

# ESSAY

## PROFESSIONALISM IN PERSPECTIVE: ALTERNATIVE APPROACHES TO NONLAWYER PRACTICE

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### INTRODUCTION

No issue is more central to the contemporary American legal profession than how to define itself as a profession: who's in, who's out, and why. The recent report of the American Bar Association's Commission on Nonlawyer Practice places these questions in sharper focus. Although the report offers a thorough and thoughtful analysis of the policy considerations at stake, its ultimate recommendation is disappointing. For the ABA Commission, the bottom line is that somebody else should do something. More specifically, the report recommends that "each state should conduct its own careful analytical examination, under the leadership of its highest court, to determine whether and how to regulate . . . nonlawyer activity . . ." <sup>1</sup> In making that determination, states should consider the need both to increase access to legal services and to protect consumers from unqualified and unethical practitioners. <sup>2</sup>

From the perspective of bar politics, this deferral of responsibility to states is scarcely surprising. Lay competition is an increasingly divisive issue in an increasingly divided profession. But from the perspective of public policy making, the result leaves much to be desired. Many experts hoped for a stronger, more specific call for reform. My own reaction is a bit like the response of a weary New England farmer when neighbors asked whether his livestock had brought a good price: "Well, I didn't get what I thought I would but then I knew I wouldn't."

This essay explores the contributions and limitations of recent bar debates over nonlawyer practice. Part I highlights the stakes in these debates from a personal perspective. My involvement with questions of nonlawyer

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1. COMMISSION ON NONLAWYER PRACTICE, AMERICAN BAR ASSOCIATION, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS, A REPORT WITH RECOMMENDATIONS 4 (Aug. 1995) [hereinafter COMMISSION ON NONLAWYER PRACTICE].

2. *Id.* at 3-8.

competition now spans two decades, and the new ABA report raises concerns that have long been central to my work.<sup>3</sup> Part II reviews the ABA Commission's findings and the obstacles that its recommendations are encountering. Part III addresses the public interest in nonlawyer practice, and Part IV offers an alternative regulatory framework. Like the ABA Commission, I conclude that somebody else should do something. Unlike the Commission, however, I try to be specific about who and what.

## I.

To understand the values at stake in this area, a bit of personal history may be useful. My story, which is still relevant for current professionalism debates, began during the mid 1970s with a controversy over access to legal services. I was then a law student intern in a New Haven legal aid office that was overwhelmed with routine divorce cases. The family law unit's floodgate strategy was to accept new cases only one day a month. If you were a poor person in New Haven and you did not show up on that day, you did not get a legal aid lawyer, nor did you have any decent alternative. For a routine uncontested divorce, attorneys in private practice charged a minimum of \$500 to \$750 (roughly \$1500 - \$2200 in current dollars).<sup>4</sup> At that time, there were no do-it-yourself kits for local *pro se* litigants. At least not until my office decided to put one together.

No fault divorces in Connecticut have never been particularly complicated. In the mid 1970s, the procedure required several standardized forms and a hearing that lasted an average of four minutes. During that proceeding, a distinctly overqualified judge glanced at the forms and listened to a stock script about the parties' marriage and its irretrievable breakdown.<sup>5</sup>

To address some of the unmet need for legal services, the New Haven legal aid office prepared a do-it-yourself kit for divorce petitioners. Local bar association officials then threatened to file charges of unauthorized practice of law. "Can they win?" was the question that the office's family law attorney asked me to research. The answer then was "very possibly." Several courts had concluded that the distribution of kits constituted unlicensed practice and virtually every reported decision enjoined form-preparation services that provided any advice to customers.<sup>6</sup>

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3. See Ralph C. Cavanagh & Deborah L. Rhode, *Project, The Unauthorized Practice of Law & Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976) [hereinafter Cavanagh & Rhode]; Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990) [hereinafter Rhode, *Delivery*]; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) [hereinafter Rhode, *Policing*].

4. See Cavanagh & Rhode, *supra* note 3, at 154 (noting that 84.4% of clients interviewed for their study paid at least \$500 for their divorces).

5. *Id.* at 123-29 (describing the Connecticut procedure).

6. *Id.* at 109-11, 167-68, Appendix 1 (detailing the organized Bar's efforts to defeat do-it-yourself divorce kits).

That ended that as far as the legal services office was concerned. Its lawyers were not willing to tangle with the bar on an issue where they were not on strong legal footing. Moreover, most of our targeted kit users had limited education and needed some oral assistance. Yet while the legal aid office was prepared to leave the issue behind, I was not. As a fledgling law student with idealism still intact, I was outraged by both the reasoning and the results of prevailing case law.

Although courts and bar associations maintained that their sole concern was protecting the public, their focus in reported decisions seemed poorly suited to that end.<sup>7</sup> Virtually all of the cases enjoining nonlawyer practice rested on unsupported empirical claims about the potential harm to consumers receiving any lay assistance. Yet none of these decisions offered any evidence of significant injury. Nor did they acknowledge the social costs of lawyers' monopoly, particularly for low-income consumers who could neither afford an attorney nor proceed without some legal assistance.

In an effort to reframe the unauthorized practice debate, a classmate and I decided to investigate the bar's empirical claims about the dangers of nonlawyer practice. One thing led to another, and we ended up spending much of our remaining years in law school reading divorce files, tabulating lawyer questionnaires, and interviewing divorce clients. We also were able to review the experiences of kit users, because a local women's center had begun distributing self-help materials. When the bar threatened to file charges of unauthorized practice against the center, its organizers' response was, in essence, "Go right ahead. If you win damages, you can collect the coffee pot."

