completed law school and been admitted to the bar in one or more states. But only a minority of these individuals actually appear in court on a regular basis. Most of the rest

11. This point is developed with some wit in Ray August, *Mythical Kingdom of Lawyers: America Doesn't Have 70 Percent of the Earth's Lawyers*, A.B.A. J., Sept. 1992, at 72-74 (disputing Vice President Quayle's made-up statistic and ranking countries by effective "law providers" per 10,000 population in 1987).

perform a wide range of law-related tasks such as counseling, planning, and deal-making. In addition, some of those admitted to the bar have gravitated into rather distantly related roles, such as that of corporate officer, real estate developer, or executive in a government agency. In Japan, by contrast, the number of "lawyers" is usually taken to be indicated by the number of bengoshi, that is, those law-trained persons who have actually been admitted to practice in court.

Most bengoshi actually do have a court-centered legal practice. But they are not the whole story. In Japan, legal study is primarily a matter of undergraduate education, and, as it turns out, law is one of the most popular majors. Indeed, evidence for recent years indicates that the absolute number of law students is greater in Japan than in the United States, despite the fact that Japan's population is roughly half that of the United States.¹² Of the vast number of Japanese college graduates who major in law, only a small percentage go on to become bengoshi.¹³ Many of the others go on to work in large, formal organizations. They become bureaucrats or staff the law departments in corporations or in government agencies. It is quite plausible to suppose that their legal training helps all such bureaucrats to function in these worlds, where they are often called upon to devise and administer standard operating procedures, to work out the structure of rights and duties between their organization and others, and so forth. These "non-bengoshi" are not certified as professionals, and they are probably not as specialized in law-related tasks as are most American "lawyers," but they do many things that in the United States might be done by members of the bar, and they have received legal training.¹⁴

What this brief glimpse at Japan suggests is that it is quite important, before proceeding further in our theorizing, to have a better idea of what we are talking about. What is a lawyer? If we want to look beyond formal credentials and certifications, as it seems we should, how might we define the beast? Or to pose the inquiry in a more useful and manageable way, what is it that formally certified lawyers characteristically do in our society? Once we have a more comprehensive and accurate notion of

12. See Masanobu Kato, *The Role of Law and Lawyers in Japan and the United States*, 1987 B.Y.U. L. Rev. 627, 661 (1987) (presenting data that, for example, in 1984 there were 159,000 law students in Japan versus 120,000 law students in the United States).

13. See John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. Japanese Stud. 359, 385 (1978) (number of bengoshi deliberately limited by strictly enforced examination policy).

14. See Richard S. Miller, *Apples vs. Persimmons: The Legal Profession in Japan and the United States*, 39 J. Legal Educ. 27, 29-31 (1989) (describing work done in Japan by unlicensed legal experts that would be done in the United States by lawyers); Richard B. Parker, *Law, Language, and the Individual in Japan and the United States*, 7 Wis. Int'l L.J. 179, 179 n.1 (1988) (discussing how, in Japan, individuals with only undergraduate law degrees staff the law departments of large corporations and government ministries, and do much of the work done by lawyers in the United States).

what most lawyers do, we may be able to think more precisely about why the demand for such work may have increased.

II. WHAT LAWYERS DO

What is the essence of being a lawyer? What is it that lawyers do? My answer is that they create, find, interpret, adapt, apply, and enforce rules and principles that structure human relationships and interactions. More briefly, lawyers "handle" the rules and norms that define rights and duties among people and organizations. That is, they are *specialists in normative ordering*.

At the outset, it is important not to equate lawyers with litigators, or with professionals who practice law in courts. Most lawyers are not litigators,¹⁵ and yet the tasks that these out-of-court practitioners specialize in are connected to a comprehensive and reasonably coherent notion of what constitutes "lawyers' work." It is also important not to equate lawyers' work with work that concerns law in the special sense of commands laid down by or traceable to a sovereign, or to a formal government. This public side of law accounts for only part of what lawyers do. There is no good reason to make it an exclusive touchstone of what counts as legal work, and to ignore the fact that many lawyers engage principally in private ordering, or in tasks that intertwine public and private sources of normative ordering in complex ways. The private-ordering aspect of the legal profession's work is sometimes assumed to be collateral or accidental to work centered on "real" (that is, public) law, but this is an arbitrary and short-sighted view. The knot that properly ties together the myriad activities of so many practicing lawyers is that they are often engaged in handling rules, norms, and principles that define the rights and duties that people and organizations have with and toward each other.

A. Arenas of Normative Ordering

It is helpful to define the concept of normative ordering extensionally as well as intensionally. There are at least six distinct arenas of normative ordering. One is legislation. In our society, lawyers are disproportionately involved in legislation, both as legislators and as lobbyists and advocates of new statutes. A second and related arena is administrative rule-making. Again, lawyers tend to participate here as both as the rule-makers and as the advocates. A third area is private deal-making, which

15. See, e.g., Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. Legal Educ. 264, 278 (1978) (only 11.8% of 969 practitioners surveyed reported that their primary practice area was "trial and litigation"). Good system-wide data about the allocation of lawyers' efforts among their different roles do not seem to be available, and the subject has received surprisingly little scholarly attention. Nevertheless, I doubt that many lawyers who are acquainted with a range of large and mid-sized law firms and who regularly read the national legal newspapers would dispute the judgment that most lawyers are not litigators.

comprises the many phases of negotiating and drafting agreements. Structurally, this vast private arena of day-to-day lawyers' work is quite analogous to legislation and administrative rule-making. For to make deals is to find, create, adapt, and apply rules defining the rights and duties among people and organizations. That the process involves government actors and formal "law" only remotely (or as a background reality casting a shadow over the bargaining) does not make it any less lawyers' work. A fourth arena is counseling and planning. Lawyers interpret rules and norms (both publicly and privately created) for a particular client, and advise the client about action to be taken in light of the rules. Obviously, this category covers a vast portion of what many American lawyers actually do. A fifth category is dispute resolution through non-judicial means such as arbitration and mediation. These activities also involve the enforcement and adaptation of norms. And, last, though not least, there is litigation, or the enforcement of rules by courts.

