WHY DO WE REGULATE LAWYERS?: An Economic Analysis of the Justifications for Entry and Conduct Regulation

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In the middle of the nineteenth century the legal market was virtually unregulated. Several states passed statutes allowing any registered voter to practice law, and the nominal requirements for bar entry in other states were not enforced.[1] There was also no explicit regulation of attorney behavior.[2]

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1. New Hampshire, Maine, Wisconsin, Indiana and Michigan expressly abolished any requirements for appearing in those states' courts. *See* HENRY S. DRINKER, LEGAL ETHICS 19 & n.38 (1953). Likewise, those states that maintained a bar admission requirement significantly slackened their standards. *See* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 227-28 (1953):

> In 1800 a definite period of preparation for admission to the bar was prescribed in fourteen of the nineteen states or organized territories which then made up the Union. In 1840 it was required in but eleven out of thirty jurisdictions. In 1860 it had come to be required in only nine of the then thirty-nine jurisdictions.

2. *See* HENRY WYNANS JESSUP, THE PROFESSIONAL IDEALS OF THE LAWYER: A STUDY OF LEGAL ETHICS xxiv (1925) (noting that prior to organized statements of ethics "the traditions of the profession were perpetuated and the fundamental principles observed" as a result of "the habit of the tribe"); Richard L. Abel, *United States: The Contradictions of Professionalism, in* LAWYERS IN SOCIETY 186, 219 (Richard L. Abel & Philip S. C. Lewis eds., 1988) ("Until well into the twentieth century, professional discipline in most jurisdictions depended almost entirely on those informal pressures for conformity that inhere in the face-to-face contacts within small local bars."); Fannie Memory Farmer, *Legal Practice and Ethics in North Carolina 1820-1860, in* THE LEGAL PROFESSION, MAJOR HISTORICAL INTERPRETATIONS 274, 350 (Kermit L. Hall ed., 1987) (noting that "prior to 1868, no court, so far as the records show, was called upon to disbar an attorney" in North Carolina); Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 931-38 (1995) (arguing that early American lawyers learned professional responsibility from other lawyers, as well as from the society at large); William R. Johnson, *Education and Professional Life Styles: Law and Medicine in the Nineteenth Century*, 14 HIST. EDUC. Q. 185, 187-92 (1974). In Wisconsin in the nineteenth century "[g]roup standards were defined and enforced in an immediate and personal manner." *Id.* at 192.

Lawyer behavior was, however, controlled by common law torts and criminal sanctions. Each court retained the common law "summary jurisdiction" over the lawyers who practiced before them, and could disbar or sanction an errant attorney. *See* Spevack v. Klein, 385 U.S. 511, 524 (1967) (Harlan, J., dissenting); EDWARD P. WEEKS, A TREATISE ON ATTORNEYS AND COUNSELORS AT LAW

Since this time we have seen steady growth in the regulation of the legal market.[3] The first changes came in tightening bar requirements, and later in the adoption and enforcement of codes of legal ethics.

This process, from an unregulated market to the high level of regulation we observe today, occurred gradually. For example, the rules governing attorney conduct have transformed from broadly stated ethical norms, to narrower rules shorn of what was deemed to be philosophical surplusage.[4] Now lawyers are governed not by a statement of ethics, but by explicit rules that narrowly describe the minimum standards of allowable lawyer conduct.[5] At the same

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144-223 (Charles Theodore Boone ed., 2d ed., Bancroft-Whitney Co. 1892) (1878); Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States,* 7 GEO. J. LEGAL ETHICS 911, 912-17 (1994). The common law also allowed clients, and occasionally third parties, to sue lawyers for misconduct or malpractice. *See* 1 EDWARD M. THORNTON, A TREATISE ON ATTORNEYS AT LAW 514-624 (1914) (describing attorney duties and liabilities); WEEKS, *supra*, at 267-92, 568-783.

3. When referring to "regulation" this Article refers to the administrative rules that govern the conduct of existing lawyers and the rules that govern entry into the practice. A broader conception of lawyer regulation might include, for example, the common law claims of legal malpractice and abuse of process, criminal sanctions, or the informal behavioral norms of attorneys that affect behavior. As used in this Article, regulation refers to government administration of attorneys beyond the controls offered by the tort or criminal system. In this context, regulation might be needed to control behavior that falls between the common law system and norms, that is, behavior that is too harmful to leave to informal channels, but not harmful enough to justify a criminal prosecution or the expense of a full-fledged civil suit.

4. This process began when the American Bar Association ("ABA") adopted the broadly stated *ABA Canons of Professional Ethics ("Canons")* in 1908. *See* ABA CANONS OF PROF'L ETHICS (1956), *reprinted in* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 311-25 (1997). The *Canons* were replaced in 1969 by the *ABA Model Code of Professional Responsibility ("Code").* The *Code* retained some of the broad ethical statements of the *Canons*, but for the first time segregated them from black-letter rules stating the minimum allowable attorney conduct. *See* MODEL CODE OF PROF'L RESPONSIBILITY (1983). In 1983 the ABA adopted the *ABA Model Rules of Professional Conduct ("Rules").* The *Rules* completed the journey by jettisoning the *Code's* non-enforceable ethical norms for a regulatory structure focused solely on the black-letter rules. *See* MODEL RULES OF PROF'L CONDUCT (1999).

5. Many commentators have discussed the ABA's continuing attempts to crystallize lawyer regulation or the "legalization of the profession's governing norms" over the last century. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics,* 100 YALE L.J. 1239, 1249-52 (1991); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 69-70 (1986) (arguing that the transition from the *Canons* to the *Code* to the *Rules* has marked a separation of ethics from the rules regulating lawyers); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117 (1999) (arguing that the transition from the *Canons* to the *Code* to the *Rules* has marked a transition from standards to rules); Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1279-1303 (1998) (arguing that the *Code* and the *Rules* show the emergence of a "regulatory approach" to legal ethics); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 905-10 (1995) (arguing that the alterations in lawyer self-regulation reflects the emergence of a "positivist" approach to legal ethics).

time, requirements for entry to the bar have grown more and more regimented. At the turn of the century, there were few educational requirements and an oral bar examination.[6] Now, there are extensive educational requirements, including three or more years of pre-legal education, and graduation from an ABA accredited law school.[7] The bar exam and accompanying character and fitness reviews have also expanded in scope and content.[8]

In short, the rules that govern the legal market have grown exponentially in scope and changed in character; the legal market is now unquestionably regulated to a high degree. The commentators that have focused upon this shift have, by and large, decried the phenomenon as an ethical or philosophical failing.[9] There has been little attention, however, to the regulation of lawyers *as regulation*.[10] For example, no one has comprehensively addressed the underlying justifications for the regulations we have, and whether the regulations are satisfying those justifications.

A comparison between the justifications for regulation and the regulation itself is a critical first step to any analysis of lawyer regulation for three

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6. *See* ALFRED ZANTZINGER REED, THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, BULLETIN NO. 15, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 87-90, 98-101 (1921).

7. *See infra* notes 17-20 and accompanying text.

8. *See generally* SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, & NAT'L CONFERENCE OF BAR EXAM'RS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 1999 (1999) [hereinafter BAR REQUIREMENTS].

9. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE, AN ETHICAL STUDY (1988); Geoffrey C. Hazard, *The Legal Ethics of Radical Individualism,* 65 TEX. L. REV. 963 (1987); Steven R. Salbu, *Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics*, 68 IND. L. REV. 101 (1992); *cf.* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE, A THEORY OF LAWYERS' ETHICS 14-25 (1998) (arguing for a broader conception of legal ethics from existing jurisprudence).

10. Exceptions include Richard Abel's *American Lawyers*, which gathers and interprets a mass of historical data concerning the American legal profession, and various articles discussing the economic merits of the attorney regulations governing client conflicts of interests. RICHARD L. ABEL, AMERICAN LAWYERS (1989); *see also* Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579 (1992); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965 (1997); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998). Gillian Hadfield has recently written an article exploring the market forces that control the current price of legal services, but her analysis pays scant attention to the regulation of lawyers. *See* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 983-84 (2000). David Wilkins has written two articles focusing on locating the appropriate agency to *enforce* the regulation of lawyer conduct. David B. Wilkins, *Afterward, How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Re*gulation, 65 FORDHAM L. REV. 465, 467-68 (1996) [hereinafter Wilkins, *Afterward*]; David B. Wilkins, *Who Should Regulate Lawyers?,* 105 HARV. L. REV. 801, 802-03 (1992) [hereinafter Wilkins, *Who Should Regulate?*]. Professor Wilkins' groundbreaking article expressly set aside consideration of the *content* of attorney regulation, Wilkins, *Who Should Regulate?, supra,* at 810-11, and also did not address the other half of lawyer regulation: entry regulation.

reasons.[11] First, in recent decades a number of economists and political scientists have built powerful cases for deregulation in general,[12] and more specifically for deregulating occupations.[13] Second, it is only by establishing the rationales for lawyer regulation that we can fairly judge the success of the current forms of attorney regulation. In situations where the regulatory structure does not fit the justifications, we have what Justice Breyer has termed regulatory mismatches.[14] Third, once the justifications are identified, lawyer regulation can be reformulated to match the defensible purposes.