The results of our study ended up in the *Yale Law Journal*. To make a long article very short, we found no convincing justification for prevailing unauthorized practice prohibitions. Many individuals who retained lawyers were paying large sums for routine work that could readily have been done (and often was done) by nonlawyer assistants without substantial supervision. Attorneys made as many errors in form preparation as litigants proceeding on their own and such errors were easily corrected. Most clients resolved the substantive issues regarding property, child support, and custody without significant assistance from their lawyers, and four-fifths received no tax advice.<sup>8</sup> In short, the contribution of attorneys was not so essential as to justify banning alternatives.

This research left me with a sense that there was more to be said about lay competition—a conviction I have yet to lose. Throughout the last fifteen years, I have pursued issues of nonlawyer practice, periodically in print.<sup>9</sup> The basic message of this work, summarized in Part III, is that the current breadth of unauthorized practice prohibitions ill serves the public

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7. See *id.* at 113-14, and sources cited therein.

8. *Id.* at 137-153.

9. See *supra* note 3.

interest. This message is consistent with most evidence reviewed by the ABA Commission. The question now remaining is whether the bar is prepared to acknowledge the need for change and to become a constructive participant in the reform process.

## II.

The last twenty years have witnessed a dramatic increase in nonlawyer competition and a corresponding decline in lawyers' capacity to restrain it. As the ABA Commission notes, this development reflects several interrelated factors:

(1) the difficulty in defining the terms 'practice of law' and 'legal advice'; (2) the ability of nonlawyer businesses to fill the vacuum of unmet legal and law-related needs; (3) the insistence by the public on . . . [nonlawyer alternatives] with increasing support from legislatures and courts; and (4) constantly evolving technology that has greatly expanded the opportunities for nonlawyer businesses to deliver services directly to the public.<sup>10</sup>

William Fry, director of Americans for Legal Reform (HALT), puts the point more starkly:

The bar has lost control of routine information about the law. Software off the shelf can draw a will, apply for a patent . . . or complete a bankruptcy petition. Computer help screens explain the issues and give advice—in several languages and through talking heads. In the public forum of the computer bulletin board, American lawyers and lay people swap questions and answers about the law.<sup>11</sup>

While advancing technology has increased lawyers' ability to provide cost-effective services, it has also increased competition from nonlawyer alternatives. Because prevailing doctrine no longer bans publication of self-help materials or provision of typing services, more consumers are bypassing attorneys for routine legal assistance. So too, although states generally prohibit personalized legal advice from nonlawyer providers, such prohibitions have proven difficult to enforce.<sup>12</sup>

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10. COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 43.

11. William R. Fry, *Yes: Monopolizing the Market Serves No One*, in *Practicing Law Without a License*, A.B.A. J., Jan. 1995, at 36 [hereinafter *Practicing Law*]; see generally Christopher James, *Software and Hard Choices*, 52 OR. STATE BAR BULL. 15 (1992) (discussing the benefits and problems of interactive legal software and a potential licensing system for such services).

12. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5; CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* §2.2.3, at 23-31 (1986); see also Rhode, *Delivery*, *supra* note 3, at 211; COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 60-72 (focusing on the efforts of several states in enforcing prohibitions on the unauthorized practice of law); Ryan J. Talamante, *We Can't All Be Lawyers . . . Or Can We? Regulating the Unauthorized Practice*

Like almost all state task forces that have reviewed the issue, the ABA Commission recommended that the bar rethink its traditional resistance to this lay competition. Among experts, the general consensus is that the profession should instead support regulatory structures that make the public interest paramount in fact as well as in principle. Yet neither the ABA Commission nor its state counterparts have acknowledged the political obstacles to achieving such regulatory reform. Those obstacles will remain so long as lawyers have control over the reform process and are resistant to giving up their monopoly.

The ultimate recommendation of the ABA Commission is that state courts should "take the lead" in reassessing nonlawyer activities, with the "active support and participation of the bar and the public."<sup>13</sup> In particular, states should consider whether specific nonlawyer activities present a significant risk of harm to the public, whether consumers can evaluate those risks in considering providers' qualifications, and whether regulation of those activities will serve the public interest.<sup>14</sup> This is fine as far it goes, but it fails to tell us how to get from here to there. State courts generally have refused to take the lead in regulatory reform. Progressive proposals typically have come from legislatures or from task forces responding to legislative pressure.<sup>15</sup>

Where bar organizations have participated actively in the reform process, they almost always have resisted the kind of liberalization that expert task forces and commissions have recommended.<sup>16</sup> Over the last half-century, state bars repeatedly have fought publication of self-help law books; opposed introduction of standardized forms; prevented court clerks from providing routine legal assistance; shut down form preparation services; and blocked licensing systems for nonlawyer practitioners.<sup>17</sup> In recent polls, over 85% of lawyers support the prosecution of independent paralegals who give legal advice or prepare legal documents.<sup>18</sup>

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*of Law in Arizona*, 34 ARIZ. L. REV. 873, 886-90 (1992) (reviewing Arizona's problems with enforcing bans on the unauthorized practice of law).

13. COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 11-12.

14. *Id.*

15. See COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 60-72 (discussing legislative attempts to establish regulatory schemes for nonlawyer practice); Rhode, *Delivery*, *supra* note 3, at 213-14, 225-26 (discussing the current trend toward easing restrictions on lay competition).

16. COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 60-72; STATE BAR OF CALIFORNIA COMMISSION ON LEGAL TECHNICIANS REPORT 5 (July 1990) [hereinafter STATE BAR COMMISSION REPORT]; Kathleen Eleanor Justice, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 193-97 (1991); Rhode, *Delivery*, *supra* note 3, at 213-14, 222-28.

17. Fry, *supra* note 11, at 36.

18. James Podgers, *Legal Profession Faces Rising Tide of Non-Lawyer Practice*, A.B.A. J., Dec. 1993, at 51, 56.

The bar's traditional attitude is well-captured in the ABA Commission's two minority reports. Four members of the Commission, representing various sections of the ABA, took issue with any inference that the goal of insuring access to legal services should be "given greater weight than the goal of the protection of the public from . . . unskilled or unethical providers."<sup>19</sup> In the dissenters' view, "once the door of access is opened wider, we must anticipate the dangers to the public that could lurk in the darkness behind that door."<sup>20</sup>

My sense, after twenty years of observing this debate, is that the main danger lurking in the shadows is the bar's own interest in restricting competition. No professional group, no matter how well-intentioned, can make disinterested assessments of the public welfare on an issue where its status and livelihood are so directly implicated. For many lawyers, the rise in lay competition carries obvious risks. Americans spend an estimated two billion dollars annually on routine legal problems that nonlawyer specialists and self-help technology can often resolve.<sup>21</sup> The stakes for the profession are not only economic. The clearer it becomes that nonlawyers can effectively perform legal tasks, the more difficult it becomes for lawyers to claim special status and to justify regulatory autonomy.

Yet, what complicates this controversy and offers hope about its future direction is that a growing number of lawyers have little to lose and something to gain from the liberalization of unauthorized practice rules. As many bar leaders acknowledge, lawyers' efforts to restrict nonlawyers looks

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19. Ernest Y. Sevier & Raymond J. Werner, *Minority Report in COMMISSION ON NONLAWYER PRACTICE*, *supra* note 1, at 163 [hereinafter *Minority Report of Sevier & Werner*]; see also Walter J. Russell & C. Terrence Kapp, *Minority Report, in COMMISSION ON NONLAWYER PRACTICE*, *supra* note 1, at 167 (concurring with the views expressed by Sevier and Werner and furthermore stating that the ABA recommendation on access is without substance) [hereinafter *Minority Report of Russell & Kapp*]; Comments by Walter H. Beckham, III, Chair, ABA Section on Tort and Insurance Practice, on *NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS—A REPORT WITH RECOMMENDATIONS* (Dec. 13, 1995) (compiled by the ABA Center on Professional Responsibility) (expressing concern that the ABA Commission had not placed sufficient emphasis on the need to protect consumers from unauthorized practice); Comments by Joseph G. Hodges, Colorado Bar Association Nonlawyer Task Force Commission, on *NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS—A REPORT WITH RECOMMENDATIONS* (Jan. 16, 1996) (compiled by the ABA Center on Professional Responsibility) (supporting minority report of Sevier and Werner); Comments by Arthur L. Piccone, Pennsylvania Bar Association, on *NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS—A REPORT WITH RECOMMENDATIONS* (Jan. 24, 1996) (compiled by the ABA Center on Professional Responsibility) (supporting minority reports).

20. *Minority Report of Sevier & Werner*, *supra* note 19, at 164-65.

21. Maria Shao, *Perry Mason They're Not*, *BUSINESS WEEK*, Nov. 20, 1989, at 83. See also Comments by John W. Clark, Jr., Chair, ABA General Practice Section, on *NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS—A REPORT WITH RECOMMENDATIONS* (Dec. 14, 1995) (compiled by the ABA Center on Professional Responsibility) (expressing concern that liberalization of rules on unauthorized practice "would cut deeply into the basic 'bread and butter' practice of sole and small firm lawyers").

like “feather bedding” and erodes public trust.<sup>22</sup> Where such efforts are successful, they also increase unmet legal needs and heighten pressure for measures that many attorneys find even more threatening than lay practice—measures such as mandatory *pro bono* service or procedural simplification. For lawyers who do not compete directly with nonlawyer services, reforming unauthorized practice rules could be a relatively painless way of expanding access to legal services.

Lay competition is becoming an increasingly controversial issue because it arises in an increasingly diverse professional community. At issue are competing concerns of occupational status, public image, economic advantage, consumer protection, and access to justice. Lawyers in different practice settings have different perspectives on how such interests should be accommodated.<sup>23</sup> Yet, if the bar takes the long view, most of its concerns point in the same general direction. As the remainder of this essay suggests, none of the common arguments against nonlawyer practice can justify the current regulatory structure. Change is inevitable, and the bar’s best interest ultimately lies in constructively assisting the process, not in trying to prevent it.

### III.

If, as the ABA Commission and other bar leaders consistently maintain, our primary goal in regulating nonlawyer practice is to serve the public interest, then three considerations become critical. What are the risks and benefits of lay competition in the legal services market? What is the best way to minimize these risks? Who should make such decisions?

These are not, however, the questions that traditionally have dominated the debate over unauthorized practice. Rather, courts and bar enforcement agencies typically have focused on whether nonlawyers are providing assistance that calls for legal skills.<sup>24</sup> The underlying assumption is that prohibiting such lay assistance shields consumers from incompetent or unethical services. But the risks to consumers often are asserted rather than demonstrated, and the potential benefits are overlooked.

