Polling and Popular Culture (News, Television, and Film): Limitations of the Use of Opinion Polls in Assessing the Public Image of Lawyers

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A. INTRODUCTION

This paper begins by exploring limitations on the use of opinion polls as a way to assess whether images of lawyers in popular culture (news, television, and film) have an impact on the public image of lawyers. Not surprisingly, most American polls show a wide range of negative views about lawyers. When asked whether those negative impressions come from popular culture sources, most people will deny that influence. Oddly enough, however, if asked about particular personal experiences with individual lawyers, most people will rate having had a fairly satisfactory experience. So that even if people have positive one-on-one experiences with lawyers, these satisfactory encounters are not capable of displacing what I call their “global negative perception” of lawyers (for example, lawyers are greedy). Like consumers who think themselves free from external influence by advertising, most people when asked whether they draw their views from media sources (especially fictional ones) will prefer to say that they make up their minds “independently.” In reality, these people are probably being influenced by popular culture depictions they are unaware of. If this is true, it raises a problem with respect to the quality of information gathered on the premise that people will (or even can) accurately self-report on an issue like this.

The paper consists of three sections. Section B lays out the problem that individual experience seems to be unable to displace global

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negative perceptions and uses various theories about how advertising works and how popular culture is absorbed in order to explain why it is difficult to trust polls that directly ask about media influence. Section C connects the entrenched global perception to the literature on lawyer's job dissatisfaction. Here the focus will be on those who complain that they thought the practice of law would be more exciting than they find it and disappointed clients who expected lawyers to exert more heroic efforts on their behalf. A connection is made between that disappointment and how it might be exacerbated by images of lawyers in popular culture. The final section, Section D, asks how the public image of lawyers should be different in a Canadian context, where given a range of indicators one would think that there are fewer reasons to revile lawyers.

B. AN ENTRENCHED GLOBAL NEGATIVE PERCEPTION

Is popular culture (news, television, and film) an important source for creating the public image of lawyers? A nation-wide 1999 American Bar Association (ABA) survey of 1000 respondents placed fictional sources low on their list of sources of information about the justice system. The three sources in last place were: (1) court programs like People's Court/Judge Judy; (2) television dramas; (3) movies/videos. At the top of the list was personal experience, followed by school or college courses, books/library, and jury duty.

People know better, in other words, than to use popular culture media sources to form their views of the law and lawyers. If such self-reporting can be trusted, the largely negative view of lawyers presented in these various forms of popular culture appear to be of marginal importance. However, in a study of first-year law students in various countries (Argentina, Australia, England, Germany, Scotland, and the United States), a significant number of students in each country report that all three media (news, television, and film) are quite helpful in forming their (very low) opinions of lawyers. This "openness" to media influence is consistent with a point made in the context of advertising, namely, that the young and generally "people in transitional states in their lives" are more vulnerable to advertising. Combining this point with the finding in the 1999 ABA Survey, one might say that first-year law students are more likely to base their perceptions of lawyers on media and fictional accounts, since they will not yet have encountered the legal system in a first-hand way or studied it as an academic subject. As they proceed to do both of these things, one would expect the basis of their views to shift.

Being open to media influence and taking popular culture representations for reality might not necessarily be one and the same thing. Another study of first-year law students showed that these students had a good idea of the realities of legal practice despite consumption of high levels of glamorous (and erroneous) prime-time portrayals. In other words, the students did not require personal experience or study in order to "discount" those sources.

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2 The rest of the list in order of most to least important included: lawyers/attorneys; materials available from the court; television news; family member; television shows like 20/20, 60 Minutes, Dateline; local daily newspaper; national newspapers; radio news; high profile cases; internet; word of mouth; television trials like Court TV; magazines; and radio/TV talk shows. Ibid.

3 Michael Asimow, Steve Greenfield, Guillermo Jorge, Stefan Machura, Guy Osborn, Peter Robson, Cassandra Sharp, & Robert Sokoloskie, 'Perceptions of Lawyers: A Transnational Study of Student Views on the Image of Law and Lawyers' (2005) 12 International Journal of the Legal Profession 407. The exception to this was Argentina. Ibid. at 409–10: "only news coverage is more helpful than popular cultural media in assisting students to form their opinions. News and pop culture media are generally more helpful than having lawyers as friends or family members, personal experience with lawyers, conversations with family and friends, or classes at school. Those results are surprising, since traditionally respondents in surveys in this field deny that their opinions were influenced by popular culture [citing the 1999 ABA Survey]," Ibid. at 427. "law students have a very low opinion about whether lawyers are trustworthy and ethical."

4 Michael Schudson, "Advertising: Hit or Myth?" (1986) 37 Media & Values, online: www.medialit.org/reading_room/article177.html (accessed 28 August 2006). "It's hard to make this point too strongly. Different groups are differently vulnerable to advertising."

5 See Lieve Gies, "Explaining the Absence of the Media in Stories of Law and Legal Consciousness" (2003) 2 Entertainment Law 19, on the importance of "everyday life" and the danger of underestimating the extent to which first-hand experience would alter the kind and extent of media influence.

Another small focus-group study of first-year law students in Australia confirmed something like this distinction in the context of what is called the “active audience” paradigm. This is a theory which contends that audiences are not cultural dopes but instead are active producers of meaning from within a cultural context of their own. Formulated in response to the assumption that watching television was passive in character—with audiences immediately taking up the meanings and messages in an unproblematic way—this theory maintains that even when shows are watched for pure entertainment, viewers are nevertheless actively decoding messages and transforming them into their own ideas and perceptions. This study found that students readily acknowledged that the representations of lawyers were not realistic. Nonetheless, these students legitimated the images in formulating aspirations to be like the characters.