This article divides attorney regulation into two categories: entry regulation and conduct regulation. Entry regulation deals with the required steps to become a lawyer; conduct regulation covers the rules governing practice once one becomes a lawyer. Comparing the justifications for current entry and conduct regulation to the regulation itself, however, establishes that much of the current regulatory structure is misguided and harmful to consumers. This is partially because the regulations serve the interests of lawyers first and foremost. It is also partially because the most prevalent regulatory justification, consumer protection, relies upon two faulty assumptions: that the legal market is swamped by information asymmetry, and that substandard lawyers can cause irremediable harms to clients. Further, regulators have focused their consumer-protection efforts into raising and enforcing barriers to

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11. Admittedly, this approach implicitly assumes that regulation of an occupation or an industry must be justified, which assumes non-regulation and the free market to be the status quo. By contrast, one might argue that the discussion should begin with justifications for not regulating lawyers, that is, assume that government regulation of an occupation is the norm, and any deviation from regulation must be defended. Utilizing the market as the baseline is preferable for two reasons. First, there has long been a general American preference for the free market over government regulation. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937, at 105-08 (1991). Second, even the strongest modern defenders of regulation do not argue that regulation should replace the free market on the whole. *See* SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA, THE REFORM OF THE AMERICAN REGULATORY STATE 190-92 (1992); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION, PRECONCEIVING THE REGULATORY STATE 228 (1990).

12. S*ee, e.g.*, MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985); SCH. OF BUS., UNIV. OF VT., THE LIMITS OF GOVERNMENT REGULATION (James F. Gatti ed., 1981).

13. S*ee, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137-60 (1962); S. DAVID YOUNG, THE RULE OF EXPERTS, OCCUPATIONAL LICENSING IN AMERICA 15 (1987). Although few have advocated fully deregulating the legal profession, several have advocated limited deregulation. *See, e.g.*, Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?,* 1980 AM. B. FOUND. RES. J. 159, 159-60; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions,* 34 STAN. L. REV. 1, 97-98 (1981).

14. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 191-368 (1982); Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549, 586-604 (1979). Ironically, the ABA has endorsed a similar approach to analyzing and repairing or eliminating regulation, all without mention of the regulation of lawyers. COMM'N ON LAW AND THE ECON., AM. BAR ASS'N, FEDERAL REGULATION: ROADS TO REFORM 24-67 (1979).

entry, virtually ignoring any measure of ongoing competence through conduct regulation, despite the many harms—for example, inhibited competition and inflated prices—that rising entry barriers inflict upon the public. As such, current regulation cannot be defended as a consumer protection. The problem itself is limited, and the solution, entry barriers, is poorly suited to the task.

However, a frequently overlooked rationale, the needs of the court system for qualified practitioners to efficiently file and prosecute lawsuits, does warrant some attention. As currently structured, courts rely upon lawyers to provide most of the work involved in processing legal disputes. Current regulations, however, mostly focus upon *consumers*, and not the courts. As a result, much current attorney regulation is superfluous, or even injurious.

This Article separately discusses entry and conduct regulations, comparing the justifications for such regulation with the current state of the regulation, and finally proposing an alternate structure of regulations narrowly tailored to the applicable rationales. Part I addresses entry regulations, and considers consumer protection, externalities to the courts, and professionalism as rationales. Part I concludes that the needs of courts are the only acceptable justification for entry barriers, and proposes a set of regulations narrowly tailored to that purpose. Part II examines conduct regulations, and determines that information asymmetry, the needs of the courts, externalities, and agency costs warrant some regulatory response. Part II rejects lawyer independence and regulating law as a monopoly as reasons for conduct regulations. Part II culminates by proposing a regulatory system that focuses upon eliminating information asymmetry and encouraging competence, both for the needs of the courts and the public.

I. A COMPARISON BETWEEN CURRENT ENTRY REGULATION AND ITS JUSTIFICATIONS

This section compares the possible justifications for entry restrictions in the legal market to the current regulation, to determine if the current system is defensible. Both economic "market failures," such as information asymmetry or externalities,[15] and non-economic justifications, such as encouraging professionalism, are considered.

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15. The economic justifications for regulation have been grouped under the general category of "market failures," such as monopolies, information asymmetries, the failure to provide public goods or externalities. *See* STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 5-11 (3rd ed. 1992); CONG. QUARTERLY, INC., REGULATION: PROCESS AND POLITICS 8-9 (1982); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 367-68 (4th ed. 1992); Breyer, *supra* note 14, at 553-60. Note that not every market failure requires an *ex ante* regulatory solution. Many market failures are addressed directly by courts through common-law or statutory remedies that award damages *ex post* to repay an injured party. Thus, regulation may be necessary

Entry regulations cover the requirements for entrance to the bar, that is, gaining a state license to practice law.[16] As a general rule, in order to enter the bar, an applicant must graduate from an ABA accredited law school,[17] which requires three continuous years of full-time study, or equivalent credit hours.[18] ABA accredited law schools can only accept students with three years of college study before law school.[19] Some states also have pre-legal educational requirements, such as a bachelor's degree or equivalent.[20] A bar applicant must also pass a written bar exam that is part essay and part multiple choice,[21]

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when the market has failed, and courts are unable (or unwilling) to address the issue through common-law or existing statutory remedies. *See* BREYER & STEWART, *supra*, at 6 & n.3; POSNER, *supra*, at 368. Even when the market has failed, and the courts cannot correct for the failure, regulation may still be impracticable, because it may be too difficult to tailor regulation to the market failure at issue. Some proponents of deregulation recognize that market failures exist, but argue that government solutions to these failures make matters worse. *Cf.* ROGER C. NOLL & BRUCE M. OWEN, THE POLITICAL ECONOMY OF DEREGULATION, INTEREST GROUPS IN THE REGULATORY PROCESS 155 (1983) (noting that "the view that regulatory politics is based on special economic interests has led to very cynical conclusions not only about regulatory policy making but also about the overall role of government.").

16. Generally, state supreme courts control both admission to the bar and the conduct of practicing lawyers, with assistance from court appointed administrative agencies, the ABA, and state bar associations. In forty-three states the supreme courts alone control the rules for bar admission. BAR REQUIREMENTS, *supra* note 8, at 3. In six of the remaining states the control is split between the legislature and the courts. *Id.* In Virginia the legislature controls the admission requirements, with the assistance of the board of bar examiners. *Id.* at 3-4. For a general overview of current bar admission requirements, see *id*; INST. OF JUDICIAL ADMIN., BAR ADMISSION RULES AND STUDENT PRACTICE RULES (Fannie J. Klein ed., 1978).

But, in practice, local bar associations and the ABA control most aspects of lawyer regulation. In many states the regulatory responsibilities have been delegated to a unified bar association. As of 1996, the bar was integrated or unified in thirty-six states and the District of Columbia. *See* Terry Radtke, *The Last Stage in Reprofessionalizing the Bar: The Wisconsin Bar Integration Movement, 1934-1956*, 81 MARQ. L. REV. 1001, 1001 (1998). In states with an integrated or unified bar a lawyer must join the bar association as a prerequisite to practicing law. *See* Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 1 & n.1 (1983); Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. L.J. 35, 36 (1994). Moreover, forty-five states require graduation from an ABA accredited law school as a prerequisite to taking the bar, granting the ABA substantial control over both legal and pre-legal educational study requirements. BAR REQUIREMENTS, *supra* note 8, at 18.

17. Forty-five states now require graduation from an ABA approved law school as a prerequisite to bar admission. BAR REQUIREMENTS, *supra* note 8, at 10.

18. *See* AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 305 (1987).

19. George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2151 (1998).

20. BAR REQUIREMENTS, *supra* note 8, at 3-4.

21. Forty-seven states and the District of Columbia require students to take the Multistate Bar Examination, a multiple-choice exam focused on a core group of subjects. *Id.* at 16. For a description of the grading of the multiple choice and essay sections in each state, see *id.* at 21-23.

and meet a character and fitness requirement.[22] Entry regulation also includes state statutes that bar the unauthorized practice of law. Entry regulation thus encompasses the rules allowing licensed practitioners in to the practice of law, and those keeping unlicensed practitioners out of the practice of law.