According to the American Bar Association’s Model Rules of Professional Conduct, what constitutes unauthorized practice of law varies by jurisdiction. Yet, “[w]hatever the definition, limiting the practice of law to

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22. Statement of the Tennessee Board of Professional Responsibility 1992, *quoted in* COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 31; Jim Calle, *Bar Seeks to Protect Public with Non-Lawyer Practice Rules*, ARIZONA ATTORNEY, Mar. 1994, at 10, 14; *see also* COMMISSION ON PROFESSIONALISM, AMERICAN BAR ASSOCIATION, “. . . IN THE SPIRIT OF PUBLIC SERVICE”: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (Aug. 1986), *reprinted in* 112 F.R.D. 243 (1987); Michael F. Brockmeyer & A. Bradley Parkham, *Client Protection: Enforcing the Unauthorized Practice of Law*, MD. B. J., Jan./Feb. 1991, at 18, 20.

23. Geoffrey S. Yuda, *A Piece of Your Business*, PENN LAWYER, May 1993, at 6, 8.

24. Rhode, *Policing*, *supra* note 3, at 45-48; WOLFRAM, *supra* note 12, at § 15.1.3.

members of the bar protects the public against rendition of legal services by unqualified persons."<sup>25</sup> Similar themes run throughout much of the relevant caselaw and bar commentary. Opponents of increased competition never lack examples of nonlawyer providers who have offered negligent advice, failed to complete essential services, or fraudulently misrepresented themselves as attorneys.<sup>26</sup>

Although it is clear that such abuses do occur, this should not be the only relevant consideration. In evaluating the public interest, we need to know not just whether consumer problems arise, but also how often, and compared to what? We also need to know how well the current system responds to nonlawyer abuses and at what cost. Can low-income individuals realistically afford attorneys? Is lawyers' performance sufficiently superior to lay practitioners' in all context to justify compelling the additional expense? Are unauthorized practice prohibitions well tailored to address only cases of consumer injury? Are enforcement structures adequate to deter and remedy abuses?

All too often, opponents of lay competition finesse these questions by relying on unsupported or anecdotal assertions. The following claim in the 1995 ABA Journal is typical:

The experience of unauthorized-practice-of-law commissions, committees and task forces nationwide teaches that, among these wanna-be attorneys, there are far too many unscrupulous "practitioners" who misrepresent their abilities and take money under false pretenses from those who can ill afford it. As lawyers who have served on these committees, we can personally attest to many such instances.<sup>27</sup>

However, opponents of lay competition overlook the fact that far too many attorneys commit the same abuses, as studies of bar disciplinary systems attest.<sup>28</sup> The more relevant issues are whether the risk of harm is substantially greater among lay practitioners than lawyers; whether consumers are

25. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 cmt. (1984).

26. COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 126; *Bar Protects Consumers from Unauthorized Practice of Law*, MICH. LAW. WKLY., Apr. 10, 1995, at 30; L. Bruce Ables, *Unauthorized Practice of Law*, ALA. L., Sept. 1995, at 288-90; Hon. A. Jay Cristol, *The Nonlawyer Provider of Bankruptcy Legal Services: Angel or Vulture?*, 2 AM. BANK. INST. L. REV. 353 (1994); Robert L. Ostertag, *Nonlawyers Should Not Practice*, A.B.A. J., May 1996, at 116; Yuda, *supra* note 23, at 6-8.

27. F.M. Apicella, John H. Hallbauer & Robert H. Gillespy, II, *No: Keeping High Standards Protects the Public*, in *Practicing Law*, *supra* note 11, at 37; *see also* Ables, *supra* note 26, at 288-90 (recounting instances of "rampant unauthorized practice of law" in Alabama); Ostertag, *supra* note 26, at 116 (recalling that "[h]ardly a day passed without another horror story" of lay incompetence, while the author chaired his state bar's unauthorized practice of law committee.)

28. *See generally* REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASSOCIATION (1992) [hereinafter COMMISSION ON DISCIPLINARY ENFORCEMENT]; *see also* DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 849-63 (1995) and sources cited therein.



able to gauge that risk; and whether categorical prohibitions on all nonlawyer services are the best response.

Systematic research on these questions is limited, but the evidence available paints a far more complicated picture of nonlawyer practice than bar opponents acknowledge. Lay practitioners are a highly diverse group. Some, like accountants, insurance representatives, and real estate brokers, are already subject to licensing requirements, and many cannot avoid giving advice that implicates legal issues. Other lay providers are former paralegals or specialists in areas like administrative agency representation, where they have considerable experience with routine matters. The only comparative research to date on these practitioners, in contexts such as pro se divorce and agency proceedings, finds that nonlawyer specialists perform about as effectively as lawyers.<sup>29</sup> Moreover, in the only reported survey on consumer satisfaction, lay practitioners rate higher than attorneys.<sup>30</sup>

These findings should come as no surprise. Three years in law school and passage of a bar exam is neither necessary nor sufficient to ensure competence in areas where lay provision of services is common. Schools do not generally teach, and bar exams do not test, ability to complete routine forms for divorces, landlord-tenant disputes, bankruptcy, immigration, welfare claims, tax preparation, and real estate transactions.<sup>31</sup> For many of these needs, retaining lawyers is like hiring "a surgeon to pierce an ear."<sup>32</sup> Attorneys who do specialize in these fields often delegate form preparation tasks to paralegals or secretaries, who receive minimal supervision.<sup>33</sup> When these nonlawyers branch out on their own, they can often provide

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29. See RECOMMENDATION 86-1, NONLAWYER ASSISTANCE AND REPRESENTATION, 1 C.F.R. § 305.86-1 (1986), reprinted in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 3 (1986) [hereinafter RECOMMENDATIONS AND REPORTS]; Zona Fairbanks Hostetler, *Nonlawyer Assistance to Individuals in Federal Mass Justice Agencies: The Need for Improved Guidelines*, in RECOMMENDATIONS AND REPORTS, *supra* this note, at 51 (concluding that individuals represented by nonlawyers at administrative hearings achieve results only slightly less favorable than those represented by lawyers). See also sources cited in Rhode, *Delivery*, *supra* note 3, at 230 n.164.