These studies of first-year law students might not be indicative of the wider lay population. After all, deciding to go to law school is a big decision given the expense, time, and hard work it involves. It is the kind of decision that might prompt people to be reflective about the factors that have influenced them in arriving at this particular challenge in life. Would self-consciousness cause a tyro to overestimate the extent to which media and various forms of popular culture have affected their views of the law and lawyers? Or does this result in more honest reporting than older and generally more experienced laypeople who, whether or not they are using that experience to form specific views, will tend to pride themselves on using real experience to make judgments about the real world?

Here we have the basic problem at the heart of using opinion polls to assess the influence of popular culture on views held about lawyers: the fallibility of self-reporting. An opinion poll always asks a person about how they think they or others are influenced; it cannot get at how they or others are in fact influenced. It is in the nature of influence that it does not announce itself or self-present in a transparent way.

A 2002 ABA survey of 300 households found that 76 percent of consumers who have hired a lawyer in the past five years were either very satisfied (58 percent) or somewhat satisfied (18 percent) with the lawyer. “From these stories, we learn of lawyers who know the law, take time with their clients, work hard on their clients’ behalf, charge them reasonable fees, and generally help them through a difficult period. Some tell stories of lawyers who got their clients out of a tough spot or persisted through a difficult situation.”

If the self-reporting in the 1999 Survey was accurate—people were in fact basing their opinion of lawyers on individual personal experience—one would expect the overall opinion of lawyers to be positive. On the contrary, this 2002 Survey indicates that people continue to hold what I call a “global negative perception” of lawyers, which it seems that no amount of individual positive experience can displace.

In making an assessment of lawyers, there are obviously differences between different types of lawyers and different views of them. Those who came in for most criticism in the 2002 Survey were criminal de-

7 Cassandra Sharp, "Scarlet Letter or Chastity Belt? What Legal Dramas of the Twenty-First Century are "Telling" Law Students About a Career in Law" (2002) 5 Legal Ethics 90.
8 Ibid. at 93.
9 Ibid. at 95. [there was an overwhelming sense of participant acknowledgement that the representations of lawyers were not realistic—many comments were often prefaced by such a statement as "even though I know it's not real..." or "it's not realistic but..." Students believe the representations are not a realistic portrayal of lawyers, yet they legitimize such images when they engage aspirations to be like them.” Ibid. at 94: “first-year law students have a strong orientation towards many of the characteristics portrayed by lawyers on television—they crave the same skills, status, lifestyle and opportunity to ‘make a difference’ in society.”

11 Ibid. at 21.
13 The 1999 ABA Survey, above note 1 at 44, put the point this way: "Those people seeking services such as real estate transactions and drafting up a will or contract were more likely to be satisfied than dissatisfied with those legal services. This may be because they were voluntarily going to have a lawyer do something for them and they were able to tell the lawyer what to do. In contrast, those seeking services related to a lawsuit, divorce, or party to a criminal proceeding were more likely to be dissatisfied with the legal services they received. This may be because the reason for seeking a lawyer, to begin with, was more negative, the risk of a negative outcome was greater; or, in fact, the outcome itself was actually negative.”
fence lawyers, prosecutors, public defenders, personal injury lawyers, divorce lawyers, and corporate lawyers. Neutral or positive reactions were found for real estate lawyers—buying a house you fell in love with is likely to be a more positive experience than going through a divorce with someone you fell out of love with—and civil rights lawyers. Large-scale pro-bono work done on behalf of 9/11 victims’ families is thought to have the potential to lead to some increase in confidence in lawyers.

The three primary negative findings in the 2002 Survey were: (i) lawyers are viewed as greedy, manipulative, and corrupt; (ii) lawyers have too many connections to politics, the judiciary, government, big business, and law enforcement; and (iii) lawyers do a poor job of policing themselves. The ABA is viewed “as an Old Boys Network, more similar to a union or club than a professional association.” Overall, “the legal profession is among the least reputed institutions in American society,” ranking only above the media in terms of consumer confidence.

It is then not difficult to see why an individual positive experience would be unable to displace a global negative perception for those surveyed. That experience would likely be with only one lawyer or one kind of lawyer, whose carriage of that person’s particular case (or performance of duties such as drawing up a will or making a contract) was perfectly satisfactory, and would leave unchecked suspicions about the larger system, that is, traits that are thought to be generally shared by members of the profession and what are seen as systematic weaknesses in functioning and governance. Such an opinion will be left untouched by a positive experience with a real estate lawyer, whose upright professional behavior can be easily reconciled with the general view by thinking something like “this good honest lawyer was the exception rather than the rule.”

Where does the global negative perception come from? Obviously some people surveyed had negative individual experiences—the percentage who indicated they were “somewhat dissatisfied” or “very dissatisfied” with the service they received. However, according to Michael Asimow, “if a contact with a real lawyer is unfavorable or unpleasant, the experience fits right into and reinforces the negative image acquired from popular culture. Even if the experience with the real lawyer is positive, it is viewed as exceptional.”

Interestingly, respondents in the 2002 Survey pointed to media coverage of high profile cases as one of the factors perpetuating negative perceptions of lawyers. They also thought lawyer advertising was detrimental to the reputation of the profession. In terms of television programs like The Practice, Law and Order, Court TV, Judge Judy, and Ally McBeal, the study found little difference in confidence in lawyers between those respondents who watched such programs and those who did not. Typically, when people answer questions about media influence, they tend to overstate the degree to which others are affected by the media influence and underestimate the extent to which they are themselves.”