B. *Lawyers as Specialists in Normative Ordering*

Legislation, administrative rule-making, private contracting and deal-making, counseling and planning, mediation, arbitration, and litigation all involve the processing of rules and norms that structure and stabilize human relationships. In other words, these activities are all aspects of normative ordering. But lawyers are not the only people who participate in normative ordering. In many societies, including our own, there is a vast amount of activity that could be classified as normative ordering as I use the term, yet the activity is not performed by lawyers. Mothers and fathers do a great deal of normative ordering, for example. They inherit or create, and attempt to assert and enforce, rules applicable to their children; they bargain and negotiate with each other and their children to establish relative rights and duties; and they attempt dispute resolution in part by reliance on alleged norms. Yet they are not lawyers, and normative ordering is only one aspect of their parental roles. In contrast, lawyers are *specialists* in normative ordering, and they are members of a recognizable *profession* that has all the attributes classically attributed to a profession by the sociologists: a long and cumulative tradition of specialized learning, a requirement of special training, strict and clear entry points, mechanisms to assure independence and self-regulation, and so forth. Consequently, any theory that attempts to explain the growth of law and lawyers in the United States should pay some attention not only to factors that might increase the volume of normative ordering, but also to those factors that might result in this work being left to professionalized specialists such as lawyers.

III. SOME CANCEROUS GROWTH THEORIES

Various lines of thought suggest that the growth in the legal profession is something to wring our hands about, and that if we only had a little

backbone we would take steps to reverse the trend. There are as many variations on this theme as there are cocktail parties and barrooms, but I will limit myself to discussing three of the more serious theories. These theories allege and stress, respectively: widespread decline in the moral fabric of society; the capacity of lawyers to induce demand for their own services; and imperfections in the market for legal services.

A. *Individual and Social Decline*

It can be argued that there has been a breakdown, at least in the United States, in the efficacy of non-legal forms of social control such as the family, the neighborhood, the school, and the major religions, with a resulting increase in reliance on law. Under this theory, the growth of law can be seen as a compensatory substitute for forms of social control that have been greatly weakened by various forces and trends in our modern society. In other words, since the family and the schools are unable to make people behave, the criminal justice system must give it a try.

Even assuming such a breakdown, two cautions must be sounded. First, this theory does not, without more, imply that the growth of law has been bad. Indeed, precisely to the extent that the theory is true, reducing reliance on law and lawyers would make things worse rather than better, *unless* other forms of social control were instituted or rebuilt. Yet restoring these other forms of control may not be feasible or cost-effective. The forces that have weakened the efficacy of religions as instruments of social control, altered the composition of household units, and sterilized the schools as purveyors of moral education may simply be too great to turn back at any acceptable cost. The horses may be out of the barn. At the very least, there is great room for debate on this point. Put another way, it is not at all clear that the moral-decline theory should lead us to view the growth of law as cancerous, so my initial classification of this theory may be inaccurate.

Second, and more important for my purpose, even if this theory is valid, it seems to explain only a modest part of the growth of law. It takes note of forces connected with an increase in criminal activity and family strife, and may help to explain the growth of legal activity in these areas. Yet this is only a modest subset of law practice. The theory does not seem so useful in explaining the vast growth in so many other areas of law—in particular, growth in the major regulatory areas such as environmental law, health law, and the like, or in the many areas of business law practice that occupy most sizable law firms.

True, one could speculate about how to extend moral-decline theories to reach these other areas of law. Perhaps children who are raised in broken or morally weak families grow up to be especially greedy and litigious, with the result that they figure quite disproportionately in the creation of regulatory schemes and in the generation of lawsuits among businesses. Maybe so; anything is possible. It seems to me, however,

that we should demand much more particularized evidence before accepting such a speculative view.

B. *Lawyer-Created Demand*

There is a familiar sense in which one lawyer can breed work for another. If shopkeeper Victor goes to the only lawyer in town to sue his landlord, Steven, then Steven is likely to feel at a great disadvantage until he can bring in a lawyer to help his side. More generally, not just lawsuits but many transactions are two-sided, and a lawyer on one side creates demand for a lawyer on the other.

Notice a key aspect of this story. It is assumed that a lawyer provides something of real value to a client (why else would the client be willing to pay?), and that the full value can only be provided by a professional, or specialist. But it is not apparent, without more, why this sort of multiplication of lawyers is bad. Indeed, what would need to be explained is a judgment that lawyers make things worse on balance, even though clients are eager and willing to buy their services. To turn the fact of competition for legal talent into a cancerous growth theory, one has to focus on the services provided by lawyers and argue that they are wealth-destroying.

A more macroscopic theory of lawyer-created demand is that we need more lawyers because there is now more regulation, yet it was the lawyers who created the extra regulation, even though it was not useful. The trick to making this "rap" stick is to show, rather than assume, that the added regulation is bad rather than good—or, more precisely, that lawmakers create regulations out of desire for legal work per se rather than to meet some other, deeper, independently valid purposes. It is not enough simply to note that many legislators, agency personnel, and judges are lawyers.

Actually demonstrating such a flaw in our legislative system would be very difficult. In fact, after reading about the origin of some major regulatory schemes, I am tempted to propose that it is quite implausible. In general, one seems always to find some interest group that had a particularly passionate interest in insisting on new legislation—for example, the Medicare and Medicaid statutes, the major environmental laws, and the pension laws. Either that, or another interest group wanted to limit regulation by qualifying and thus complicating the statutes, and thereby adding further (at least temporarily) to the demand for lawyers' services. In either case, it seems far-fetched to claim that lawyers themselves "created" or even induced the demand for regulation, or for deregulation and complexifying compromise, or for their own services. If there has been a shift over time in the demand for regulation, one ought to look for its source in more fundamental factors, such as those that I discuss later.

C. *Market Imperfections*

This theory posits that there are imperfections in the market for legal services, and that these imperfections operate to increase rather than decrease the amount of such services that are consumed. The main culprits, in my view, are *asymmetrical information* and *moral hazard* (two terms taken from the economic analysis of law). Interestingly, these culprits are also key factors at work in the market for medical services, a market that has seen far greater growth in the last 30 years than the legal sector.

In the medical world, patients normally do not have as much information as their physicians do about the optimal amount of consultation, testing, and other medical procedures (e.g., whether to undergo an angioplasty or not). As a result, patients cannot easily judge which set of actions has the best ratio of benefit to cost. This is so almost by hypothesis. The whole point of a rational doctor-patient relationship depends on informational asymmetry: one goes to a professional in large part because the professional has intensive specialized training and knows more about what should be done. If the professional has an incentive to err on the side of more rather than fewer services—as physicians do when they operate on a fee-for-service basis—the patient is not in a good position to second-guess the recommendations. Greatly compounding this tendency is health insurance. To the extent it is available, then neither the patient nor the physician has a financial incentive, at the point in time when they decide whether the patient should consume an only possibly helpful test or procedure that they know will be covered by the patient's insurance, to exercise any restraint. They face what economists call a *moral hazard*: they may choose to consume more medical services than are needed or reasonable. In the aggregate, this blunted incentive or moral-hazard effect may mean that society will over-consume medical services.