30. STATE BAR COMMISSION REPORT, *supra* note 16, at 41. See also sources cited in Rhode, *Delivery*, *supra* note 3, at 231 n.165; Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 FAM. L.Q. 407, 418 (1994).

31. One survey of Chicago practitioners revealed that only 11% had "learned . . . how to draft documents in law school." FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 123-28 (1981). See, e.g., Hon. Geraldine Mund, *Paralegals: The Good, the Bad and the Ugly*, 2 AM. BANKR. INST. L. REV. 337, 340 (1994) (noting that law school courses do not typically teach the skills necessary for routine bankruptcies).

32. Hal Lancaster, *Rating Lawyers: If Your Legal Problems Are Complex, a Clinic May Not Be the Answer*, WALL ST. J., July 31, 1980, at 1, 8 (quoting Robert Ellickson).

33. COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 54-55; see also Mund, *supra* note 31, at 338 (arguing that economic concerns necessitate delegating form preparation to nonlawyers).

comparable services at lower costs.<sup>34</sup> In many other industrialized countries, such specialists provide legal assistance without the significant injuries that opponents to lay practice assert.<sup>35</sup>

This is not, of course, to deny that some problems do result from unqualified and unethical lay practitioners. Nonattorneys sometimes misrepresent their status. Others, including disbarred attorneys, have extended histories of fraudulent conduct, and many prey on particularly vulnerable groups. Immigrants are the most common targets, not only because they often are unfamiliar with American legal norms and with the role of non-lawyer providers, but also because they are unlikely to contact law enforcement agencies or seek civil remedies for abuses.<sup>36</sup> Bankruptcy is another area where unsophisticated consumers too often pay fees they can ill afford for services that confer no benefit.<sup>37</sup> In contexts where consumers lack adequate information and remedies, the danger is that an unregulated market will encourage a race to the bottom. The most competent service providers lose out if unsophisticated consumers make decisions based largely on price, which is comparatively easy to judge, rather than on quality, which is far more difficult to assess at the time of purchase.<sup>38</sup>

Yet as these examples suggest, if consumer protection is our true objective, the current system is poorly designed to achieve it. Unauthorized practice doctrine generally focuses on whether lay providers are performing a legal task, not whether they are doing so effectively.<sup>39</sup> The overly

34. COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 53-54.

35. See Richard L. Abel, *Comparative Sociology of Legal Professions: An Exploratory Essay*, 1985 AM. B. FOUND. RES. J. 1, 29 (noting that only in the United States and Canada do lawyers claim an exclusive right to give legal advice); Michael Zander, Lecture at the London School of Economics, Access to Justice—Toward the 21st Century 5-6 (July 11, 1995) (transcript on file with *New York University Review of Law & Social Change*) (noting effective performance of Citizen Advice Bureaus staffed predominantly with nonlawyer volunteers).

36. See COMMISSION ON NONLAWYER PRACTICE, AMERICAN BAR ASSOCIATION, NON-LAWYER PRACTICE IN THE UNITED STATES: SUMMARY OF THE FACTUAL RECORD BEFORE THE COMMISSION 18-19 (April 1994) [hereinafter FACTUAL RECORD] (discussing testimony that inaccurate counseling provided by legal technicians in the area of immigration can lead to severe hardship); Alexandra A. Ashbrook, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, 5 GEO. J. LEG. ETHICS 237, 249-51 (1991) (summarizing three barriers to ethical immigrant representation: immigrants' cultural differences, their uncertain legal status, and the fact that legal service providers are often aliens themselves and ill-versed in English and/or legal practice); Rhode, *Delivery*, *supra* note 3, at 231-32.

37. Cristol, *supra* note 26, at 353-58; Mund, *supra* note 31, at 348-49.

38. Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE WESTERN RES. L. REV. 531, 545-46 (1994); Munroe, *Deregulation of the Practice of Law: Placenta or Placebo?*, 42 HASTINGS L. J. 203, 238-40 (1990). For a general account of these market imperfections, see George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970). For a discussion of heightened consumer orientation in the market for legal services, see Burnele V. Powell, *Open Doors, Open Arms, and Substantially Open Records: Consumerism Takes Hold in the Legal Profession*, 28 VAL. U. L. REV. 709 (1994).