14 2002 ABA Survey, above note 10 at 11: “More neutral or positive reactions are found only for real estate lawyers, who are largely viewed as functionaries; and civil rights lawyers, who are said to be working in the public interest.”

15 See ibid. at 29–31. “Public confidence in many U.S. institutions has wildly fluctuated over the past two years, dropping immediately following the 2000 presidential election and recovering post-September 11, 2001. The legal profession has been under the radar during most of this period. However, to the extent that lawyers have responded (or chosen not to respond) to the events of September 11, the public reaction has been favorable to neutral. This may change as more lawsuits are filed, and some public backlash may be unavoidable… [Large-scale pro-bono work done on behalf of victims’ families] has the potential to ameliorate some of the negativity generated by lawsuits, assuming that consumers are made aware of these public service activities” (ibid. at 31).

16 See ibid. at 4 and 7–10. In relationship to connections, when a group of elite lawyers (234 partners in the 100 most prestigious law firms in the United States as ranked by American Lawyer magazine) were asked if they knew people they could contact about an important political issue, 52 percent said they knew a current member of Congress, 59 percent a current member of their state legislature, 31 percent a member of the national news media, 70 percent a member of the local news media, and 13 percent said they would feel comfortable contacting a member of the President’s Cabinet. See Amy E. Black & Stanley Rothman, “Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession” (1998) 21 Har. J. & Pub. Pol’y 848.

17 2002 ABA Survey, ibid. at 10. See also Black & Rothman, ibid. at 850–54, for a summary of surveys tracking a dramatic decrease in prestige and respect for the profession from the 1970s to 1997, constituting what they term “a crisis of public opinion.” Both elite lawyers and federal judges surveyed placed “public image” high on their list of the most important problems facing the profession. See ibid. at 856.


19 Ibid. at 19 (together these amounted to 12 percent in 2002 and 20 percent in 1998).


21 2002 ABA Survey, above note 10 at 12: “Respondents believe that the media perpetuates these negative perceptions of lawyers by focusing on the highly controversial cases that feed into the public belief system and by ignoring facts and stories that do not.”

22 Ibid. at 13.

23 Ibid.
selves influenced. This is known as "the third person effect" (a term coined by W.P. Davison in 1983). Here the application would be "I am not affected by what I see on the news (television programs or film) but others are." People like to see themselves as "competent and intelligent, and therefore they are likely to see themselves as largely impervious to media's undesirable influence ... people are largely unaware of their own psychological functioning and vulnerabilities, they are likely not to perceive media's influence on themselves." 

This is a valuable insight when assessing responses to the ABA 1999 and 2002 Surveys. With the exception of law students (who might constitute their own special case) those surveyed tended to minimize the influence on them of popular culture influences, preferring to see themselves as people who make up their minds based on actual experience (1999 Survey). However, even when that individual experience is a relatively positive one, they assign poor marks to the profession as a whole, ascribing negative perceptions to the vulnerability of others to news media (2002 Survey). If the third person effect is correct, these respondents are probably underestimating the extent to which they are influenced by popular culture in their views of lawyers (explaining why individual positive experiences are unable to displace the global negative perception) and overstating its influence on others (explaining why, at least in one case, the 2002 Survey found little difference in confidence in lawyers between those who watched law-related television programs, and those who did not).

Popular culture "realists," who hypothesize a strong connection between representations and the beliefs of those who view them, would say that even (and perhaps especially) when people disclaim being influenced, they cannot be trusted to have accurately stated the matter. There is also probably a lesson here for members of the profession who—manifesting our own version of third person effect—might overestimate the degree to which those outside the profession are influenced by popular culture sources, while at the same time understi-


26 See Saltmarr & Dunwoody, above note 6 at 414-25, for an explanation of pop culture realism, sometimes referred to in the context of law and film as legal 'realism.'

27 See Paul Bergman & Michael Asimow, Reel Justice: The Courtroom Goes to the Movies, 2d ed. (Kansas City, Missouri: Andrews McMeel, 2000), reviewing movies with legal themes, pointing out things in the movie that could or could not happen.


29 See Asimow, above note 20 at 533-55, for this explanation of "cultivation-effect."
opposite and 23 percent said they associated lawyers equally with both settings.\textsuperscript{30}

Another study that strongly suggests the influence of television at work is one showing that frequent viewers of syndicated television courtroom shows—Judge Judy and The People's Court—expected judges to be active on the bench and thought that they should be looking at the judge's behavior (including his or her silence) for clues on that judge's opinion of what the verdict should be.\textsuperscript{31} The confusion of fiction and reality is evidenced anecdotally by the fact that "the public regularly submits complaints about Judge Judy and other TV judges, [not] understanding that Judge Judy and most of her cohorts are not present members of any judiciary."\textsuperscript{32} Litigants who win their case but are disappointed when their opponent was not humiliated by the judge in the style of Court TV complain about the judge.\textsuperscript{33}

"Reception research" holds that "diverse audience types may receive and interpret messages differently"—some may engage more actively, while others absorb messages more passively.\textsuperscript{34} Probably each person does some of one and some of the other at different times, depending on how interested in the topic they are and how much they know about it.\textsuperscript{35} Lawyers and law students might actively engage in a legally-themed movie but adopt a more passive attitude when half-watching a documentary on television about penguins.

The important conclusion would seem to be that even when people deny media influence on their view of lawyers or give it a low ranking as in the 1999 ABA Survey, it is likely that it is having an effect greater than they recognize. Hence, simply asking them about that influence is not likely to generate an accurate reflection of the situation.