Similarly, many clients of lawyers have both poor ability and poor incentives to monitor professional services. So when lawyers charge on a fee-for-service basis, too much legal work may be produced.

Consider, for example, Juliet, the CEO of a corporation that is about to buy, and to operate as a wholly-owned subsidiary, another company that engages in risky activities that may at some point generate class action lawsuits seeking enormous damages. Juliet turns to an outside law firm seeking advice on the extent to which such possible lawsuits might have to be satisfied out of the parent company's assets. The law firm assigns an associate to research the relevant case law on corporate veil-piercing in all states in which the would-be subsidiary does business. There are in fact hundreds of relevant cases. The associate may do research for 20 hours; or for 40 hours, in which some deeper understanding may in fact be achieved; or for 80 hours. How could Juliet even begin to second-guess the number of billable hours consumed, or to judge that the law firm charged for excessive research (i.e., research with a benefit smaller than its cost). Furthermore, although Juliet is not covered by

"legal insurance," there is still a moral hazard problem because her corporation will pay the legal bill. The cost is diffused among many shareholders and other potential claimants; Juliet herself does not bear the cost of any excessive legal work, except perhaps in the most extreme situations. Yet should Juliet choose, instead, to request no or minimum legal service, she may be personally tainted by a bad legal outcome that happens to follow. So Juliet chooses to err on the side of excess by spending more on legal services than may really be optimal for the corporation.

My assessment is that there is undoubtedly some validity to this model of imperfections in the market for legal services. Many corporate counsel and corporate consumers of legal services would agree that there is a problem, and would classify some of the more important lawyer-client developments of the last fifteen or twenty years as attempts to mitigate it. So I am told, over and over, that many corporate clients now insist on itemized bills; that they insist on fixed rates, in advance, for certain types of service; that they shop around among law firms; and that they now bring more legal work in house, where it can be more closely monitored by corporate officers who are also lawyers. Even with all these cost-control efforts, however, no one seems to believe that the basic problem of potential over-consumption of legal services has been solved, as opposed to mitigated.

Even granting that the market imperfections theory has validity, however, the real question is *how much* of the overall growth in the legal profession does this theory explain. My guess is "not much." After all, clients faced comparable problems in monitoring legal services a century ago, yet the rapid growth of law is much more recent. This suggests that other factors must also be heavily involved. Similarly, the growth in law has not been characterized by a mere proportionate increase in the types of legal service provided to organizations. Instead, there have also arisen whole new areas of legal regulation and law practice. In addition, some areas of law have grown quite rapidly, while others have not. It is not apparent how this pattern could be derived from the theory of market imperfections just explained.

To be sure, there are competing considerations suggesting that the role of market imperfections in explaining *change* in the size and shape of legal services—as opposed to explaining a more or less constantly proportionate amount of "fat" in the legal system—is far from trivial. It is likely, for example, that there have been significant changes over time in the relative severity of the knowledge and incentive problems in monitoring legal services.

Consider asymmetry first. True, even a century ago, lawyers knew much about law that their clients did not, so there was serious asymmetry of information. But surely the asymmetry is greater, and the monitoring and agency problems associated with it have grown, now that the legal system is so much more developed and complicated. New areas of regulation have been created, and their existence creates information

problems for lay persons, who are driven to seek the advice of lawyers and to endure the agency problems of the lawyer-client relationship.

While the observation that the growth of regulation has increased informational asymmetry seems valid, note several points about it. First, it posits rather than explains the growth in regulation. The assertion is not that informational asymmetry between lawyers and clients has caused the proliferation of new types of regulation, but that regulatory growth brings along with it a certain additional amount of information asymmetry (and, therefore, more room for agency problems and more potential for overconsumption of legal services). But it is the growth in regulation that we are most interested in explaining. What caused *that*? Second, the additional asymmetry attendant upon new regulation hardly implies that the potential for excessive service outweighs the benefits of legal advice. Quite the opposite seems true: given the existence of new regulations confronting clients, clients will go to lawyers for advice about the regulations only to the extent that the expected benefits of the advice outweigh its costs, including the risk of receiving more-than-optimal service.

Consider next how incentive problems have changed. It is clear that, a century ago, a lesser percentage of total economic and other activity was carried out in large organizations than is the case today. Accordingly, less activity took place in entities that could diffuse the cost of legal services, so the blunted incentive or moral hazard problem was less severe. The individual farmer or sole proprietor cared very much about the size of legal bills; the corporate officer was less concerned. In other words, the subsequent relative growth of corporations and other large formal organizations may have enabled an increased amount of "fat" or inflation in legal bills by expanding the arenas in which moral hazard is present.

This observation also has some merit. Note, however, that the growth of corporations and similar formal organizations (e.g., government agencies and nonprofit institutions) has also expanded the arena in which seeking legal advice from professionals is rational and cost-effective. (As discussed below, this relationship follows from economies of scale in the acquisition and application of legal knowledge.) Thus, the relative growth of organizations may have led to growth in the legal profession for two distinct reasons: Organizational growth expands the realm in which professional advice is cost-effective (a good effect); and it expands the realm in which incentives to monitor lawyers are blunted (a bad effect). Given the reality and zeal of current corporate strategies to control legal costs, it is quite plausible to suppose that the former kind of effect outweighs the latter.

IV. SOME BENIGN GROWTH THEORIES

A widely neglected alternative to the theories so far considered is to posit that there are more lawyers because there is a greater demand for the work that lawyers do, and the greater demand is the natural out-

growth of fundamental changes in our society. I will propose and explain four such alternative theories. Each of them is an illustration of this more general proposition: There are important long term social and economic trends that have greatly increased the demand for normative ordering and, therefore, the demand for law and lawyers.

Recall my earlier proposal: Lawyers are specialists in normative ordering; they make, adapt, apply, and enforce rules and norms that define rights and duties among people and organizations. Given this conception of lawyers' work, why might it be that the demand for such work would increase so much in our society in this century?

A full answer is difficult to offer, especially if one also wants to explain cultural differences in reliance on law. But several fundamental factors seem to me to be important to any theory. They all involve important economic or social trends that increase the demand for normative ordering. At the same time, other sources of normative ordering—such as religion or social custom—have seemed less suited than law to handle these new demands.