39. See examples discussed in Rhode, *Policing*, *supra* note 3, at 45-48.

broad reach of these prohibitions, together with strong consumer demand for low-cost services, means that most lay practice goes unregulated. When abuses do occur, consumers have inadequate remedies. The absence of malpractice insurance, client security funds, or affordable claims procedures make effective recourse difficult. These remedial problems are greatest for poor, uneducated, and non-English speaking clients who are least able to bear the costs.<sup>40</sup>

However, the most effective response to these problems is regulation, not prohibition. Consumers need a system that offers remedies without foreclosing choice. But choice is precisely what is missing in most arguments against nonlawyer practice. Seldom do opponents consider the issue that most experts find central: whether consumers are able to assess a provider's qualifications and to make their own cost-benefit tradeoffs.<sup>41</sup> Rather, bar opponents of lay practice typically assume that more is always better when it comes to credentials. Two of the dissenters to the ABA Commission report were exceptionally explicit on this point. As they noted, some testimony before the Commission indicated that lawyers' fees for a simple will involving no tax advice seldom exceeded \$125. To the dissenters, the question then became: "How does this compare with the cost to a family of four attending a sporting event with the attendant charges for parking, souvenirs, tickets and food? Or how does the cost compare for the same family to spend the day at an amusement park?"<sup>42</sup>

The question is obviously meant to be rhetorical, but I doubt that all Americans would find the answer self-evident. Many would probably view the dissenters' comparison as beside the point. For the average family, the more relevant fact appears in other testimony before the Commission. According to that evidence, nonlawyers often draft routine wills with equal competence at lower prices than lawyers. For the same total cost, a family might decide to draft their own will, with lay assistance, *and* spend half a day at the amusement park. The real question is not whether people are better off with more lawyers' services and fewer sports souvenirs, but rather who should decide. Why should it be the organized bar? And why isn't *that* question rhetorical?

Moreover, millions of consumers cannot pay lawyers' bills without real sacrifice; legal fees compete not just with amusement parks, but also with far more basic needs. About forty million Americans have incomes below

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40. Ashbrook, *supra* note 36, at 250-51; John H. L'Estrange, Jr. & William R. Nevitt, Jr., *The Participation of Unlicensed Advocates in California in the Resolution of Disputes Between Investors and Stockbrokers*, 31 CAL. W. L. REV. 73, 95-98 (1994).

41. John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1053 (1982); COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 57-60; Jon Stubenvoll, *Let the Consumer Choose*, OR. ST. B. BULL., July 1992, at 21, 23. See also *supra* note 4 and accompanying text.

42. *Minority Report of Russell & Kapp*, *supra* note 19, at 168.

the poverty line and another large group live just above it.<sup>43</sup> When faced with more urgent priorities, many individuals forego legal services altogether. According to most studies, close to three quarters of the legal needs of low income individuals remain unmet, as do about sixty percent of the needs of middle-income households.<sup>44</sup> Drastic reductions in federal funds for legal services funding are making a bad situation considerably worse.<sup>45</sup> Denver legal aid lawyer Jonathan Asher is undoubtedly correct that “[t]he only thing less popular than a poor person these days is a poor person with a lawyer.”<sup>46</sup>

Yet opponents of lay practice often deny or discount the urgency of these needs. For example, Thomas Curtin, the President of the New Jersey bar, is organizing opposition to nonlawyer practice and sees no reason for concern about access to justice. In his view, “If there is [legal] work to be done[,] we have lawyers to do the work.”<sup>47</sup> At what cost is a question he and other commentators leave discretely unaddressed.

Opponents of lay practice similarly fail to acknowledge the public interest in increased competition. Bar commentators who address the issue typically maintain that competent nonlawyer providers will end up charging close to the same fees as lawyers, particularly if some adequate licensing structure is in place. Opponents further assume that this convergence in prices will wipe out any advantages to the consumer.<sup>48</sup> However, evidence indicates that, where fee differentials have narrowed, it is because attorneys have been forced to deliver more cost-effective services in order to compete with nonlawyer service providers. If, in fact, many Americans

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43. UNITED STATES BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS 60-188, Table 744 (1993); Robert Pear, *A Proposed Definition of Poverty May Raise Number of U.S. Poor*, N. Y. TIMES, Apr. 30, 1995, at 1.

44. ROY W. REESE & CAROLYN A. ELDRED, INSTITUTE FOR SURVEY RESEARCH, TEMPLE UNIVERSITY FOR CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, AMERICAN BAR ASSOCIATION, LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 7-30 (1994). See also the studies reviewed in the COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 35; RHODE & LUBAN, *supra* note 28, at 805; Yegge, *supra* note 30, at 407-08.

45. Steven A. Nissen, *Should Congress Pull the Plug on the Legal Services Corp.?*, L.A. TIMES, Nov. 29, 1995, at 139; Henry Weinstein, *Great Society's Legal Aid for Poor Targeted by Budget Ax*, L.A. TIMES, Dec. 29, 1995, at A1, A3.

46. Brian Sullivan, Chris Zombory & Kali Subins, *So They Say*, A.B.A. J., Nov. 1995, at 37 (quoting Jonathan Asher).

47. Podgers, *supra* note 18, at 54 (quoting Thomas R. Curtin); *Nonlawyer Practice*, PROFESSIONAL LAWYER, Aug. 1994, at 28 (quoting Curtin's concerns about creating a structure of “Lawyer Life”). Other commentators agree that unmet needs should be met through underemployed lawyers. Ostertag, *supra* note 26, at 116; Comments by William H. Brooks, Chair, ABA Standing Committee on Group and Prepaid Legal Services, on NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS—A REPORT WITH RECOMMENDATIONS (Dec. 15, 1995) (compiled by the ABA Center on Professional Responsibility); Apicella, Hallbauer, & Gillespy, *supra* note 27, at 37.

48. COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 141-42. *But see id.* at 141 n. 463 (finding no “useful method for actually estimating the economic impact of regulatory systems on prices”).

can now get lawyers to draft routine wills for \$125, the reason has much to do with increased nonlawyer alternatives. Attorneys' average fees for uncontested divorces in Connecticut are now substantially lower, controlling for inflation, than they were in 1974.<sup>49</sup> The main explanation involves the rise in lay competition, and consumers unquestionably have benefitted from the result.

Nonlawyer practice has served the public in other ways as well. Testimony before the ABA Commission made clear that cost is not the only reason people turn to lay practitioners. In many communities, the Commission noted,

there appear to be few, if any, lawyers experienced or willing to handle certain types of cases—for example, those of handicapped children seeking alternative school placements, battered women seeking temporary protective orders, claimants challenging denial of disability and unemployment claims and cases . . . which often carry very low statutory fee limitations. . . . [Additionally,] too many lawyers are fluent only in the English language.<sup>50</sup>

Some individuals are also put off by lawyers' insensitive treatment. Chronic complaints include attorneys' failure to respond promptly to requests for information, their unwillingness to clarify or document billing arrangements, and their failure to prepare adequately for meetings or adjudicative proceedings.<sup>51</sup> A profession that is in fact committed to public service should try to learn from its competitors, not suppress them. Non-lawyer providers are flourishing because of inadequacies in lawyers' services. It is these deficiencies, not competition itself, that should be the focus of the bar's concern.

#### IV.

A framework for regulating legal services that truly made public interests paramount would build on two central principles. First, it would seek more effective ways to reduce the costs of legal services and the obstacles to self-representation. Second, it would construct regulatory structures that better accommodate consumer protection and consumer choice.

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49. Compare the prices of \$1,500 to \$2,000 in current dollars cited in the text accompanying note 4 with the prices quoted to Professor Stephen Wizner, Yale Law School, clustering between \$600 and \$1,000, in Spring 1996. Telephone Interview with Stephen Wizner (Mar. 6, 1996).

50. COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 81 (citing Thomas D. Morgan, Remarks at the A.B.A. National Conference on Professional Responsibility, Naples, Fla. (May 28, 1994) (discussing the need for multi-lingual lawyers)).

51. *Id.* at 34; FACTUAL RECORD, *supra* note 36, at 6-7. For further discussion of such complaints, see sources cited in RHODE & LUBAN, *supra* note 28, at 858-63; CITY OF NEW YORK DEPARTMENT OF CONSUMER AFFAIRS, WOMEN IN DIVORCE: LAWYERS, ETHICS, FEES, AND FAIRNESS 1-3 (1992) (detailing billing abuses in divorce cases); COMMISSION ON DISCIPLINARY ENFORCEMENT, *supra* note 28, at 9-11 (discussing fee disputes).

Recent legislative and judicial initiatives offer useful guidance for reducing the expense and necessity of legal assistance. Simplifying procedures, standardizing forms, and eliminating burdensome personal appearances are all steps in the right direction.<sup>52</sup> So too, some courts and bar associations have developed effective strategies for assisting *pro se* litigants, such as *pro bono* lawyer-staffed clinics, courthouse facilitators, telephone hotlines, interactive videos, and computer kiosks that generate ready-to-file forms.<sup>53</sup> Organizations such as the American Association of Retired Persons also have established toll-free telephone services that provide advice and referrals to members.<sup>54</sup> The experience of other countries also suggests possible innovations. For example, in Great Britain, neighborhood Citizens Advice Bureaus rely on trained lay volunteers to assist individuals with several million legal problems annually.<sup>55</sup>

States should revise rules on nonlawyer practice. For occupations that are already subject to licensing requirements, it is time to recognize reality and eliminate prohibitions on the unauthorized practice of law. Groups such as accountants, real estate brokers, and insurance agents cannot help but provide law-related services, and no evidence suggests that these practitioners' work has been less satisfactory than lawyers'.<sup>56</sup> For currently unlicensed practitioners, states should devise regulatory structures that balance the public interest in maximizing choice and minimizing harm.

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52. COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 112; *Form Pleadings Expected to Assist Pro Se Litigants at Superior Court*, D.C. B. REP. Feb./Mar. 1995, at 1; Yegge, *supra* note 30, at 418.

53. COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 104-08; Scarlett Caminiti, *Going Pro-Se is Getting Easier*, in HALT, THE LEGAL REFORMER, Apr./June 1995, at 6, 7; Louise B. Trubek, *The Worst of Times . . . and the Best of Times: Lawyering for Poor Clients Today*, 22 FORDHAM URB. L.J. 1123, 1127 (1995); *The District of Columbia Bar Legal 54 Information Helpline*, in AMERICAN BAR ASSOCIATION, JUST SOLUTIONS, A PROGRAM GUIDE TO INNOVATIVE JUSTICE SOLUTIONS 54 (1994) [hereinafter JUST SOLUTIONS]; *The Arizona Pro Se Information System Project "Quickcourt,"* in JUST SOLUTIONS, *supra* this note, at 52.

54. *American Association of Retired Persons Statewide Legal Hotlines*, in JUST SOLUTIONS, *supra* note 53, at 57.