C. CLASHES BETWEEN REALISTIC AND UNREALISTIC EXPECTATIONS

The literature on satisfaction in the legal profession by practising members is mixed but, when compared against the public perception of lawyers, is somewhat heartening. An ABA study of lawyers two to three years after law school graduation reports relatively high levels of satisfaction with their decision to become a lawyer and their practice.\textsuperscript{36} That rate of 80 percent either "moderately" or "extremely" satisfied is echoed in city-specific studies.\textsuperscript{37} Canadian studies show similar findings.\textsuperscript{38}

These studies do not account for those so dissatisfied they "exited." Amongst those who remain, there are of course sources of dissatisfaction, one of which, according to the Boston Bar Association, is "the increasingly negative image of attorneys expressed by the public and

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30 See Hengstler, above note 12.
31 This study was based on 225 questionnaires filled out by individuals called for jury duty while waiting entrance to the courtroom and at lunch breaks in courthouses in Manhattan-New York City, the District of Columbia, and Hackensack, New Jersey. Of these, 149 were frequent viewers. See Kimberlaine Podlas, "Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Jury Citizenship" (2001) 39 American Business L.J. 1.
33 Podlas, above note 31 at 21–22.
34 Eschholz, above note 28 at 43. For an explanation of the history of "reception analysis," along with an explanation of its encoding and decoding process, see Gies, above note 5 at 34–26.
35 Asimow et al., above note 3 at 411–20: "It is likely that some consumers fall into the passive sponge cultivation model, paying little attention to the contents of the movie or TV show they are watching while storing away in their memories bits of information gleaned from the show. Other viewers are more active consumers, constructing their own realities out of the raw material provided by the cultural product. These are likely to be people who are paying attention to the show, who already have some information about the subject, and are at least moderately interested in the issue."
37 Ibid. See also John P. Heinz, Kathleen R. Hull, & Ava A. Harter, "Lawyers and Their Discontent: Findings from a Survey of the Chicago Bar" (1999) 74 Ind. L.J. 735 at 736 (84 percent of Chicago lawyers were "satisfied" or "very satisfied"); John Sonsteng & David Camarotto, "Minnesota Lawyers Evaluate Law Schools, Training and Job Satisfaction" (2000) 26 Wash. Mitchell L. Rev. 397 at 416: "74.7% of Minnesota lawyers attorneys generally agreed with the statement 'I am satisfied with the practice of law as a meaningful part of my life.'"
38 See John Hagan & Fiona Kay, Gender in Practice: A Study of Lawyers' Lives (New York: Oxford University Press, 1995) at 155–56: Among Toronto lawyers, 81 percent of men and 78 percent of women were either "satisfied" or "very satisfied" with their jobs in 1983 and 79 percent of men and 78 percent of women reported this satisfaction in 1999. Canadian Bar Association, "CBA Futures Study—Highlights" (July 2004) at 1, online: www.cba.org/CBA/futures/pdf/ipos_highlights.pdf (accessed 4 June 2006): 975 responses from lawyers and law students showing lawyers are generally positive about their choice to pursue a career in law, 64 percent expressed satisfaction and only 8 percent dissatisfied.
exacerbated by the media and partisan interests." A Canadian Bar Association (CBA) web and telephone survey found that Canadian lawyers placed "public perception and the credibility of lawyers" among the two issues of highest concern to the profession.46

Popular culture "realists" (or "reelists") have discussed what effect media images of lawyers have on pre-law, law students, and lawyers given the inability of the profession to live up to glamorous media representations. One scholar, Nancy Rapoport, writes that "the expectations of lawyers are raised by fictional depictions and often dashed by reality. For those who have no experience with real lawyers and choose law as a career based in part on what they think law will be like, the shock of the mundane is enormous."47 Another, David Ray Papke, speculates: "Among lawyers themselves, there is often a gnawing feeling that the practice of law was supposed to be something else. Could it be because the cases and performances of literary and cinematic courtroom lawyers are so much more exciting? The great majority of lawyers, after all, are not litigators, and, even among litigators, how many routinely have dramatic, significant cases which bristle with courtroom excitement?"

Given that most students know that what they have seen on TV and film will not reflect what they will be doing in practice and those who stay in the profession certainly do, it is difficult to take this too seriously as a source of what Papke calls "professional melancholy.

Probably more important than the expectations of lawyers are the expectations of clients created by the fictional representations, which Papke also points to: "Real-life attorneys, after all, never measure up to those heroic defense lawyers and occasional prosecutors who are so articulate in their opening and closing statements, who find spectacular evidence, and who can break down Jack Nicholson on the stand."44 Another researcher warns of "inflated public expectations of attorneys' courtroom prowess, contributing to disappointment" and "the specter of 'unrealistic' public expectations of attorneys. If, in real life, attorneys fail to measure up to inflated expectations, negative perceptions are likely to result."

There is, however, a third possibility, other than lawyer disappointment in finding less glamour than they might have dreamed of and client disappointment in discovering their lawyer is no Tom Cruise or Perry Mason, namely, general disparagement and its effect on morale.

The harshly negative perception that lawyers or law students encounter constantly in their daily lives ("how can a nice person like you be a lawyer or law student?") undeservedly lowers self esteem. It causes lawyers to devalue the work they do, and diminishes their satisfaction in doing this work. Surely it contributes to the widespread feelings of career dissatisfication and stress among practicing lawyers.45

So, for instance, it cannot be good for the morale of sole practitioners when clients come to initial lawyer-client interviews assuming the worst of them.46 Rapoport says after walking out of the movie The Devil's Advocate—the premise of which was that the devil was a lawyer recruiting other lawyers to do his evil work—she heard people saying things like "they sure told the truth about lawyers." Part of me wanted to shout out, 'We're not like that! Most of us are good, caring, and ethical people!"46 "The pop cultural trial educates at the same time as it entertains. Just what does it teach us?"