Part I.A considers the classic justification for entry regulations, the protection of unsuspecting consumers from incompetent practitioners. This justification actually involves two connected claims: the legal market is subject to serious information asymmetries, and incompetent practitioners can inflict irreversible or irremediable harms upon clients. Part I.A concludes that neither information asymmetry nor irremediable harms are endemic problems in the legal market, and asserts that entry regulations are not the solution to these problems regardless. Part I.B reviews the needs of the courts for entry regulations, and determines that because of the potential externalities, that is, costs that incompetent lawyers can inflict upon the court system, some entry regulation may be necessary. Part I.C addresses professionalism as a defense for entry regulation, and contends that maintaining lawyers' status as "professionals" cannot justify the costs associated with entry barriers. Part I.D proposes an alternative system of entry regulation narrowly based upon the needs of the courts.

A. Protecting the Public from Incompetent Practitioners—Information Asymmetry

The most common rationale given for occupational regulation in general is the protection of the public from substandard practitioners.[23] The regulation of lawyers has been defended on similar grounds by the ABA[24] and the Courts.[25]

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22. *See* Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 67 (1984) ("American jurisdictions universally require good moral character for admission to the bar.").

23. *See, e.g.*, YOUNG, *supra* note 13, at 15; Ira Horowitz, *The Economic Foundations of Self-Regulation in the Professions*, *in* REGULATING THE PROFESSIONS, A PUBLIC-POLICY SYMPOSIUM 3, 7 (Roger D. Blair & Stephen Rubin eds., 1980); Alex R. Maurizi, *The Impact of Regulation on Quality: The Case of California Contractors*, *in* OCCUPATIONAL LICENSURE AND REGULATION 26, 26 (Simon Rottenberg ed., 1980); Jonathan Rose, *Occupational Licensing: A Framework for Analysis*, 1979 ARIZ. ST. L.J. 189, 190 (1979).

24. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 1-2 (1983) ("The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law."); COMM'N ON PROFESSIONALISM, AM. BAR ASS'N, "IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), *reprinted in* 112 F.R.D. 243, 261-62 [hereinafter Blueprint] (defining the profession of law as "self-regulating—that is, organized in such a way as to assure the public and the courts that its members are competent"); *see also* ASS'N OF AM. LAW SCHS., BAR EXAMINATION STUDY PROJECT 3 (1976) (indicating that the bar requirement is meant to prevent

This rationale alone cannot justify regulation of lawyers. In virtually every occupation or industry there is the possibility of substandard service or products. For example, anyone who has waited in a near-stationary checkout line at the grocery knows that there are varying levels of quality in grocery clerks. Nevertheless, the government has not regulated grocery clerks in an attempt to eliminate substandard practitioners. Instead, a free-market system relies upon a combination of consumer expertise to choose the best and safest products, and *ex post* damages actions to control for substandard or dangerous products. When these options fail, *ex ante* regulation may be justified.

In general, *ex ante* regulation is necessary to protect the public from a substandard product or service when information asymmetry is high, that is, when consumers lack sufficient information to gauge the quality of a product, and when the product or service presents a substantial danger to the health or safety of consumers. Thus, the most common defense of lawyer regulation—protection of the public from incompetents—depends upon two separate claims: information asymmetry is high (in the absence of regulation consumers could not discern between good, bad, or harmful lawyers),[26] and incompetent

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harm by "incompetent practitioners"). From its inception the ABA has advocated tighter bar entry standards based upon the existence of unqualified and unprincipled lawyers. *See* 2 REP. A.B.A. 212 (1879) (proposing a tightening of bar admission standards because low admissions standards had contributed to "extraordinary numbers" of the "ignorant" and "unprincipled" becoming lawyers); 29 REP. A.B.A. 601-02 (1906) (proposing standards of ethical conduct to battle a new breed of lawyers that "believe themselves immune, the good or bad esteem of their co-laborers is nothing to them provided their itching fingers are not thereby stayed in their eager quest for lucre").

25. *See, e.g.*, *In re* Ruffalo, 390 U.S. 544, 550 (1968) (noting that disbarment is "designed to protect the public"); *In re* Schwartz, 862 P.2d 215, 218 (Ariz. 1993) (stating that the purpose of attorney "discipline is not to punish the offender, but to protect the public" and the justice system); *In re* Agostini, 632 A.2d 80, 81 (Del. 1993) (stating that sanctions are aimed at protecting the public and fostering confidence in the justice system). For an overview of the reasons courts posit for regulating lawyers, see Devlin, *supra* note 2, at 934-38 & nn.208-13.

26. Economists have long argued that regulation is necessary to combat information asymmetry when customers cannot properly evaluate the product or service at issue. *See* Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, AM. ECON. REV., Dec. 1963, at 941, 951-52; Alan D. Wolfson et al., *Regulating the Professions: A Theoretical Framework*, *in* OCCUPATIONAL LICENSURE AND REGULATION 180, 190-92 (Simon Rottenberg ed., 1980). For an early (and extremely dated) variation on this theme, see Thomas G. Moore, *The Purpose of Licensing*, 4 J.L & ECON. 93, 104-05 (1961), noting that occupational regulation has been justified because "consumers and, especially, housewives do not have the knowledge necessary to make a 'wise' decision when buying the complicated goods and services offered for sale today." *See also* CHARLES L. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 35-42 (1977) (arguing that the "public provision of consumer information" can remedy the inability of markets to efficiently overcome "uncertainty and information costs"); Horowitz, *supra* note 23; Keith B. Leffler, *Physician Licensure: Competition and Monopoly in American Medicine*, 21 J.L. & ECON. 165, 172-74 (1978) (addressing high information costs that may justify occupational regulation); Rose, *supra* note 23, at 191 (arguing that occupational licensing is warranted when consumers cannot make intelligent and informal decisions "free from undue exploitation").

lawyers could cause substantial harm to these consumers.[27] Note that if either of these two claims fail, the argument for regulation is substantially

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At the most basic level, the worry is that a consumer will be unable to differentiate between good, bad, or even dangerous versions of the product. *See* BENJAMIN SHIMBERG ET AL., OCCUPATIONAL LICENSING: PRACTICES AND POLICIES 11 (1972); Timothy Stoltzfus Jost, *Oversight of the Quality of Medical Care: Regulation, Management, or the Market?*, 37 ARIZ. L. REV. 825, 835 (1995). Because many clients will not be knowledgeable concerning legal work, lawyers may be tempted to perform unnecessary work. Similarly, a lawyer might provide shoddy service knowing that the client will not know the difference, and that standards for a legal malpractice claim are quite high. One of the classic worries justifying regulation of information asymmetries is the possibility for producers to hide latent and undetectable product defects from consumers. The traditional example of this phenomena is the pharmaceutical industry. *See* ALAN STONE, REGULATION AND ITS ALTERNATIVES 151-53 (1982). In the legal profession, a similar example would be poor drafting of a contract or transactional documents. In fact, a particularly cunning lawyer might build difficulties into legal documents with the knowledge that the customer would then return for help in future litigation.

Some economists have asserted that imperfect information may actually drive high-quality producers from the market. *See* George A. Akerlof, *The Market for "Lemons": Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488-500 (1970); Hayne E. Leland, *Minimum-Quality Standards and Licensing in Markets with Asymmetric Information*, *in* OCCUPATIONAL LICENSURE AND REGULATION 265, 270-84 (Simon Rottenberg ed., 1980); Hayne E. Leland, *Quacks, Lemons and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328 (1979). For a critical assessment of Leland's model, see Keith B. Leffler, *Commentary*, *in* OCCUPATIONAL LICENSURE AND REGULATION 287, 287-95 (Simon Rottenberg ed., 1980). The basic theory states that in a market where buyers cannot differentiate in quality between similar products, buyers will assume the products are of average quality, because variations in quality cannot be detected. For example, in the market for used cars, a buyer will assume all cars of the same year, make, and model are of average quality for that make and model, because the buyer has insufficient information to discern a lemon from a superior car. The problem occurs when sellers of above average products cannot find buyers at above average prices. Due to information asymmetry, buyers are only willing to pay the price for average quality, because they cannot know that the car is of a higher quality. As such, the owner of an above-average used car will not be able to sell the car for what it is worth, and will therefore drop out of the market and simply keep the car. As more and more above-average sellers drop out of the market, the overall quality begins to drop, and the average quality continues to fall. Thus, the information asymmetry decreases the overall quality in the market, leaving nothing but lemons. *See* Akerlof, *supra*, at 488-500.