A. *Greater Interaction, Including Greater Internationalization*

The increasing rate of interaction across national borders is one trend that is clearly correlated with certain aspects of the growth in law. Marc Galanter and Joel Rogers have documented several such relationships.¹⁶ For example, exports and imports as a percentage of gross domestic product increased from 10.5% in 1960 to 23.3% in 1985.¹⁷ The demand for normative ordering of these new international relationships grew accordingly. Not surprisingly, the work of lawyers concerned with international trade and finance has increased enormously; it is one of the fastest areas of growth in the market for legal services. Similarly, movements of people across borders have made immigration law one of the fastest growing areas of law practice.

It is worth dwelling for a moment on why there is a connection between international trade and finance and the work of lawyers. Suppose Steven is the chief executive of Thel Enterprises, a large chain of retail stores, and has just decided to deal with a Korean manufacturer of electronic toys. Even more than when dealing with a remote business entity in his own culture, Steven is likely to feel the need for an expert, specialized ordering of relative rights and duties between his firm and this foreign supplier. He wants expectations to be specified, reliable, and mutually understood; he wants the relationship to be squared away. Yet the "common core of background understandings" that sometimes does the trick in establishing smooth and stable business relationships may not

16. See Marc Galanter & Joel Rogers, *A Transformation of American Business Disputing? Some Preliminary Observations*, at tbl. 2 (Institute for Legal Studies, Disputes Processing Research Program Working Paper DPRP 10-3, 1990).

17. See Council of Econ. Advisors, 1989 Annual Report tbls. B-1, B-8 (in Economic Report of the President 1989).

be available cross culturally. In particular, the "noncontractual relations in business" made famous by Stuart Macaulay in his classic 1963 article¹⁸ are hard to establish and rely on in the international context.

As a matter of fact, reliance on informal, nonlegal relationships and on nonlegal sanctions for commercial misbehavior—such as taking business elsewhere or expressing social disapproval within an established group of business persons—are now less available even in the domestic context. Internationalization is a reality that is relatively easy to spot and to think about (and it is easy to see why it leads to more legal work), but it is just a major component of a larger relevant change: there are greater rates of interaction among business entities in general, and this greater interaction increases the demand for normative ordering.

Why might there be this greater interaction generally among business entities? One key factor is lowered relative costs of communication and transportation, which themselves are due to technological advances. With better computers, photoreproduction, overnight mail, and fax machines, businesses are able to process and communicate a higher volume of information in a given period of time, and to deal more readily with persons and entities in distant locations. Business persons today are also more likely to travel frequently over a given span of years. They are more likely to do business with a greater number and dispersion of individuals and organizations.

Any increase in the volume and rate of interactions among business transactors leads to greater demand to structure relationships—to impose rules and guidelines on them so that they work without too much uncertainty and friction. And to the extent that the additional interactions are qualitatively new, or involve remote parties that are not easily subject to the discipline of nonlegal controls such as reputational standing in the local community, then the demand for normative ordering by lawyers is not just greater, but disproportionately greater.

Suppose, for example, the cattle ranchers in Shasta County, California that Yale Professor Robert Ellickson describes in his book, *Order Without Law*,¹⁹ were suddenly to start dealing heavily with buyers on a nationwide level. (Perhaps they already do; Ellickson focused on rancher-farmer relationships, in which both sides were local.) When disputes arise in these relationships, where would the cattle ranchers turn? I suspect that the norm of being a good neighbor would avail them little, and they would quickly call their lawyers. The cozy island of informal social controls is hard to sustain in a world of rapidly expanding and quickly shifting relationships.

So far I have concentrated on conveying the intuitive logic behind supposing there is a connection between greater interaction and greater de-

18. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 59 (1963).

19. See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 15-120 (1991).

mand for lawyers. To make the hypothesis more specific and to test how significant it is, one would have to focus more carefully on the timing of particular developments in business and law. For example, the great growth in import and export activity that I mentioned earlier occurred most dramatically in the 1970s; there was a decline in the growth rate during the 1980s. How does this square with the fact that so much of the growth in international trade and finance law appears to have occurred in the 1980s? I would hypothesize that legal developments often lag the economic and social ferment that give rise to them, precisely because it takes time to discover, formulate, and refine legal solutions and for them to become widely and stably accepted. My own study of legal doctrines in the fields in which I work supports this view. For example, in the 1980s it was some years after a distinct upsurge in corporate takeover activity was visible to everyone before the Delaware Supreme Court began to issue rich and truly interesting opinions about the principles that should govern responses to takeovers. Similarly, I suspect that current developments in bankruptcy and reorganization law will flourish and offer a bouquet of doctrine to delight the most fastidious law professor seeking to put together a definitive set of course materials only when the current wave of restructurings is coming to a close! (Alas, the law does not exist for the classroom.)

B. *Greater Diversity*

In the last several decades, there have been great demographic changes in our population. The birth rates and immigration rates of many minority groups in the U.S. have outstripped the rates of increase of the white majority population. Between 1980 and 1990, for example, the general population increased by 9.8%, while the population of Asian-American and Pacific Islanders increased by 107.8%; people of Hispanic origin, by 53%; African Americans, by 13.2%; and whites, by only 6%. By 1990, about 20% of the population was non-white. About 25% of the last decade's population growth occurred through immigration.²⁰

Also in the last several decades, the status and role of women have changed. For example, the participation of women in the workplace has increased greatly. There have also been changes in families and households. People marry later and divorce more often.²¹ A smaller percentage of households are headed by married couples.²² The median age of the population is higher,²³ and older workers are a relatively more pow-

20. See United States Dep't of Commerce, Bureau of the Census, *in The World Almanac and Book of Facts 1992*, at 77 (1991).

21. From 1960 to 1990, the median age at first marriage went from 22.8 to 26.1 for men and from 20.3 to 23.9 for women. See *id.* at 943. From 1960 to 1990, the divorce rate per 1,000 population went from 2.2 to 4.7. See Nat'l Ctr. for Health Statistics, *in The World Almanac and Book of Facts 1992*, at 942 (1991).

22. See *The World Almanac and Book of Facts 1992*, at 944-46 (1991).

23. The median age went from 29.5 in 1960 to 32.9 in 1990. United States Dep't of

erful force in the economy.

Those of us who study, teach, or act as deans in law schools realize full well that increasing diversity, while it has brought a more exciting and wonderful world, has also brought friction and tumult. The conflict on campuses between free speech and offensive speech, the debates over political correctness, and the calls for greater diversity in faculty hiring are all manifestations of real demographic change. More generally, demographic changes and changes in the status and role of subgroups lead inevitably to some conflict among groups and uncertainty about the proper parameters of relationships, and this in turn raises the demand for normative ordering. The more rapid and significant the changes, the more likely they are to generate situations of conflict or uncertainty that need to be resolved or mediated. In our society, this need has often been responded to by resort to law and lawyers. It is not really surprising, in such an era of real demographic change, to see a flourishing of law and legal work relating to civil rights, especially rules relating to discrimination (on the basis of minority status, gender, or age) in employment, housing, and other contexts. It is also not surprising to see more law and legal work connected to family relations, abortion rights, and related matters.