55. Zander, *supra* note 35, at 5-6.

56. See generally *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 422 S.E.2d 123, 124-25 (S.C. 1992) (citing rigorous professional training, ethical codes, certification, and licensing procedures as a justification for permitting certified public accountant practice on tax issues); Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption From Unauthorized Practice of Law Rules*, 11 AKRON TAX J. 47, 78-98 (1995) (arguing that the historical role of the certified public accountant in the tax return process provides ample evidence that an unfettered role in tax practice is justified); Rhode, *Delivery*, *supra* note 3, at 230-31 (noting infrequency of complaints); Rhode, *Policing*, *supra* note 3, at 79-80, 85-88 (noting that seldom do lay legal activities trigger reported consumer grievances); Comments by Raymond R. Trombadore, Chair, ABA Standing Committee on Professional Discipline, on NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS—A REPORT WITH RECOMMENDATIONS (Nov. 29, 1995) (compiled by the ABA Center on Professional Responsibility) (noting that it is impractical to prosecute unauthorized practice because of the lack of complaining witnesses).

Where the risk of injury is substantial, in contexts like immigration, the best strategy is likely to be a licensing system that specifies minimum qualifications and includes effective enforcement mechanisms. For other services, it may be sufficient to register practitioners and permit voluntary certification of those who meet specified standards. States also could require all lay practitioners to carry malpractice insurance, contribute to client security funds, and observe fiduciary obligations. The design of these requirements should not rest exclusively with the legal profession, which has concerns that may differ from the general public's.<sup>57</sup>

The evolution of such regulatory frameworks ultimately points to more fundamental changes in the delivery of legal services. As the practice of law becomes increasingly specialized and distinctions between lawyers and nonlawyers become increasingly blurred, the current "one size fits all" model of legal education appears more and more anachronistic. The work of a Wall Street securities expert bears almost no resemblance to that of a small-town matrimonial lawyer. Why require that they receive essentially the same training and pass the same bar exam? So too, as more and more legal work has national and international dimensions, the current prohibitions on out-of-state practitioners appear more and more unrealistic.<sup>58</sup> An effective regulatory structure for the coming decades must adapt to the changing dynamics of legal practice.

As the barriers to lay competition erode, lawyers should build more cooperative relationships with nonlawyer providers and develop more effective services for individuals interested in representing themselves. Some promising efforts are already underway. Many legal services offices and scattered private practitioners are offering services expressly designed for *pro se* litigants.<sup>59</sup> In some jurisdictions, lawyers and nonlawyers have

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57. For examples of such proposals, see WOLFRAM, *supra* note 12, § 15.1.3, at 834-39 (listing general considerations for regulatory standards on the unauthorized practice of law); Cramton, *supra* note 38, at 614-15 (recommending ways to protect clients from misconduct, ensure competent lawyering, and guarantee fairness in the lawyer-client relationship); L'Estrange & Nevitt, *supra* note 40, at 98-100 (enumerating several proposals for restrictions on the activities of unlicensed advocates that could help protect consumers from abuse); Rhode, *Delivery*, *supra* note 3, at 230-33 (setting forth general considerations for regulatory standards on the unauthorized practice of law); Stubenvoll, *supra* note 41, 21-23 (discussing task force draft legislation which provides a framework for licensing and regulating the unauthorized practice of law).

58. See generally Stephen Gillers, *Change Will Come: Transforming the Law Marketplace* (1995) (unpublished essay, on file with author) (calling for the change of structural rules from the past that do not fit present realities). For a general discussion of unauthorized practice, see Justin Castillo, *International Law Practice in the 1990s: Issues of Law Policy & Professional Ethics*, 86 AM. SOC'Y INT'L L. PROC. 272, 280-81 (1992).

59. Junda Woo, *Entrepreneurial Lawyers Coach Clients to Represent Themselves*, WALL ST. J., Oct. 15, 1993, at B1, B5. See also Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 427-35 (1994) (discussing malpractice issues for attorneys advising *pro se* litigants); Trubek, *supra* note 53, at 1127; Yegge, *supra* note 30, at 417 (stating that an estimated 15% of lawyer referral programs provide assistance to *pro se* litigants (citing CHARACTERISTICS OF LAW REFERRAL PROGRAMS: 1990 SURVEY RESULTS,

worked out mutual referral arrangements that maximize clients' ability to obtain cost-effective services.<sup>60</sup>

Law schools could assist such efforts by offering programs specifically designed for *pro se* litigants and nonlawyer practitioners or by assisting other institutions to do so. The former director of the ABA Division of Professional Education forecasts that in the next century, law schools will teach courses not only to J.D. candidates, but also to other students such as law enforcement personnel, paralegals, independent legal technicians, mediators, arbitrators, financial advisors, and accountants.<sup>61</sup>

Throughout the last half-century, bar leaders often have claimed that "the fight to stop [lay practice] is the public's fight."<sup>62</sup> The public, however, has remained notably unsupportive of the war effort, and the major battles already have been lost. The question remaining is how long it will take for the organized bar to accept the inevitable. The fight for a sensible system of nonlawyer practice is not just the public's fight. It is the profession's as well.

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60. Fry, *supra* note 11, at 36; Ted Sisco, *Poverty Law for the '90s*, CAL. LAW., June 1995, at 31, 34.

61. COMMISSION ON NONLAWYER PRACTICE, *supra* note 1, at 109 (quoting Barry Vickrey, Dean of the University of South Dakota Law School).

62. AMERICAN BAR ASSOCIATION COMMITTEE ON EVALUATION OF THE NATIONAL CONFERENCE ON THE UNAUTHORIZED PRACTICE OF LAW 153 (1962) (quoting former A.B.A. President John Satterfield, quoting the Iowa Supreme Court).