27. *See* Donald L. Martin, *Will the Sun Set on Occupational Licensing?, in* OCCUPATIONAL LICENSURE AND REGULATION 142, 142-43 (Simon Rottenberg ed., 1980). Regulation has been justified to control industries where errors create a significant possibility of large and irreversible harms, such as death. *See* NOLL & OWEN, *supra* note 15, at 59-60. Many have argued for regulation of occupations that involve truly catastrophic consequences that society wants to eliminate or avoid, partially because victims of these errors cannot truly be recompensed after the fact. *See, e.g.*, POSNER, *supra* note 15, at 368; Ross F. Cranston, *Reform Through Legislation: The Dimension of Legislative Technique*, 73 NW. U. L. REV. 873, 901 (1979). For example, most patients would prefer that *ex ante* regulation would protect them from mistaken amputations, rather than relying on a later lawsuit for the approximate value of their legs.

Arguably, lawyers are involved in a complex field that can cause serious and sometimes irreversible consequences to clients, from the loss of a large jury verdict to the death penalty. The imposition of a serious criminal penalty may well fit this justification because the result is so serious that a mistake may cost a client her life. Further, even if a client is eventually freed from prison after the discovery of a lawyer's error, it is difficult to repay the client for the time she has lost. *Cf.* BOB DYLAN, *Hurricane, on* DESIRE (Columbia Records 1976) (arguing that the story of Rubin "Hurricane" Carter will not be over "['til they] give him back the time he's done").

weakened.[28] Defenders of lawyer regulation have asserted that both information asymmetry and irremediable harms are serious problems in the legal market.[29]

1. Is Lawyer Incompetence a Problem?

Neither information asymmetry nor irremediable harms are present in most areas of legal practice. First, there are multiple reasons to believe that information asymmetry is becoming less prevalent in the legal market. There are many informal ways to collect information about a lawyer or law firm, such as seeking recommendations from family and friends, working with the same lawyer over time, gauging success by the length of time a firm or lawyer has been in the market, or estimating a firm's success by surveying its offices or the cars in the parking lot.[30] Increased attorney advertising and growing competition for clients has also led all lawyers, from solo practitioners to large law firms, to focus more upon "selling" themselves,[31] allowing consumers more information in selecting an attorney.

Lawyers are increasingly working in organizations or law firms rather than in solo practice,[32] and law firms are growing larger and larger.[33] The lawyers within these firms are increasingly specialists. The agglomeration of these specialist lawyers in larger organizations lessens information asymmetry, because it is easier to judge the track record of a large organization than an individual practitioner. Large and successful firms have also theoretically done the legwork of finding quality associates and partners.

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28. In a circumstance where information asymmetry is high, but the product is relatively harmless, there is generally little need for regulation: the harm is small, and the market will eventually correct for substandard products. Similarly, when a product is harmful, but easily discernable as harmful, informed consumers can "pick their poison," in the absence of regulation designed to protect consumers from themselves (such as helmet or seatbelt laws).

29. *See* Joseph R. Julin, *The Legal Profession: Education and Entry, in* REGULATING THE PROFESSIONS, A PUBLIC POLICY SYMPOSIUM 201, 204 (Roger D. Blair & Stephen Rubin eds., 1980); Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773, 778 (1987) (reviewing BLUEPRINT, *supra* note 24).

30. The author can attest that at least one real-life client claimed to gauge law-firm success on the "BMW/Mercedes index." The author's Toyota Tercel, therefore, was not appreciated.

31. *Cf.* Steven A. Delchin & Sean P. Costello, *Show Me Your Wares: The Use of Sexually Provocative Ads to Attract Clients*, 30 SETON HALL L. REV. 64, 64-69, 112-13 (1999) (arguing that profit considerations have fueled the advent of sexually provocative legal advertising).

32. *See* Anthony T. Kronman, *Professionalism*, J. INST. STUDY LEGAL ETHICS 89, 98 (1999); Catherine Gage O'Grady, *Preparing Students for the Profession: Clinical Education, Collective Pedagogy, and the Realities of Practice for the New Lawyer*, 4 CLINICAL L. REV. 485, 494-95 & n.38 (1998).

33. *See* RICHARD A. POSNER, OVERCOMING LAW 66 (1995).

Customers of legal services, especially corporations, are also becoming increasingly sophisticated and knowledgeable through the use of in-house counsel and information clearinghouses.[34] In short, while multiple commentators and lawyers have decried the death of a "profession" and the birth of a "business," the changes in the structure of the legal market have substantially decreased information asymmetries.[35]

Nevertheless, there are still substantial numbers of solo practitioners, and prospective clients who lack the knowledge to successfully select a lawyer, let alone oversee legal work.[36] As such, there may be pockets of the legal market where information asymmetry remains a problem.[37] But it strains credulity to assert that there is substantial information asymmetry between the majority of current lawyers and clients.

Second, most damages that result from legal work are not irremediable. In the bulk of civil cases and legal transactions the potential damages for error can be stated in terms of money. For example, a court seeking to redress a wronged client after a civil trial, a botched tax return or bankruptcy, will have the money damages awarded or incurred as a basis for damages. Thus, there is a baseline to make the client whole, in a way that does not exist with products or services that may cause bodily harm or death.[38]

Since the potential harm from most legal transactions can be estimated in monetary terms, savvy clients can handicap the potential harms involved, and account for them in their behavior. For example, in most state or federal civil proceedings some statement of the damages claimed is necessary in the initial complaint or during discovery. A knowledgeable client will have some basis

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34. *See* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 899-903 (1990).

35. Moreover, it is difficult to assess information asymmetry as a justification for lawyer regulation based upon the current market for legal services, because some legal regulation has been specifically aimed at restricting the free flow of information, rather than encouraging it. Consider, for example, the various rules against advertising that were overturned by the Supreme Court. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 379-83 (1977). Most disciplinary complaints against lawyers are investigated and prosecuted confidentially. *See* ABEL, *supra* note 10, at 147-48 (1989).

36. Ironically, the clients most likely to be affected by problems of information asymmetry, clients who cannot afford to hire lawyers from large, well-established firms or with other clear trappings of success, are precisely the clients that have arguably been priced out of the legal market altogether by entry-control and regulation. Compare the "crisis" in provision of legal services for the poor, see, for example, Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 578-89 (1994); William J. Dean, *The Role of the Private Bar*, 25 FORDHAM URB. L.J. 865, 866 (1998), with the various regulations restricting entry to the legal profession and decreasing the supply of legal services.

37. These pockets are shrinking, however. As of 1995, 61% of legal work was done on behalf of corporate clients. Hadfield, *supra* note 10, at 962 & n.30.

38. This is not to say that a client who loses a business or a personal fortune through a botched lawsuit has not suffered a serious harm. The critical point is that the harm should be remediable through a later malpractice action, making the harm quite different from death or dismemberment.

for measuring the risks involved, and can purchase the appropriate level of legal services or insurance. If the client chooses incorrectly, it is a result of a poor tactical decision, not a flaw in the market. Nevertheless, some potential harms, notably those involved in criminal defense work, are potentially irremediable and may justify regulation.[39]

As such, the "incompetent lawyer" justification for regulation cannot justify regulation of the legal market as a whole, because the entire market is not affected by information asymmetry or serious harms. Instead, limited subsections of the market, for example lawyers who represent clients in serious criminal matters or lawyers who tend to represent less savvy clients, may need to be regulated. The need for regulation based upon consumer protection should thus be understood as a sliding scale. The more serious and irreversible the potential harm, the greater the justification for regulation to counteract informational asymmetry. As the harms become more quantifiable and foreseeable the need for *ex ante* regulation lessens, because the danger of an irremediable harm lessens.

2. Current Entry Regulation and Lawyer Incompetence

The current regulation of lawyers aimed at remedying the problem of incompetent practitioners, however, is not calibrated to needy subsections of the market. To the contrary, every aspect of lawyer regulation, from the bar exam, educational requirements, and character and fitness, to the rules governing practicing attorneys, have been defended as necessary to protect the public from incompetent practitioners.[40] The regulatory goal is relatively simple, to remove all substandard practitioners from the market through entry and conduct regulations.[41] By guaranteeing that all licensed practitioners are minimally competent, the regulations arguably address both the information asymmetry—presumably all practitioners are minimally competent—and the problem of grave harms—minimally competent lawyers will be less likely to cause such harms. Nevertheless, a comparison between the current entry regulations and the supposed justification establishes that the regulations are ill-fitted to the actual problem.

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39. The information asymmetry will be avoided for many criminal defendants, however, by a court's appointment of counsel. A criminal defendant will still have great difficulty monitoring her counsel's work.

40. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY EC 1-2 & nn.1-4 (1983).