C. *Changes in Wealth Levels*

One other likely source of growth in law is simply the gradual increase in wealth.²⁴ As more people satisfy their basic needs for food, shelter, and the like, they move on to previously neglected desires. Suddenly, they want more and better health care; they want a cleaner environment. Inevitably, the systems we devise to respond to these new goals are complicated. They involve elaborate relationships among people and organizations. The relationships have to be structured by rules—rules that cannot be fully derived from social custom, religious traditions, or the forces of the marketplace.²⁵ Enter then the lawyers. For they are the

Commerce, Bureau of Statistics, in *The World Almanac and Book of Facts* 1992, at 128 (1991).

24. A leading study found that the most important determinant of the demand for lawyers is a country's gross national product, and attributed this relationship to the supposition that more transactions require more lawyers. See B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J.L. & Econ. 53, 72 (1977). So conceived, the study supports both the first and the third of my "benign" hypotheses in the text. But in each case I emphasize somewhat more subtle relationships as well. As to the first: there is more interaction among business entities (and, therefore, more work for business lawyers) not only because of a general increase in the scale of economies, but also because of increasing internationalization and an increasing rate of interaction, made possible by technological advances. Similarly, as to the third: an increased level of wealth not only implies more economic transactions (and, therefore, more work for business lawyers) but also allows for the political expression of higher order preferences, which lead to new systems of norms and a relatively rapid growth of certain kinds of legal work, e.g., in environmental law.

25. See *infra* part V. ("Completing the Explanation").

modern-day specialists in the normative ordering of human relationships, both in public and in private spheres of activity.

In fact, the growth of law in the areas of health and environment has been among the most remarkable.²⁶ In the Progressive Era early in this century, there were five new federal statutes enacted in the area of health and consumer safety; in the New Deal period, there were eleven; during the period from 1964 to 1979 (the "third wave," as it might be called), there were sixty-two. The figures for statutes regulating energy and the environment are just as dramatic: two during the Progressive Era, five during the New Deal, and thirty-two in the third wave. And the new statutes are also much more complicated.

Such laws, however imperfect they are, do seem important to achieving the emerging social objectives of modern societies. I read in the newspaper last summer that 117 salmon had reached Manchester, New Hampshire from the Atlantic Ocean, by way of the once-dead and totally polluted Merrimack River. This small environmental miracle was largely the work of lawyers.²⁷ A short while later, I read in the same paper, the Boston Globe, about the Penobscot River in Maine. Twenty-five years ago it was a sewer that nobody wanted to get near. Now, on every summer weekend, you can see families on its banks picnicking, swimming, and fishing. Government action and strict legal rules were responsible for this change. If you live in a less polluted part of America, you might be tempted to dismiss such an accomplishment as yet another example of overly costly romantic striving for perfection. But on the same day, I happened to look at the June 1991 issue of *National Geographic*, which carried an article on industrial pollution in Eastern Europe—in countries that have little environmental regulation to speak of. I saw picture after picture of the result: filthy skies, sooted buildings, dead trees, choking workers, and carbon-coated children. I wished those children, like my own, could sit next to clear water and watch the salmon swim. It occurred to me that over-regulation is bad, but under-regulation can be a lot worse.

To make my argument about the connection between wealth levels and growth in the demand for law a bit stronger, and to suggest more specific ways to define and test the thesis, I must say more about the timing of changes in wealth levels and legal regulation in the post-World War II era. Here is an initial stab at this project.

In the 1950s and 1960s, there was a great increase in the real or inflation-adjusted income of Americans, as well as significant growth in productivity and average annual GNP.²⁸ Americans also experienced an

26. Statistics in this paragraph are taken from Galanter & Palay, *supra* note 3, at 41 n.27.

27. Lawyers were involved in advocating and legislating environmental protection, making regulations, and counseling client companies about compliance.

28. See Council of Econ. Advisors, 1989 Annual Report Tables B-2, B-3, B-30, B-45, B-46 (in Economic Report of the President 1989). The data in these tables also show

increase relative to other countries—the U.S. was on top of the world. This increase in economic well-being was, I suggest, an essential precursor to the “third wave” of regulation in the United States: the appearance in the late 1960s and early 1970s of massively important and complicated regulatory initiatives in health, safety, environmental quality, pension security, and other areas that previous generations might have considered matters of secondary concern.²⁹

Recall some of the highlights of that heady era of new regulation. Medicare and Medicaid were created in 1965, causing a sea of change in health care financing and regulation. Major statutes on health care planning, financing, and cost control followed. The Occupational Safety and Health Act was enacted in 1970. Environmental statutes included the National Environmental Policy Act of 1969, major amendments to the Clean Air Act in 1966 and 1970, and repeated amendments to the Federal Water Pollution Control Act. And the most important legislation on pensions in generations, ERISA, was enacted in 1974.

This third great wave of regulatory activity was characterized by distinctly different subject matters than the regulatory efforts of the second great wave, the New Deal. New Deal statutes concerned regulation of areas such as labor relations, securities markets, financial institutions, and utilities. In other words, the New Deal focused on jobs, money, and the basic rudiments of civilized living. In contrast, the third wave emphasized the basic refinements of civilized living: advanced health care, a clean environment, extra security in old age, and so on. Only a wealthier society could adopt the mindset needed to make these demands on the legal system.

But the story did not end with the advent of the third wave in the 1960s and early 1970s. Later, in the 1970s and into the 1980s, the economic well-being of Americans entered a period of stasis. There was only a very modest increase in the real income of average citizens, and relative to other countries the United States appeared to be in economic decline. How did this change affect regulatory activity?

Just as the increase in wealth led to a burst of regulatory law making only after a considerable time lag, so too did economic stagnation lead to a relative decline in the growth of law making only after a lag. A gross but probably not inaccurate description of this turn of events would be that efforts to install new regulatory systems tapered off after the mid-1970s, although much legal work in the 1970s and 1980s resulted simply from the working out of and modification of regulatory schemes created

subsequent stagnation. For example, real median family income doubled from 1947 to 1973 but barely increased at all between 1973 and 1987.