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43 See Sharp, above note 7.
44 Papke, above note 42.
45 Michael Pia, Lawrence J. Mullen, Tracy Deirdrich, & Kristen Garlow, "Television Viewing and Public Perceptions of Attorneys," (1995) 213 Human Communication Research 307 at 325. "This is one plausible explanation for the conclusion of a poll of public perceptions of attorneys that greater contact results in more negative ratings."
46 Asimow, above note 20 at 54.
47 See Boston Bar Association, above note 39 at 13. "Many of the sole practitioners felt that they were affected by the prevailing negative public image of attorneys as sharks or fat cats. Their clients sometimes begin the lawyer-client relationship with the view that the lawyer is rich and uninterested in the problems of ordinary people."
48 Rapoport, above note 49 at 49.
D. CANADA

The president of the CBA wrote an opinion piece for the National Post in 2003 in which he stated that the reason why many Canadians think that our legal profession has gone badly off track is due to the skewed views presented by television, bestsellers, and news of the day.50 Canadian polls tracking confidence and trust in the profession look very much like American ones.51 Like their American counterparts, when directly asked, Canadian members of the public rank newspaper articles, television news/information shows, and television drama low on a list of sources used for legal information.52 Indeed, all three of these sources came in at 17 percent, lower than "notice boards in the courthouse" at 25 percent.53 It is hard to believe that courthouse notice boards affect people more than media (news and TV) and one must wonder whether respondents are saying what they think they are supposed to say (I'm not supposed to be getting my information from unreliable media sources, so I will say that I am not).44

"Members of the public may hate lawyers generally or find it fashionable to say they hate lawyers while simultaneously retaining and having confidence in their own lawyers and in the legal system."54 Researchers with the Alberta Civil Justice System and the Public cast skeptical light on large scale polls and surveys (for a variety of reasons).55 They conclude that while there is "probably" a crisis of public confidence in the civil justice system, "we lack clear and reliable information about the level of public confidence in either our criminal or civil justice system."56 Other research from this project includes the point that judges interviewed as part of the project believe that members of the public base their expectations on American TV dramas.57 This belief was confirmed by 25 percent of public participants who said that they sought information from TV dramas.58 "When people first become involved with the system this inaccurate base of information serves to further confuse an already complex process."59

Fictionalization in itself introduces manifold inaccuracies. This problem is exacerbated in a Canadian context since much of what is depicted may reflect the American, but not the Canadian, legal system. All countries that import American culture (and what country does not?) experience a version of this—an Australian law student inspired to go to law school in her country by L.A. Law or a Canadian undergraduate student more familiar with American legal events and legal terms

51 Where the 1999 ABA Survey, above note 1 at 50, had the legal profession and lawyers at only 14 percent "extremely/very confident," 15 out of the 16 institutions asked about, coming in only above the media, a Canadian survey ranking the professions for trustworthiness had them come in just below journalists, 16 out of 22 professions, ranking only above insurance brokers, real estate agents, publicists, unionists, car salespeople, and politicians. See Leger Marketing, "Profession Barometer Report" (March 2006) at 3, online: www.legermarketing.com/eng/tencan.asp (accessed 28 August 2006). See also Julian V. Roberts, "Public Confidence in Criminal Justice: A Review of Recent Trends" (Report for Public Safety and Emergency Preparedness Canada, November 2004) at 19 (a 2000 measure of trust with 34 percent expressing a "high level of trust" for lawyers, who came in 14 out of 18, the same as journalists, who were put in 15th place; and a 1993 Angus Reid survey registering 11 percent expressing a "great deal of trust" in lawyers, coming in second last of eight select professions, below journalists and above only Politicians). Online: http://www2.pscpc-sppcc.gc.ca/publications/corrections/pdf/200405-2_e.pdf (accessed 28 August 2006).
52 See Lois Gander, Diana Lowe, & Mary Stratton, "The Civil Justice System and the Public: Highlights of the Alberta Project" (2005) 42 Alta. L. Rev. 803 at 809–10. "The rest in the order of most to least important were: lawyer; friends; family members; court administrative staff; court information/kiosk; public legal education pamphlets/booklets; police services; government department; co-workers; the internet; public legal advice telephone line; legal aid society; signs and directions in the courthouse; law library; public legal information session/workshop; radio news/information show; public library; notice boards in the courthouse."
53 Ibid. at 810.
54 See Leonard E. Gross, "The Public: Hates Lawyers: Why Should We Care?" (1999) 29 Seton Hall L. Rev. 1405 at 1418–19; "people's responses to polls are often inconsistent with their conduct" as evidenced by studies which show people reluctant to tell pollsters the truth in order to comply with expected social norms.
55 Ibid. at 1460.
57 Ibid. at 7.
58 Diana Lowe, Naomi Schmold, & Mary Stratton, "Beyond the Headlines, the Role of Print Media in Public Understanding of the Civil Justice System" (Edmonton: Canadian Forum on Civil Justice, 2006) at 6–7, online: http://cfjc-fcjc.org/docs/BeyondTheHeadlines.pdf
59 Ibid. at 7, n. 37 (25 percent sought information from TV dramas but only 39 percent of these said that they gained useful information from them).
60 Ibid. at 7.
than Canadian ones.\textsuperscript{61} "This phenomenon is somewhat akin to knowing the words of the national anthem of another country and not knowing those of one's home nation."\textsuperscript{62}