41. In addition to the stringent requirements for admission to the bar, both the *Rules* and *Code* contain vague requirements of competency. MODEL RULES OF PROF'L CONDUCT R. 1.1 (1999); MODEL CODE OF PROF'L RESPONSIBILITY Canon 6 (1983); *see also infra* notes 70-81 and accompanying text.

Barriers to entry and minimum standards impose substantial costs on society at large. First, the cost of legal services to consumers is inflated. Barriers to entry, such as the bar requirements, naturally result in fewer practitioners. Fewer practitioners means a reduced supply of legal services, which increases the cost of hiring a lawyer.[42] The amount of extra expense is determined by the availability of substitute goods; if a consumer can substitute another, non-regulated product for legal services, regardless of barriers to entry, price inflation will be dampened.[43] Prohibitions on the unauthorized practice of law, however, explicitly ban any substitute goods.[44]

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42. Note that this effect will not persist forever. The existence of these artificially high economic rents will draw more and more applicants into the profession, regardless of the entry barriers. At a certain point the influx of these additional practitioners may drive the price down to a competitive level. Nevertheless, the sunk costs of surpassing the entry barriers places a floor on the prices that practitioners can afford to charge clients. As such, even if the legal market has reached a point where a flood of new practitioners has reduced the rates lawyers may charge to a competitive level, the price cannot fall below the costs of entry to the profession. This explains why some commentators have noted that "[t]here is far too much law for those who can afford it and far too little for those who cannot." Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983); *see also* Cramton, *supra* note 36, at 533-34. In other words, there is a high level of competition for the most profitable types of legal services, but almost no provision of less-profitable services.

43. *See generally* J. Howard Beales, III, *The Economics of Regulating the Professions, in* REGULATING THE PROFESSIONS 125, 135 (Roger D. Blair & Stephen Rubin eds., 1980) (describing the manner in which regulation raises prices); Simon Rottenberg, *Introduction, in* OCCUPATIONAL LICENSURE AND REGULATION 1, 3 (Simon Rottenberg ed., 1980) (describing the "framework of basic economics" in which occupational licensure operates, and how licensing and substitute services affect cost to consumers). For studies showing higher costs to consumers from occupational licensing, see CONSUMER AFFAIRS SECTION, AM. ASS'N OF RETIRED PERSONS, UNREASONABLE REGULATION = UNREASONABLE PRICES (1986) (considering optometry, dentistry, hearing aid sales, and funeral sales); D.S. LEES, ECONOMIC CONSEQUENCES OF THE PROFESSIONS 35-44 (1966) (examining the British legal market); Alex Maurizi, *Occupational Licensing and the Public Interest,* 82 J. POL. ECON. 399 (1974); and B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J.L. & ECON. 53, 80-85 (concluding that law schools have undersupplied lawyers for market demand, and that lawyer wages have been inflated as a result). *But see* Malcolm Getz et al., *Competition at the Bar: The Correlation Between the Bar Examination Pass Rate and the Profitability of Practice*, 67 VA. L. REV. 863, 869-79 (1981) (concluding that bar exam pass rates do not have an effect on the salaries of lawyers).

44. Gillian Hadfield has argued that there is little evidence that entry barriers have affected the legal market. She notes that solo practitioners have earned less, and that lawyer unemployment has become more prevalent. Hadfield, *supra* note 10, at 984. But, there is still little (and shrinking) provision of legal services to the poor or middle class, a sign that the market is not fully competitive. *See id.* at 960-62. This market is ill-served because of the high cost of becoming a lawyer: in order to recoup their initial investment lawyers must seek the highest paying clients and work. If the entry barriers were necessary and rational, there would be no reason for concern, because the high price of lawyers would reflect their necessary training. *Cf.* Sherwin Rosen, *The Market for Lawyers*, 35 J.L. & ECON. 215, 216 (1992) ("High wages in a profession are necessary to compensate an entrant when great expenses must be incurred for learning its trade."). But, if the entry barriers are based upon irrational regulation, rather than educational or professional necessity, the high cost of entry will price most lawyers out of range for consumers with little accompanying benefits. This is why it is critical that entry barriers be carefully calibrated to the applicable rationale. Further, unemployment or

Second, the costs of market entry are inflated. Although some potential lawyers might choose to pursue three years of college and three years of law school if it were not required, it is very unlikely that all would.[45] These educational requirements cost students in both tuition and lost income while in school.[46] Moreover, the bar exam itself imposes substantial costs. Many students take an additional bar examination preparatory course.[47] Given the lengthy educational requirements, the students who fail are unlikely to give up; but since the exam is generally only offered every six months, another period of under-employment or unemployment ensues pending the next bar exam. The unfortunate students who never pass have paid a small fortune for a non-existent credential.[48] Some or all of these costs are passed on to consumers. Again, the amount depends on whether suitable substitutes exist.

The real benefits of rising entry barriers go to existing practitioners who did not have to pass a difficult bar examination or attend school full-time for six or seven years. These practitioners did not have to meet the raised standards, yet they reap the benefits of decreased supply and higher prices.[49] As such, the continual effort to raise standards for admission to the profession is motivated by more than a simple desire for progress; as the standards rise, existing practitioners can profit from decreased supply without personally incurring the costs associated with the new entry regulations. This also

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falling income levels is a sign of increased competition for the narrow band of services currently provided in the market, that is, those services that can help pay for the substantial cost of becoming a lawyer. Until unemployed lawyers or solo practitioners begin to supply services for all income levels (at all prices), entry barriers are still having a substantial effect upon the market.

45. In fact, before the creation of legal and pre-legal requirements for entrance to the bar many lawyers had little or no formal training or education.

46. In order to finance these expenses many students incur substantial loans. The debt of students completing law school is at an all-time high and rising. *See* Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 221 & n.59 (1999); Denise Rothbardt, Note, *ABA Accreditation: Educational Standards and Its Focus on Output Requirements*, 2 J. GENDER, RACE & JUST. 461, 463 n.12 (1999).

47. The Association of American Law Schools bars its member schools from offering academic credit for bar review courses. *See* ASS'N OF AM. LAW SCHS., 1998 HANDBOOK ¶ 7.4 (1998).

48. There is an additional loss to society related to the higher fees that lawyers can charge as a result of regulation. Some have argued that the artificially inflated price and salaries associated with entry barriers have drawn individuals who would otherwise prefer another line of work into an occupation they are less suited for. YOUNG, *supra* note 13, at 55-56; Mancur Olson, *Supply-Side Economics, Industrial Policy, and Rational Ignorance, in* THE POLITICS OF INDUSTRIAL POLICY 245, 262-63 (Claude E. Barfield & William A. Shambra eds., 1986). The possibility of earning the inflated return on a law school education thus may draw students who, in the absence of regulation, would pursue another career they are more naturally suited to. The recent wave of unhappy lawyers and law students provides anecdotal evidence that this may be occurring. *See* Douglas N. Frenkel et al., *Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 FORDHAM L. REV. 697, 706-07 (1998).

49. *See* Rottenberg, *supra* note 43, at 5.

explains why any occupation will fight deregulation tooth and nail: if the entry barriers were suddenly dropped altogether, the existing practitioners could not recoup their own investment in passing the entry regulations.

Third, having strict guidelines for legal education and the bar examination regiments the training for the profession in a way that is sure to cramp technological, philosophical or pedagogical evolution. Moreover, keeping "quacks" out of the profession of law may also hamper innovation.[50] The current regulation also places substantial burdens upon interstate relocation by lawyers.[51]

Fourth, barring substandard practitioners means that an entire price category of the market—the least expensive category—is eliminated. This means that consumers who would prefer cheaper services, but can afford to pay more, have to spend more than they would like on legal representation.[52] Those who cannot afford to pay the cost for the higher quality product must either go without, or receive subsidized services.[53] Ironically, high entry standards have also had a substantial negative impact on the number of poor, female or minority lawyers.[54] Thus, the poor face two barriers to legal representation: substantial barriers to entering the market themselves, as well as a lack of services from the market.

Aside from the costs associated with the bar's lofty barriers to entry, their efficacy is open to doubt. Despite the bar exam and legal education requirements, there are continuing questions about the competency of the

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50. *See* FRIEDMAN, *supra* note 13, at 157:

> If you are a member of the profession and want to stay in good standing in the profession, you are seriously limited in the kind of experimentation you can do. A 'faith healer' may just be a quack who is imposing himself on credulous patients, but maybe one in a thousand or in many thousands will produce an important improvement in medicine.

51. *See generally* B. Peter Pashigian, *Has Occupational Licensing Reduced Geographic Mobility and Raised Earnings?*, *in* OCCUPATIONAL LICENSURE AND REGULATION 299 (Simon Rottenberg ed., 1980).