29. The first two waves of regulation occurred in the Progressive Era and the New Deal. The differences between the New Deal regulation and that of the 1960s and 1970s are an important topic of analysis by historians of regulation. See, e.g., Thomas K. McCraw, *Prophets of Regulation* 303-04 (1984) (contrasting assumptions about markets and the proper role of government agencies in these two eras).

in the third wave. Regulations were adopted pursuant to the enabling statutes, and counseling, litigation, and regulatory adjustments followed *en masse*.

It is possible, of course, that the very intensity and cost of the regulatory systems created in the third wave contributed to economic stagnation, but that issue is not part of my present discussion. Furthermore, the stagnation of economic growth probably led to the calls, circa 1980, for deregulation. Ironically, deregulatory initiatives, when they were implemented, seem only to have added, at least temporarily, to the demand for legal work. It takes enormous effort to dismantle a regulatory system and work out all the consequences, and lawyers are the workers most qualified to do the job.

Now note this twist: an economic downturn can, as has recently happened, lead to bankruptcies, restructurings, and reorganizations, all of which increase the demand for legal work. Perhaps, then, the essential factor in explaining the growth of legal activity is simply social or economic change that puts into question the rights and duties of persons toward one another, thereby creating demand for normative ordering to settle the uncertainty. In other words, new legal work is created by a bust as well as a boom, because governance mechanisms are disrupted by either sort of change.³⁰ But I would question whether change on the downside usually creates *as much* legal work as change on the upside. Over the long haul, assuming that we define "legal work" to include the creation and development of major new regulatory systems as well as litigation, it probably does not. Lawsuits may take a swing upwards in an economic downturn, but large upswings in overall legal activity seem to depend on economic growth.

What about the future? If my account has merit, it allows us to make some very rough "if. . . then. . ." judgments. If economic stagnation continues, it may mean a gradual stabilization or moderation in the growth of demand for lawyers to work in the regulatory areas characteristic of the third wave. If economic growth resumes, this moderation is less likely to happen, and at some future level of higher wealth one might

30. *Compare:*

The rate of economic change increases instability, and thus the temptations and opportunities for defection from present governance arrangements, the transaction costs of devising new ones, the uncertainty of parties, and the likely or anticipated ineffectiveness of informal sanctions. Again, advance and detailed specification of duties, and reliance on formal enforcement mechanisms, is likely to be enhanced.

Galanter and Rogers, *supra* note 16, at 44. Later they argue more specifically about the relationship between economic change and lawsuits or formal dispute resolution procedures: "Any major change in economic activity (boom or bust) has the effect of disturbing prior governance relations [among businesses], simply by changing the actors involved. Declining economic performance, moreover, would reasonably be seen as increasing the incidence of injury, and perceived injury. Most simply, with a declining surplus, zero sum conflict increases. The number of issues in *dispute*, then, would be expected to increase, and the stakes in dispute would rise." *Id.* at 53.

anticipate a new burst of regulatory activity associated with an even higher-order set of social preferences. What the shape of that fourth wave may be, we can only speculate.

D. Greater Involvement in Complex, Formal Organizations

Consider this subtle but important relationship. When economic activity—or, for that matter, any other human activity—is carried out by a large formal organization (such as a business corporation, a nonprofit corporation, or a government agency), it will more frequently make sense to hire a lawyer to engage in normative ordering rather than to have nonspecialists do it. This is because there are economies of scale in performing the kinds of tasks that lawyers do. After some threshold level, when an organization is “large enough,” using specialists in normative ordering—that is, lawyers—makes economic sense.

An example may help make the point clear. Suppose Martha owns and operates a delivery truck as sole proprietor. Mike owns and operates an automotive repair shop as sole proprietor. Whenever Martha’s truck needs repairs, she brings it to Mike, who does the work and charges a fee. The parties feel no need to hire a lawyer for advice on how to structure their relationship, or to use contracts devised by a lawyer, or, except in extraordinary circumstances, to employ a lawyer to resolve the disagreements that arise between them from time to time. This is not to say that there is no normative ordering of the relationship; there is plenty. But because the parties know each other, would like to continue the relationship, and can readily ask questions, express dissatisfaction, and bargain for adjustments, they are usually able to structure the relationship by themselves.

Note that even if the economy had thousands of Marthas dealing one-on-one with thousands of Mikes, there would still be only occasional demand for the services of lawyers. Most normative ordering of these business relationships would be done by nonspecialists as an incident to their other work.

Suppose, by contrast, Boston Edison Co. wants to engage Special Ship Corp. to build and charter a special ocean-going ship for the purpose of transporting vast cargoes of coal to Edison’s generating facilities. The deal involves many millions of dollars, thousands of employees on both sides, and numerous uncertainties and contingencies. The parties feel it important to reduce to paper their understanding of what happens under the myriad contingencies, and to specify in advance who owes what to whom. They readily turn to lawyers who specialize in negotiating and drafting complex contracts, even though the hourly pay of those specialists is higher than the hourly pay of all corporate officers involved in the deal. The costs are minuscule in relation to the total value of the economic arrangements, yet the benefits, in terms of stabilizing expectations and reducing the transaction costs of later misunderstandings, conflicts, and dispute resolution, are potentially enormous.

As this example suggests, the work of lawyers can often create an increase in real economic well-being by reducing transaction costs. It is wrong to see the work of lawyers as essentially restricted to assisting in zero-sum games or, even worse, as being "parasitic" and wealth-consuming or wealth-destroying. Normative ordering often makes people better off, and it often leads to a net increase in well-being. Not to see this is to miss the boat.

That was a nice story about how formal organizations—whether private or public, profit or nonprofit—can lead to greater use of lawyers (as well as other specialists). But how, if at all, is this illustrated by major historical trends?

First consider some historical shifts on a large time frame. The historian Alfred Chandler points out that in colonial times most Americans worked on family farms, and most of those who did not worked in small economic units.³¹ By the middle of the twentieth century, the situation was quite different: a vast segment of the population worked in large multi-unit organizations.³² By the early 1980s, corporations accounted for 88% of business receipts, with the larger corporations accounting for disproportionately more.³³ Throughout the long period of the rise to dominance of corporations and other formal organizations, the number and importance of lawyers have grown.