If it is true that negative images of lawyers arise from American TV news and popular culture, this seems unfair to the Canadian legal system, in which there are arguably fewer reasons to resent lawyers. To identify one of the most obvious differences, juries, while available for civil trials in common law Canada, are unusual and are in fact unavailable in Quebec.\textsuperscript{63} Enormous punitive damages awards in civil cases—the very \textit{raison d'etre} of "going after" defendants with "deep pockets" in so many American films—are also rare in Canada and do not create the same kind of incentive to litigation nor provide what are perceived to be windfalls for lawyers operating on contingency fee arrangements.\textsuperscript{64}

Indeed, the existence of these awards in the United States may be more myth than reality.\textsuperscript{65} In the famous (and widely reported) McDonald's coffee case—in which the plaintiff received $2.7 million in punitive damages for a burn received by hot coffee spilled in her lap—the judge reduced this amount to $480,000.\textsuperscript{66} While the image of "unrestrained litigiousness" probably reinforces the sense Americans have that "the

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\item[\textsuperscript{61}] Peter Bown, "A Study of Lay Knowledge in Canada" (1998) 9 Ind. Int'l & Comp. L. Rev. 121 at 139. "Junior undergraduate students are somewhat capable of distinguishing between Canadian and American legal events and legal terms. They are, however, markedly more familiar with the American legal genre than with the Canadian legal genre." at 135 (this was true despite the fact that the Canadian events "tested" were local ones), at 136 (the legal terms "tested" related to criminal and constitutional law).
\item[\textsuperscript{62}] Ibid. at 141.
\item[\textsuperscript{63}] See Steven Penney, "Mass Torts, Mass Culture: Canadian Mass Tort Law and Hollywood Narrative Film" (2004) 30 Queen's L.J. 205 at 222–23. "When plaintiffs receive massive punitive damages in the United States, the awards are usually made by juries, not judges. In each of the common law provinces in Canada, it is possible to obtain a jury for most civil matters ... But unlike the United States, where civil juries are common, in most Canadian provinces they are extremely rare. Moreover, Canadian courts have the power to bar juries when they believe that the case is too complex for jurors to understand. They often employ this discretion to reject jury trials even in relatively straightforward motor vehicle accident cases."
\item[\textsuperscript{64}] See ibid. at 220–22, on capped non-pecuniary damages and the reluctance to award large punitive damages awards in the absence of intentional wrongdoing.
\item[\textsuperscript{65}] See Marc Galanter, "News from Nowhere: The Debased Debate on Civil Justice" (1993) 71 Denv. U. L. Rev. 77, questioning the myth of the United States as a litigious society with runaway juries making capricious awards to undeserving plaintiffs.
\item[\textsuperscript{66}] See online: http://en.wikipedia.org/wiki/McDonald's_coffee_case (accessed 2 October 2006).
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system is so routinely abused by exaggerated and deceptive claiming that one would be a sucker not to play the game," and one would think that this would be a "self-fulfilling prophecy" leading to over-claiming, it turns out that this is not so.\textsuperscript{67} Certainly, the number of people who are actually compensated—or over-compensated in what is perceived to be a perfectly respectable system of gambling—is much lower than stories like the McDonald's coffee case suggest. Much of this, in other words, is a kind of bravado—rugged individualism reinvented in the image of risk-taking litigiousness—much talked about but in point of fact not frequently followed. "Most Americans," however, will probably continue to think "there is too much claiming."\textsuperscript{68}

In Canada, the decision to sue at all opens a plaintiff to the potential risk of paying a part of the other side's costs if they lose. This creates a disincentive to litigation that does not exist in the United States where, generally, each side pays their own costs.\textsuperscript{69} This makes it easier to at least fantasize in terms of Russian roulette with a more manageable downside—"If I lose, I will only have to cover my own costs." Class actions expressly permitting contingency fee arrangements were made available by legislation in Ontario in 1993.\textsuperscript{70} Contingency fees were approved in Ontario in 2004.\textsuperscript{71} Both of these features will act as an incen-

\begin{itemize}
\item[\textsuperscript{67}] See Marc Galanter, "The Conniving Claimant: Changing Images of Misuse of Legal Remedies" (2000) 50 DePaul L. Rev. 647 at 662. See also at 662–63, reviewing low rates of claiming—with the exception of automobile-related injuries—reported by the Civil Litigation Research Project, the Institute for Civil Justice, a Harvard study of medical malpractice in New York state, and a study by Richard Abel concluding that the tort system actually suffers from a "crisis of underclaiming."
\item[\textsuperscript{68}] Galanter, ibid. at 664, citing various American surveys in which people report thinking that there is too much litigation.
\item[\textsuperscript{69}] See Penney, above note 63 at 218–19: "In the United States, each party generally pays his or her costs regardless of the outcome of the action ... In Canada courts have a broad discretion to award costs in any manner they wish. In practice, they usually award costs on a party-and-party basis. This means that in addition to bearing their own costs, losing parties must also pay a portion of the winner's costs."
\item[\textsuperscript{70}] Class Proceedings Act, 1992, S.O. 1992, c. 6 s. 33(1) (brought into force 1 January 1993) [Ontario Class Proceedings Act]. "Despite the Solicitor's Act and An Act Respecting Champerty ... a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding."
\item[\textsuperscript{71}] See Solicitor's Act, R.S.O. 1990, c. S-15, as am. by S.O. 2003, c. 24, s. 38(1) (brought into force 1 October 2004). "A solicitor may enter into a contingency fee arrangement with a client in accordance with this section."
\end{itemize}
tive to litigation, while at the same time creating more access to justice. It is important to notice, however, that the “loser pays” system still operates, including in class actions.72

Another important point of difference between Canada and the United States is the use of discovery as a pre-trial mechanism. An American attorney would find discovery rules in Ontario significantly more limited than the Federal Rules, reducing the scope for the kind of guerilla tactics frequently depicted in American films (for example, A Civil Action).73 Discovery in Ontario has traditionally been limited to parties. While non-parties may be examined with leave, this does not create a situation where armies of lawyers staff the routine depositions of non-parties (in order to slow things down and increase costs). Examining non-parties (for example, witnesses and experts) is the exception rather than the rule.74 Why is this? The Ontario rules do not share the design rationale of the American Federal Rules, namely, to arm every American lawyer with a subpoena power to uncover corporate and other misdeeds.