52. As a result these customers will not be able to spend their money on preferred goods or services, resulting in a loss to these customers. *See* Wolfson et al., *supra* note 26, at 180, 207-08.

53. Both pro bono legal services and the Legal Services Corporation are meant to meet this demand. There is strong evidence that the legal needs of the poor are not being met. *See, e.g.,* MARK KESSLER, LEGAL SERVICES FOR THE POOR 2-4 (1987); CHARLES K. ROWLEY, THE RIGHT TO JUSTICE 131-60 (1992); Robert A. Katzmann, *Themes in Context*, *in* THE LAW FIRM AND THE PUBLIC GOOD 1, 2-5 (Robert A. Katzmann ed., 1995).

54. *See* ABEL, *supra* note 10, at 85-108; David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 90-92 (1994); Richard B. Freeman, *The Effect of Occupational Licensure on Black Occupational Attainment*, *in* OCCUPATIONAL LICENSURE AND REGULATION 165, 165-79 (Simon Rottenberg ed., 1980); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 18-19 (1976); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 759-60 (2000) (arguing that the barriers of entry to the legal market have reinforced and amplified societal discrimination, and have limited the numbers of minority lawyers).

bar.[55] Consider, for example, the recent increase in legal malpractice claims.[56] Further, as a general matter, it is questionable whether pre-education and a bar exam can guarantee any level of performance over thirty or forty years as a licensed attorney.[57] Perhaps the most damning evidence of the efficacy of the bar exam, however, is a consideration of the skills of the newest members of the bar. Query what legal tasks, if any, we could guarantee that a lawyer could perform on the day she receives her letter of bar admittance. Without further training or experience, most would shudder to imagine this newly minted lawyer immediately trying a case, or drafting a complex contract. This failing alone casts serious doubts upon the utility of current entry regulations. Even after a minimum of three years of college, three more years of law school, a two to three day bar examination, and the character and fitness process, there are few identifiable skills that a new member of the bar is guaranteed to have.[58]

The irony, of course, is that the bar examination is actually quite difficult. Even students who have completed the requisite years of pre-legal and legal education frequently fail the bar.[59] The relative difficulty of the bar

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55. *See* TASK FORCE ON PROF'L COMPETENCE, AM. BAR ASS'N, FINAL REPORT AND RECOMMENDATIONS (1983); Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 234 (1973) ("[O]ne-third to one-half of the lawyers who appear in serious cases are not really qualified. . . ."); Bryant G. Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WISC. L. REV. 639, 639-40 ("No one with any practical experience would deny the superficiality and shoddiness of much legal work, nor would anyone claim that the bar's institutions of quality control have provided effective means of self-regulation in the past."); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 110-13 (1994) (discussing continuing problems with attorney competence); Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 288-90 (1986) (discussing ongoing debate over attorney competence); Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?*, 61 TEMP. L. REV. 1211, 1214 (1988) (discussing continuing problems with attorney competence).

56. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1678 (1994) (reporting that the filing of legal malpractice claims doubled between the mid-seventies and mid-eighties); Gary N. Schumann & Scott B. Herlihy, *The Impending Wave of Legal Malpractice Litigation—Predictions, Analysis and Proposals for Change*, 30 ST. MARY'S L.J. 143, 160–67 (1998); Thomas E. Zehnle, *Study Finds Legal Malpractice Claims on the Rise: Lawyers Suing Lawyers More Commonplace*, LITIG. NEWS, Sept. 1997, at 4.

57. The bar exam also only measures a certain, relatively small, group of attorney skills. Some students might even argue the skills it measures are memorizing and regurgitating information. The bar exam generally does not test for negotiation skills, oral advocacy, or client counseling, let alone the skills involved in practicing a specialty such as tax or bankruptcy.

58. As such, current entry barriers may well exacerbate any information asymmetries that exist by overstating the actual competence of licensed practitioners and giving consumers a false sense of security.

59. OFFICE OF THE CONSULTANT ON LEGAL EDUC., AM. BAR ASS'N, ABA APPROVED LAW SCHOOLS: STATISTICAL INFORMATION ON AMERICAN BAR ASSOCIATION APPROVED LAW SCHOOLS 34-40, 57-66 (1997) (providing bar passage rates for the summer 1995 bar exams).

examination, in comparison to the paucity of actual skills that it guarantees, suggests that the exam is designed more to limit the number of lawyers than to guarantee any set level of competence, that is, the entry regulations are set to limit competition with existing lawyers rather than to protect the public.

Further, there are substantial problems with standard-setting. It is difficult, if not impossible, to mandate one course of study or one exam that will successfully guarantee to the public that a lawyer will be capable of performing all levels and types of legal services. The process of standard-setting also poses difficulties. If lawyers are allowed to set the standards, the incentives noted earlier will continually drive the standards up, and the eventual standard may be based upon self-interest.

There are also many less drastic ways to remedy the information asymmetry at issue. The preferred economic remedy for an information asymmetry is more information,[60] not government mandated standards.[61] Consider, for example, President Clinton's recent suggestion that states create a system for mandatory public disclosure of serious or fatal medical errors.[62] Attorney regulatory authorities, by contrast, have kept their proceedings almost entirely secret,[63] and have similarly kept even their existence unpublicized.[64] A well-publicized lawyer-disciplinary agency that shared

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60. *See* William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 275 (1997); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 581 (1998).

61. *See* BREYER, *supra* note 14, at 101-19, 193.

62. *See* Editorial, *Preventing Fatal errors*, BOSTON GLOBE, Feb. 23, 2000, at A18; Shailagh Murray, *Clinton to Propose State-Based System to Protect Patients*, WALL ST. J., Feb. 22, 2000, at A6.

63. As of the 1970s, "[t]he expressed policy of the bar [was] to keep hearings secret in order to protect the 'unjustly accused lawyer.'" F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?,* 1974 U. ILL. L. F. 193, 209 (1974); *see also* SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 138-42 (1970) [hereinafter CLARK REPORT]. As of the 1980s a substantial portion of states still kept attorney disciplinary proceedings secret until the imposition of discipline. HALT, ATTORNEY DISCIPLINE NATIONAL SURVEY AND REPORT 9-10 (1988). The McKay Report recognized that "secrecy in discipline proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems." COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY 33 (1992) [hereinafter MCKAY REPORT]. Nevertheless, the McKay Report only recommends that disciplinary proceedings become public after a determination that probable cause exists. *Id.* In short, complaints against lawyers, and the initial investigation of those complaints, would remain secret, and only the most serious of complaints would ever see the light of day. Given that in some jurisdictions regulators summarily dismiss up to 90% of all complaints, the McKay Report's disclosure rule would do little to cure information asymmetry. *See* HALT, *supra*, at 13.

64. HALT, *supra* note 63, at 7-8. "Most disciplinary agencies deliberately discourage any publication of information concerning their activities, believing that the public image of the profession is damaged by a disclosure that attorney misconduct exists." CLARK REPORT, *supra* note 63, at 143; *see also* MCKAY REPORT, *supra* note 63, at 120-21.

information about attorney competence or complaints with the public would likely alleviate most, if not all, information asymmetry problems.

A second possible alternative to full-scale licensing is certification. Certification is less restrictive, but still allows clients to easily find a lawyer who has a certain amount of schooling, or who has passed an examination.[65] On the one hand, certification involves some of the same problems as licensing; the certification process may not reflect ongoing competence and may allow the certified to press for higher prices. But, under certification the availability of a substitute, that is, uncertified practitioners, acts as a natural drag on any over-pricing by the certified.[66] There would also be free entry into the market for the uncertified, providing a further downward pressure on prices.[67] The growth of programs that certify practicing attorneys as experts in a certain field of law establishes that certification is practicable.[68] It also suggests that the requirements for bar entry alone offer insufficient information to consumers.[69]

The serious harm argument is also undermined by the fact that laws barring unauthorized practice do not stop a person from proceeding pro se. If the purpose of licensing and unauthorized practice laws is truly to protect the public from serious harms, it would seem that pro se representation should be banned as well. If a lawyer representing herself has a fool for a client, one would assume that the danger of layperson self-representation would be too much for society to bear. Nevertheless, we allow self-representation, but not unlicensed representation; a sign that unauthorized practice rules are aimed at suppressing competition and not protecting the public.

Given the variety and difficulty of the entry regulations governing competence, one would expect a similar level of concern for the competence of existing practitioners. The relative disinterest in lawyer competence after licensing further belies any serious worry about substandard practitioners. In fact, attorney regulation focuses almost exclusively on the qualifications of

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65. Milton Friedman was an early proponent of the advantages of certification over licensure. *See* FRIEDMAN, *supra* note 13, at 146-47.