The picture looks somewhat different if we focus on the post-World War II period. If we assume, as seems plausible, that economies of scale in using lawyers will taper off after reaching some threshold level of practicality,³⁴ then recent changes in the average size (in terms of employees) of economic units have not seemed dramatic enough to have a big impact on demand for lawyers. Nevertheless, there has been increasing involvement in formal organizations that are large enough to find frequent resort to lawyers cost-effective, and the increase has outstripped population growth. At the least, such an increase is strongly suggested by the fact that participation in the workplace went from 38% of the population in 1960 to over 45% in 1985.³⁵ (Incidentally, this increase was due in large part to the inclusion of women in the out-of-home workforce.) It is reasonable to suppose that this increase was paralleled by an increase in the number of "large-enough" economic units and, therefore, in the demand for legal services. Some data on the precise shape of the growth of law is

31. See Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* 17 (1977).

32. See *id.* at 482-83 (dominance of large managerial enterprises after World War II).

33. U.S. Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 1984, at 532 (1983).

34. This view seems consistent with evidence that large companies spend a lesser percentage of total sales on legal services than do small companies. See B. Peter Pashigian, *A Theory of Prevention and Legal Defense with an Application to the Legal Costs of Companies*, 25 J.L. & Econ. 247, 260-61 (1982) (graph showing legal costs per million dollars of sales).

35. See Galanter, *supra* note 4, at 3.

consistent with this view. For example, "[f]rom 1967 to 1987, the portion of the receipts of the legal services industry contributed by businesses increased from 39 percent to 51 percent, while the share purchased by individuals dropped from 55 percent to 42 percent."³⁶ Similarly, although the "litigation explosion" is popularly blamed on greedy tort plaintiffs and their avaricious lawyers, in fact there has been a disproportionate increase in recent years (1960-1988) in the extent to which litigation in federal courts is comprised of businesses suing one another in disputes arising out of their contractual dealings, intellectual property claims, and similar matters.³⁷

V. COMPLETING THE EXPLANATION

So far I have argued that there are long term trends that increase the demand for what lawyers do. I have identified four such trends: greater interaction and internationalization; greater diversity; changes in wealth levels; and greater involvement in complex, formal organizations. There are undoubtedly more such trends, and some of the others may be more important. In discussing each trend, I have tried to do three things:

- give an intuitive sense of how the trend could lead to greater demand for law and lawyers;

- supply initial evidence indicating that the alleged trend is real; and

- point to *specific* areas of legal growth that fit the proposed model of socioeconomic trend and legal growth.

As an example of one of these specific areas of growth, I used increases in wealth levels to account, not for the expansion of law in general, but for the especially rapid growth of law relating to health care, environment, occupational safety, and extra pension security. In addition, I linked greater demographic diversity to the rapid expansion in employment discrimination law, and increased internationalization to the demonstrably great growth in international trade and finance law. Note that drawing these sorts of specific connections is a far more satisfying approach than simply offering broad theories, such as the supposed generic increase among people of an all-pervading sense of entitlement, that seek to explain the explosion of law in general.

Nevertheless, it is not enough to show a plausible connection between a demonstrable social or economic trend and a demonstrable growth in cognate legal activity. To be complete, one needs to explain why increases in the demand for normative ordering have not been satisfied by non-legal sources of order such as the family, informal social groups, market forces, and the major religions. What has happened, during this period of massive social change, to the ability of these other systems to generate and enforce norms appropriate to the changing social and economic conditions?

36. *Id.* at 5 n.39.

37. *See id.* at 10 n.78.

This is not the context in which to develop a full answer to this question, so I will sketch only the briefest hints of an answer. Briefly, in modern societies, with the great mobility and interconnectedness of their populations, it is less costly than ever to escape from informal social groups and their informal methods of social control. If you lived as a shepherd in an isolated Greek village in the early part of this century and expected to spend all of your life there, you cared a lot about what the neighbors thought, and about your reputation. In contrast, if your neighbors in Westchester County do not think well of you today, you may choose to move or, easier yet, to ignore them and socialize with people who live elsewhere.

In modern societies, market forces do enforce some important norms of behavior—honesty, diligence, and even (as Adam Smith pointed out so long ago) politeness and cooperation. But of course they leave many externalities—public goods that must be subsidized, and third-party effects that must be taxed or regulated.

In modern societies, the power of the ethical precepts of the major world religions (Judaism, Christianity, Islam, Hinduism, and Buddhism) is often supposed to have been weakened by an underlying decline in faith. But even if this is not really so, or if a great revival restores religious faith, there is a more fundamental problem. Religions tend to ground their norms of behavior in texts that have been sacralized—that is, made deserving of special reverence and acceptance, and exempted from fundamental criticism or second-guessing. Sacralization helps give religious precepts their great psychological force—a force that legal precepts only rarely achieve. Yet it also creates rigidity, and as a practical matter this tends to confine effective religious ethics to very general, transcendent norms of behavior appropriate to the most basic conditions and relationships of humankind. (Thou shalt not kill; thou shalt not steal; etc.) It is hard, for example, to derive a scheme of environmental regulation from the Bible or the Koran. What do either of these texts have to tell us about how many parts-per-million of sodium should be allowed in the city's drinking water?

While we might in fact trace a norm of concern for human health or the natural environment to a sacred text, it is quite another matter to develop the specific, detailed, and flexible rules that are needed in today's world. Doing that involves investigation and arguments about the costs and benefits of various acts. There must be resort to pragmatic, fact-based, rational reasoning about means and ends, and there will most surely be an opportunity for competing interest groups to argue different interpretations of these questions while still appearing to take the high moral ground. Similarly, what do you do when a sacred text *does* lay down a very specific rule—like a prohibition on interest for money lent—that now seems wrong and even suicidal? Creative theologians can come up with a solution, often a convoluted one, but the process is likely to be costly and not fully satisfying. Sacralization entails rigidity, and in our

modern world rigidity has great costs. More generally, it is *intrinsically* difficult to derive the incredibly complex, elaborate, and ever-changing rules needed to satisfy the modern world's new demands for normative ordering by resort to religious sources and institutions.

VI. COMPLETING THE ASSESSMENT

So far, this essay has approached the issue of evaluation rather indirectly, by critiquing what I label "cancerous" theories of the growth of law and lawyers and proffering a *prima facie* case for supposedly "benign" hypotheses about such growth. This approach may be strengthened by analyses that develop more carefully why it is that the work newly demanded of lawyers is probably useful. For example, Ronald Gilson has argued forcefully that many business lawyers—in particular, those who help put deals together—are best understood as "transaction cost engineers" and play an important positive role in value creation.³⁸ An analogous argument can be made about the counseling role of lawyers.³⁹ Evaluating the role of lawyers as litigators is far more complicated, because at first glance much litigation seems to be a merely redistributive or rent-seeking activity. A full assessment of litigation requires consideration of its other functions, such as forcing internalization of costs (an efficiency-enhancing consequence of an ideal torts system) or producing relatively non-monetized or non-marketed goods, such as liberty and a sense of fairness. It is also helpful to bear in mind that more lawyers do transactional and counseling work than do litigation.