[Discovery is the American alternative to the administrative state. We have by means of [the Federal] Rules ... and by their analogues in state law, privatized a great deal of our law enforcement, especially in such fields as antitrust and trade regulation, consumer protection, securities regulation, civil rights, and intellectual property. Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy. Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at

the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered.75

Canada is one of those “other industrial states” with a relatively strong tradition of “administrative bureaucracy” and much less ideological distrust of government regulation. Discovery, specifically, has not been thought about as a basic tool of privatized law enforcement—arm each attorney with a subpoena power so that fear of being sued will deter bad behaviour and encourage good behaviour. Discovery in Canada carries much less of this regulatory freight and so is less likely to become a battleground between those who find discovery too weak a mechanism for protection of the public and those who would be loath to accept more direct regulation of their industry.

Three important features of American legal culture are absent in Canada: (1) the perception (true or false) of out-of-control punitive damage awards resulting in windfalls for greedy lawyers; (2) a pay-your-own-costs rule that exacerbates the fantasies of gambling plaintiffs; and (3) an ambitious discovery system that leaves itself open to charges of abuse in terms of cost and delay. Are these features of the American system that people have in mind when they rate lawyers negatively? If so, then some of that negativity—assuming it were warranted in the American case—would not be justified in Canada.

Some reasons for hating lawyers seem pretty intractable, for example, the association of lawyers with life’s worst moments.76 Similarly, the public role lawyers must play in the criminal justice system (providing a good defence even for the guilty) will always be a source of unpopularity.77 News as entertainment and unbalanced coverage of highly publicized trials showing lawyers who will stop at nothing (for example, Johnny Cochran in the O.J. Simpson case) is news that know no borders.78 They

72 See, for example, Ontario Class Proceedings Act, above note 70, s. 31: “In exercising its discretion with respect to costs under section 35(b) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.” See also Courts of Justice Act, R.S.O. 1990, c. C.43, s. 31 (setting out the discretion of the court as to whom and to what extent costs shall be paid).

73 See Angela Fernandez, “Legal Education & A Civil Action in Canada: (In)visibility of the Courtroom in Film,” prepared for the Chief Justice of Ontario’s Advisory Committee on Professionalism, Sixth Colloquium on the Legal Profession, online: www.lsoc.on.ca/media/site_colloquium_fernandez.pdf (accessed 2 October 2006).


75 Paul D. Carrington, “Renovating Discovery” (1997) 49 Ala. L. Rev. 31 at 54.

76 Asimov, above note 29 at 537: “The general public will always associate lawyers with some of life’s worst moments.” Gross, above note 54 at 1410: “People frequently come into contact with lawyers during stressful events in their lives—debt collections and foreclosures, divorce, and death of loved ones. They naturally associate lawyers with those events.”

77 Ibid. at 536: “lawyers are doomed to be unloved because criminal practice is their most public function ... Most people think that justice means finding the truth regardless of the adversarial system, procedural technicalities, statutory loopholes, police or prosecutorial misconduct, or lawyers’ tricks.”

78 Ibid. at 545.
have their Canadian counterparts, as do the more positive depictions of lawyer "life-styles" in Canadian TV dramas like Street Legal\(^79\) and films that carry a heavy negative punch like The Sweet Hereafter.\(^80\)

Other sources of negativity may become more relevant in Canada. The view that lawyers have excessive incomes, for instance, is an important factor in the United States.\(^81\) This is something we might see more of, given the availability of contingency fees and class actions.\(^82\)

However, other factors do not seem at all relevant to Canada. Particularly striking is the way that "tort reform" became a hot-button conservative issue for the Republican Party in the 1990s in which a public relations campaign was waged against personal injury lawyers and the plaintiff's bar.\(^83\) Of only fleeting Canadian interest, the vilification of lawyers that has been part of this cultural phenomenon has a very specific American political context.\(^84\) Negative messages about
tort litigation in the United States are "disseminated by multi-million dollar campaigns spawned by a minor industry of lobbyists, consultants, think tanks, and 'tort reform' groups whose pronouncements are parroted by politicians and pundits."\(^85\)

Lawyer advertising does have the potential to create negative impressions of the profession in Canada as in the United States.\(^86\) Indeed, the CBA guidelines on this seem very much like the non-binding "aspirational goals" the ABA set out in 1988, focusing on the ideals of dignity and good taste.\(^87\) However, the impression one gets comparing subway advertisements in New York City with the Toronto transit system or billboards on highways around Buffalo with the Gardner Expressway is that advertising practices are more aggressive in the United States, requiring detailed regulation at the state level.\(^88\) "Many different regulations have been enacted by provincial law societies, but their main gist is that the advertising is to be largely informational and non-competitive. Crass commercialism is less likely to be good business in Canada


\(^80\) This is a 1997 movie by Canadian director Atom Egoyan set in upstate New York based on a class action over a school bus accident. See online: http://en.wikipedia.org/wiki/The_Sweet_Hereafter (accessed 18 October 2006).