66. Thus, to a certain extent, the bar exam and educational requirements have not driven the market for lawyers' services, the rules against unauthorized practice have. It would be easy enough to have a system where only practitioners who graduate from an ABA accredited law school and passed the bar could call themselves "lawyers" or "attorneys," but other unlicensed practitioners are allowed to perform legal services. This would be the functional equivalent of a certification system.

67. Note that certification may also solve the problems raised by the "lemons" argument. *See supra* note 26. The ability of high quality producers to certify their quality will likely keep those producers in the market. *See* W. Kip Vikusi, *A Note on Lemons' Markets with Quality Certification*, 9 BELL J. ECON. 277, 277-78 (1978).

68. For a description of the current state of these programs, see Judith Kilpatrick, *Specialist Certification for Lawyers: What is Going On?*, 51 U. MIAMI L. REV. 273, 290-316 (1997).

69. *See* Burger, *supra* note 55, at 231.

new entrants to the bar, and pays scant attention to guaranteeing the competence of practicing attorneys.[70]

There are rules that require "competent representation,"[71] diligence,[72] communication with the client,[73] safekeeping a client's property,[74] and consultation with the client concerning the objectives of the representation and "the means by which they are to be pursued."[75] Nevertheless, these regulations cover little more than would already be required by the common law covering contracts, fiduciaries and agency relationships.[76] Insofar as the regulation duplicates, or perhaps subtly alters, existing obligations, it is of questionable value.[77] Moreover, the anti-shirking provisions are stated extremely broadly,[78] and are in fact rarely prosecuted.[79]

State disciplinary bodies have tended to "treat individual instances of incompetence and neglect as not violative of the rules of professional conduct or as a minimal violation not worthy of disciplinary action."[80]

More than two-thirds of the state bar associations have turned to mandatory continuing legal education ("CLE") in an effort to guarantee ongoing competence.[81] These programs, however, hardly guarantee any level of competence. First, many states only require new attorneys to take CLE

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70. The economic incentive for doing so is clear: As entry standards for new entrants rise, the potential for economic rents among existing practitioners increases.

71. MODEL RULES OF PROF'L CONDUCT R. 1.1 (1999); MODEL CODE OF PROF'L RESPONSIBILITY Canon 6 (1983).

72. MODEL RULES OF PROF'L CONDUCT R. 1.3 (1999); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY Canon 6-7 (1983).

73. MODEL RULES OF PROF'L CONDUCT R. 1.4 (1999); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1983).

74. MODEL RULES OF PROF'L CONDUCT R. 1.15 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 9-102 (1983). These rules have been criticized as providing insufficient protection to clients, however. *See* Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 731 (1977).

75. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1999); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1983).

76. Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the* Model Rules, 46 OHIO ST. L.J. 243, 255-56 (1985).

77 . But, remember that one of the goals of *ex ante* regulation, as opposed to the protection offered by the common law, is its ability to reach small-scale problems, that is, problems that would not justify the cost of a lawsuit, but still may be widespread or costly. As such, repeating a common law standard as lawyer regulation may, in fact, serve a salutary purpose.

78. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 642 (1981).

79 *See infra* note 146.

80. MCKAY REPORT, *supra* note 63, at 13.

81. Rocio T. Aliaga, *Framing the Debate on Mandatory Continuing Legal Education (MCLE): The District of Columbia Bar's Consideration of MCLE*, 8 GEO. J. LEGAL ETHICS 1145, 1145 & n.1 (1995).

classes.[82] Second, lawyers are required to attend these classes, but there is no exam or test following the class to measure competence. Third, CLE in and of itself is not designed to identify or correct incompetence, instead it is meant to reinforce the skills and knowledge of competent attorneys.

Lastly, a substantial portion of the regulation of attorney behavior has exacerbated any information asymmetry that exists. Attorney regulation has a long tradition of restricting advertising,[83] client solicitation,[84] client referrals,[85] statements concerning lawyer credentials,[86] and law firm affiliation.[87] In short, past and current attorney regulation has focused on dampening the flow of information about legal services and prices.

Current entry regulations cannot be justified as a response to information asymmetries or irremediable harms. Instead, these regulations largely benefit existing lawyers. The entire onus of guaranteeing quality falls upon entrants to the market, with the helpful side effect of limiting competition for existing practitioners. Likewise, regulation of current lawyers is as unobtrusive as possible, leaving little ongoing control for quality or competence.

B. Externalities and the Courts

Perhaps the single strongest justification for entry regulations are the positive externalities[88] that a uniformly, well-trained cadre of lawyers offer to the court system.[89] Courts and court personnel are greatly affected by the actions of lawyers and clients, from administrative matters, such as filing

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82. *See, e.g.*, Patrick M. Connors, *Professional Responsibility,* 48 SYRACUSE L. REV. 793, 810 (1998) (focusing on New York's mandatory CLE program).

83. MODEL RULES OF PROF'L CONDUCT R. 7.1 to 7.3 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 (1983). These rules are more stringent than the typical regulations to protect consumers from misleading advertising or fraud, and are more stringent than some regulation deemed unconstitutional by the Supreme Court. Sullivan, *supra* note 60, at 580-81. As such, although the flat ban on attorney advertising has been struck down, lawyers still face more restrictive advertising regulation than other professions or industries. *Id.*

84. MODEL RULES OF PROF'L CONDUCT R. 7.1, 7.3 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101, 2-104 (1983).

85. MODEL RULES OF PROF'L CONDUCT R. 7.2(c) (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101, 2-103(B) (1983).

86. MODEL RULES OF PROF'L CONDUCT R. 7.4 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-105(A) (1983).

87. MODEL RULES OF PROF'L CONDUCT R. 7.8 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-102 (1983).

88. Externalities arise when there are costs, or benefits, from an economic transaction that are borne by persons outside of the contracting relationship. An example of a positive externality would be a classical music lover regularly overhearing the music from a neighboring symphony hall.

89. Frustrated lawyers and judges might respond, "If you ever see this 'cadre,' let me know." This reaction, however, is a reflection of the failure of current regulations, not a sign that a regulatory system tailored to producing competent court practitioners is unworkable.

deadlines or the format of pleadings, to attorney demeanor, to the filing of unnecessary lawsuits or motions, or continual discovery disputes. Each of these interactions has costs associated with them for the courts. In a well-pled and litigated case the administrative costs to the courts are kept at a minimum, and the court is allowed to focus upon its primary goal, expediting the fairest possible solution to the lawsuit.

When lawyers or clients are incompetent or uncooperative, however, courts are forced to spend precious resources on matters not directly connected with the provision of justice. Courts may deal with some of these costs through the common law authority to hold persons in contempt of court, as well as their inherent administrative powers to set guidelines for attorney behavior and the formatting of pleadings. These responses, however, are hardly cost-free. A court's contempt power is circumscribed by due process requirements, which means that a contempt citation requires a relatively high level of procedural safeguards.[90] Enforcing and drafting pleading or behavioral standards also requires substantial time. Moreover, there is an inherent tension between courts' desire for efficient and enforceable procedures, and the desire to hear cases on the merits and maximize justice.[91]

As such, the various entry requirements for admission to the bar can be justified as creating a positive externality for the courts and society at large. The courts rely upon a competent group of attorneys who know and understand court rules and procedures to present legal disputes in a recognizable form, in a timely fashion, and ready for a court's review and decision. Pro se litigants, by comparison, pose special problems for courts.[92] Because courts generally attempt to decide cases on their merits rather than on procedural violations, courts typically grant pro se litigants great latitude in meeting procedural standards.[93] This has the salutary effect of allowing even incorrectly or unpersuasively pled cases to have their day in court. The downside is the extra work required on the part of the court system. Judges must bend their procedural standards, and spend time decoding the legal and factual bases of pro se claims.

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90. *See* Lawrence N. Gray *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN'S L. REV. 337 (1998) (discussing the essence of contempt law decisions).

91. *Cf.* FED. R. CIV. P. 1 (stating that the *Rules* "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action").

92. *See generally* Hon. John M. Stanoch, *Working with Pro Se Litigants: The Minnesota Experience*, 24 WM. MITCHELL L. REV. 297 (1998) (describing Minnesota's efforts to deal with the growth in pro se litigation).

93. *See, e.g.*, Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (holding *pro se* pleadings to "less stringent standards than formal pleadings drafted by lawyers"); United States v. Garth, 188 F.3d 99, 105 n.7 (3d Cir. 1999) ("We generally accord wide latitude to *pro se* petitions for relief.").