Quite obviously, however, even a full acceptance of the points I have made about the causes of growth leaves enormous scope for further inquiry and debate about the net value of the postulated relationships. I noted, for example, that there are structural reasons to expect some overconsumption in legal services, but I have no systematic empirical evidence to support an estimate of the size of such effects. Similarly, it is conceivable that even if the four "benign" hypotheses (and others like them) explaining the increase in demand for law and lawyers are strongly operative, there may still be too much of a good thing. Some observers have a nagging concern, for example, that having lawyers in a complex economy will lower transaction costs and enhance stability and predictability up to a point, but that additional lawyers will work extra hard to find ambiguity and uncertainty that previously would not have been per-

38. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 Yale L.J. 239, 246, 253-55 (1984).

39. Scholars in law and economics are in fact beginning to conduct careful formal analyses of the conditions under which legal counseling is socially desirable or optimal. See Louis Kaplow & Steven Shavell, *Legal Advice About Acts Already Committed*, 10 Int'l Rev. L. & Econ. 149 (1990); Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. Legal Stud. 123 (1988); Louis Kaplow & Steven Shavell, *Private versus Socially Optimal Provision of Ex Ante Legal Advice* (Program in Law and Economics, Harvard Law School, Discussion Paper No. 98, Oct. 1991).

ceived, and thus to increase transaction costs and uncertainty. Such a concern depends on an assumption that market forces have inadequate mechanisms for stopping growth at the optimal level.

Is there a good way to short-circuit the analytical debates by a fairly direct test of the overall net impact of lawyers on social welfare? Some economists have made passes at this daunting task. Magee, Brock, and Young collected some statistics for thirty nations and purported to find a negative relationship between lawyers and economic growth rates.⁴⁰ Frank Cross has effectively criticized the design and execution of this study,⁴¹ however, and offered a similar study with improved design and data that found no such relationship.⁴² Cross also critiqued two other studies,⁴³ highlighted and challenged the persistent (but incorrect) identification by many economists and even legal scholars of legal work with rent-seeking or purely redistributive activity,⁴⁴ emphasized the transaction-facilitating role of most lawyers,⁴⁵ and offered empirical evidence that lawyers are important in producing "nonmarketed social goods."⁴⁶

Problems abound, and they will affect future studies. For example, even if it were to be shown that, across countries, relatively greater use of lawyers is correlated with lower economic growth rates, it would be difficult, without much more hypothesizing and testing, to assess causality and meaning. Countries at lower stages of economic development may more easily achieve high growth rates simply because they are still in the process of adopting already available technologies and organizational forms, whereas the most advanced countries depend for additional growth on genuine innovations, which are slow in coming and impose natural limits to growth. At the same time, countries moving from a less to a more advanced stage of economic development increasingly use lawyers as they become wealthier and more complex. Under such conditions, to find that mature economies (those at the high end of the S-shaped growth curve) have both more lawyers and modest growth is not to find anything that is necessarily suboptimal; nor would such a coexis-

40. Stephen P. Magee et al., *Black Hole Tariffs and Endogenous Policy Theory: Political Economy in General Equilibrium* 118-19 (1989).

41. See 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, 668-70 (1992).

42. See *id.* at 672-76.

43. See *id.* at 670-72. The two studies are Kevin M. Murphy et al., *The Allocation of Talent: Implications for Growth*, 106 Q.J. Econ. 503 (1991), which Cross characterizes as more rigorous but yielding, as the authors themselves noted, only weak and basically insignificant results concerning the effect of lawyers on economic growth, and David N. Laband & John P. Sophocleus, *The Social Cost of Rent-Seeking: First Estimates*, 58 Pub. Choice 269 (1988), which Cross characterizes as limited in scope.

44. See Cross, *supra* note 41, at 650 n.26, 653-68.

45. See *id.* at 655-58.

46. *Id.* at 676-78, where Cross offers the results of a regression analysis indicating statistically significant and substantial positive correlations between "lawyerification" (as measured by the percentage of lawyers to all white collar workers) and various measures of political rights and civil liberties.

tence of phenomena prove that lawyers caused or contributed to a low growth rate.

With all of this in mind, it is hard to escape the conclusion that it will be extremely difficult to achieve a definitive empirical assessment of the overall net impact of lawyers on human welfare.

CONCLUSION

In summary, I have developed the following points:

- The growth of law and lawyers in the last generation is real, dramatic, and pervasive.

- To understand the growth of law, it is important to develop a comprehensive notion of what lawyers do: they are specialists in normative ordering.

- Some explanations of the growth of law make it out to be a cancerous and essentially unhealthy process. Though some of these accounts contain a significant core of truth, they appear to be unsatisfactory if put forward as full (or even leading) explanations of the phenomenon of law's explosive growth:

- The theory of moral decline would appear to explain legal growth only in a few areas such as criminal and family law.

- Claims of lawyer-created demand seem implausible if meant to be major explanations of growth in law, for they do not seem to account satisfactorily for the creation of major legislative and regulatory schemes, and they tend to ignore the reasons why individuals and organizations are willing to seek out and pay for lawyers' services.

- The theory of market imperfections does suggest that there may be significant fat and inflation in the market for legal services, as in the markets for all other professional services, but these flaws hardly seem capable of explaining the bulk of growth in the law, or its distribution across subject matters and types of practice.

- Some explanations for the growth of law suggest that it is essentially a benign process. My approach was to suggest that certain long term trends have increased the demand for normative ordering, and thus, the demand for law and lawyers. I concentrated on four such trends; I don't claim to have presented a full list. The four are:

- greater internationalization and other forms of interaction;
 - greater diversity in the population;
 - changes in wealth levels; and
 - greater involvement of the workforce in formal organizations.

In each case, I presented preliminary evidence to indicate that the trend is real and serious, and I explained why there is a connection between the trend and demonstrable growth in specific areas of law and law practice that one would expect to be affected by that trend. It is a hidden leitmotif of these explanations that the normative ordering generated by

these trends is in principle a value-increasing service, not a parasitic or pointless activity.

Obviously, much more work is needed to develop and test hypotheses of the sort I have put forth. I claim only to have made them plausible enough to warrant and stimulate further refinement and testing. Nevertheless, they do generate a certain sort of cautious hope about our profession. To the extent that they or similar accounts are valid, they hardly justify complacency about the legal system, but they do appear to rule out deep cynicism. No doubt there is much about the legal profession that ought to be changed. But the profession appears already to be a useful one, for the whole modern world is demanding its services. And it can properly aspire to be noble, for at its best its members' services can augment the sum of human welfare.