\(^81\) Asimow, above note 20 at 544: "The astounding fees awarded to plaintiffs' lawyers in the cigarette litigation exacerbate the problem. Many people think that lawyers make far too much money compared to their social contribution. Others believe that lawyers pad their bills."

\(^82\) The recent residential schools cases and what lawyers involved in these stand to make have led to some raised eyebrows. See, for example, "Legal Fees Irk Residential School Claimants" (25 September 2006), online: www.cbc.ca/news/story/2006/09/22/residential-fees.html (accessed 2 October 2006).


\(^86\) Asimow, above note 20 at 547–48: "Television ads, in particular, seem to encourage people to invent phony personal injury claims, waste out of their debts through personal bankruptcy, or escape the consequences of drunk driving. This sort of advertising strikes many people as extremely sleazy."

\(^87\) Commentary on Rule 14 of the CBA Code of Professional Conduct ("Lawyers should make legal services available to the public in an efficient and convenient manner that will command respect and confidence, and by means that are compatible with the integrity, independence and effectiveness of the profession") specifies that lawyer advertisements "must comply with any rules prescribed by the governing body, must be consistent with the public interest, and must not detract from the integrity, independence or effectiveness of the profession. Advertising must not mislead the uninformed or arouse unattainable hopes and expectations, and must not adversely affect the quality of legal services, or be so unqualified or otherwise offensive as to be prejudicial to the interests of the public or the legal profession." Online: www.cba.org/CBA/activities/pdf/codeofconduct06.pdf (accessed 18 October 2006). The 1988 ABA "Aspiration Goals for Lawyer Advertising" is available online: www.abanet.org/cpr/professionalism/abaspirationgoals.html (accessed 18 October 2006).

\(^88\) The ABA Model Rules of Professional Conduct on lawyer advertising (7.1–7.3) were most recently amended in 2002. State rules, which have always varied widely, have been amended or are being reconsidered in light of this. For this overview, see "Lawyer Advertising," online: www.abanet.org/barserv/issues/update Updates/advertising.pdf (accessed 18 October 2006). For a detailed breakdown of comparisons between states, see "Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct" (updated 1 September 2006), online: www.abanet.org/cpr/professionalism/lawyerAd.html (accessed 18 October 2006).
than in the United States. In fact, there is still very little advertising of a substantial or serious kind.89 However, there are some signs that more aggressive advertising is afoot.90

Given the range of sources of negative perceptions of lawyers, it seems likely that much fictional media representation is reflecting reality rather than creating it.91 However, once created, these negative views can certainly be reinforced and deepened in popular culture sources that travel wherever the popular culture travels.92 Lawyer jokes seem to work equally well in both jurisdictions. Jokes depend on shared stereotypes and simple snap judgment heuristics.93 The shared negative view that makes the joke make sense knows no borders. The fact that the Canadian legal profession is "probably" having a crisis of public confidence suggests that whatever differences exist between the two legal cultures, these make little difference with respect to the public's negative perceptions. While popular culture is not the only source of such views, it is important and has likely played a greater role than standard public opinion polls indicate.

E. CONCLUSION

I would highlight three points by way of review. First, opinion polls that directly ask respondents about media influence on their views of the law and the legal profession are unlikely to paint an accurate picture. Second, there is a genuine risk that constant disparagement will affect the morale of members of the profession. Third, although some of the sources of negative views of lawyers have more validity in the United States than in

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89 Allan C. Hutchinson, Legal Ethics and Professional Responsibility, 2d ed. (Toronto: Irwin Law, 2006) at 89.
90 See online: www.taxamnesty.ca/index.htm for an example of a Canadian law firm selling tax amnesty solutions, including the sale of their services promoted on a television show called "Tax TV," which is essentially one long hard-pitched advertisement.
91 Asimow concedes this. See Asimow, above note 20 at 561. "Probably separately, and certainly together, these factors were more powerful than the effect of either film or television in affecting public opinion."
92 Ibid. at 382: "There are many plausible reasons why the public despises our profession, but it's just possible that negative lawyer films of the 1980s and 1990s reinforced and deepened those feelings."

Canada, given the ubiquity of a shared popular culture, effective tackling of these misperceptions presents a considerable challenge.

Given that study after study indicates that a positive individual experience with a lawyer cannot displace the global negative perception, it seems unlikely that efforts to improve the experience that members of the public have with individual members of the profession will actually result in any improvement in the popularity of lawyers. The global negative perception will likely persist—although it could of course get worse if more people start having more negative individual experiences. Adopting measures to maintain and improve quality of services will obviously yield other kinds of important rewards for both lawyers and clients, but are not likely to be rewarded with higher ratings on the opinion polls.

What would probably be most effective would be relatively targeted educational efforts (i) amongst the profession, members of whom might be suffering from some of the same (mis)perceptions as the public at large, but who will have an incentive to listen to details relating to those views, as well as (2) to government and policy makers (lawyers and non-lawyers) who play a role in deciding whether changes to the way that the profession is regulated in Ontario should be made. In such appeals, it ought to be emphasized that if American popular culture is one of the principal causes of lawyer unpopularity in Canada—which it must surely be—and if there are significant differences in the legal cultures of the two countries—as there do seem to be—that unpopularity must be taken with a grain of salt.

While lawyer unpopularity may be unpleasant for lawyers—and members of the profession might take some consolation in the fallibilities inherent in the Barometric instruments identified here—from the point of view of the public, the more important issue is the quality of the legal services they are receiving. Given this mismatch between this and the levels of unpopularity the polls show, combined with the plethora of problems that plague the opinion polls themselves, regulators should be told that the focus should be on what kind of job lawyers are actually doing, not what the public—seeing them through the distorted lens of American popular culture—may be willing (or unwilling) to give them credit for.