Again, this is not a cost-free process. As such, some level of entry regulation to guarantee that the bulk of practitioners appearing before courts are trained in procedural and pleading guidelines is justified. The ability of attorneys to adhere to procedural rules and standards of pleading has a significant positive effect upon the courts, the administration of justice, and arguably the public.

Nevertheless, while some entry regulations may be justifiable to protect the interests of courts and the public in the smooth administration of justice, the current set of entry regulations are extremely poorly suited to the needs of courts. Ironically, the need for entry regulation as an assistance to the courts is seriously undercut by the current state of legal education and bar examinations. It would be hard to argue that the standardization of practice before courts can be traced to the current system of training and testing lawyers. The bar exam may test substantive knowledge and whether the applicant can think like a lawyer, but it rarely tests for the types of skills that make court processes run more smoothly, such as procedural or pleading skills.[94] Law schools have been roundly criticized for focusing on theory at the expense of the practical.[95] If it is true that lawyers are actually learning how to practice *after* law school, required education or testing may be superfluous.

Furthermore, the negative aspect of entry regulation, the laws barring the unauthorized practice of law, reach a multitude of "legal" tasks above and beyond appearing in court.[96] Insofar as these rules reach outside of the courts, they require a separate justification.

C. Law as a Profession

There has been a long tradition of considering law a profession,[97] and connecting the idea of professionalism to the regulation of lawyers.[98]

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94. *Cf.* TASK FORCE ON LAW SCHS. & THE PROFESSION, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 278 (1992) [hereinafter MACCRATE REPORT] ("The traditional bar examination does nothing to encourage law schools to teach and law students to acquire many . . . fundamental lawyering skills . . . .").

95. *See, e.g., id.*, at 5 (noting that surveys "indicate that practicing lawyers believe that their law school training left them deficient in skills they were forced to acquire after graduation"); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Stephen Wizner, *What is a Law School?*, 38 EMORY L.J. 701 (1989).

96. *See* Christensen, *supra* note 13, at 189-201.

97. *See, e.g.*, ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 7 (1953) ("It must not be supposed, however, that an organized profession of lawyers or of physicians is the same sort of thing as a retail grocers' association . . . .").

98. Consider the Model Rules of *Professional* Conduct and Model Code of *Professional* Responsibility.

Nevertheless, neither entry nor behavior regulation can be defended solely as a means of maintaining law's status as a learned profession. There is nothing wrong with, and in fact there is much to be admired about, a group of individuals (say law school graduates) referring to themselves as a "profession," and seeking to act in a public-spirited manner.[99] Remember, however, that the existence of law as a profession is at least partially due to regulation itself.[100]

The problem with "professionalism" arises when this same group seeks to use regulation, that is, the coercive powers of the government, to perpetuate or raise the social or economic status of the group as a profession. Thus, the problem is not with the idea of "professionalism" per se, it is the use of barriers to entry and laws against unauthorized practice to reinforce an elevated societal status.[101]

The difficulty is in parsing the nostalgia for law as a profession from the arguments directly supporting regulation perpetuating lawyer status. Several arguments emerge that focus upon the benefits to society of law as a separate and elite profession. First, professional lawyers act as a buffer between their clients and the courts, steadfastly recommending against violating the law and occasionally calling their clients out as "damned fools."[102] This certainly seems like a worthwhile service, but it is unclear whether it could, or should, be required or controlled by regulation. The wave of dissatisfaction over lawyers' lack of professionalism, in fact, suggests that current lawyers are not serving these purposes, regardless of any regulation.[103] Current regulation

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99. Again, Milton Friedman would likely disagree. Friedman argues vociferously that any time a group of producers gathers to differentiate themselves as a "profession," licensure, and all of its accompanying ills, cannot be far behind. FRIEDMAN, *supra* note 13, at 148.

100. For example, the ABA's definition of law as a profession includes the concept of self-regulation. *See* BLUEPRINT, *supra* note 24, at 10. If there were not regulations limiting entry into the legal market, there might not be a clearly defined group of lawyers, let alone a stratified group forming a profession.

101. In fact, multiple commentators have built strong historical cases that bar associations' repeated calls for "professionalism" are based in elitism and a desire to perpetuate elitism. *See* ABEL, *supra* note 10, at 71-73; JERALD S. AUERBACH, UNEQUAL JUSTICE 102-57 (1976); Amy R. Mashburn & Dabney D. Ware, *The Burden of Truth: Reconciling Literary Reality with Professional Mythology*, 26 U. MEM. L. REV. 1257, 1268-69 (1996); *cf.* Philip S. Stamatakos, Note, *The Bar in America: The Role of Elitism in a Liberal Democracy*, 26 U. MICH. J.L. REFORM 853, 876-78 (1993).

102. SOL M. LINOWITZ, THE BETRAYED PROFESSION 3-4 (1994); *cf.* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 128-34 (1993) (describing the ideal of lawyer-client counseling). The ideal lawyer has long served this purpose. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 278 (Phillips Bradley ed., 1945) ("When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors.").

103. *See* KRONMAN, *supra* note 102, at 288-91; LINOWITZ, *supra* note 102, at 4.

does little to foster the desired behavior.[104] Further, these calls for the wise and disinterested lawyer-counselor frequently hearken back to the halcyon days of lawyering. As the legal market has become increasingly competitive, few lawyers can afford to be as high-minded or "professional" as the lawyers of the past are supposed to have been. If the cost of re-creating the professional ideal is to suppress competition further, the cost will surely exceed the benefits.

Second, lawyers have long been sources of high-level public servants, from judges to politicians, to presidents.[105] But, regulation has not been the source of this phenomenon, and regulation does not seem appropriate to encourage it. Moreover, most of the lawyers that are regularly claimed as the ideal of the professional lawyer-statesman come from the nineteenth century,[106] and practiced when there was little or no regulation of lawyers, and few barriers to entering practice.[107]

Third, some have argued that law must remain a licensed profession in order to provide pro bono work on behalf of needy clients. Arguably, without a separately demarcated "profession," and an accompanying responsibility for public service, much current pro bono work would be discontinued, to the great detriment of needy clients. Suggesting that lawyers need an exclusive government license to volunteer their services, however, especially in light of the fact that pro bono work is currently discretionary, not mandatory, seems to twist the idea of professionalism beyond recognition.[108] Further, if we as a society truly believe that high quality legal services should be provided to the needy, we should directly provide these services, rather than imposing a costly licensing scheme upon clients and lawyers alike, with the hope that these lawyers will later volunteer their time on behalf of the needy. If the need is

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104. The bulk of lawyer regulation is aimed at zealous client advocacy; there is little direct regulation requiring lawyer public-mindedness, or mandating that the lawyer act as a buffer or counselor to her client. A lawyer may not "counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client." MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1999). Although this bars a lawyer from directly advising a client to violate a criminal law, it requires no affirmative actions on behalf of the lawyer, and allows the lawyer to discuss all the options, even illegal ones, with the client.

105. KRONMAN, *supra* note 102, at 11-14; LINOWITZ, *supra* note 102, at 9-10; 1 TOCQUEVILLE, *supra* note 102, at 279 ("As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations.").

106. *See* James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 YALE L.J. 1031, 1048-55 (1994) (reviewing KRONMAN, *supra* note 102, and comparing the nineteenth century model of the lawyer-statesman to Dean Kronman's model).

107. *See supra* notes 2-3 and accompanying text.

108. Furthermore, the push for pro bono services is currently faltering, despite the recent windfall in lawyer salaries and incomes. Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, N.Y. TIMES, Aug. 17, 2000, at A1.

great enough to justify entry regulations, it should certainly suffice to justify a more direct provision of these services without licensing.

Moreover, it seems like a crass use of the ideal of "professionalism" to argue that lawyers need an exclusive and profitable license in order to provide the various services connected to the idea of "professionalism." If there is something about the practice of law or attending law school that inspires a public-minded and professional approach to lawyering, it should exist regardless of barriers to entry or regulation. If there is nothing about the practice of law to inspire such sentiments, it is unlikely that a bribe in the form of a license will inspire anything more than cynicism.

Lastly, the connection between promoting professionalism and suppressing competition is made explicit by an examination of the many indefensible attorney regulations that have been propagated under the banner of professionalism over the years, including rules specifically barred by the Supreme Court, like bans on advertising,[109] fee schedules,[110] and residency requirements.[111] Despite these decisions, there are still many lawyer regulations aimed at restricting competition through stringent rules on advertising,[112] client solicitation,[113] client referrals,[114] statements concerning lawyer credentials,[115] law firm affiliation,[116] and unauthorized practice in another jurisdiction or assisting in unauthorized practice.[117] The bar has sought to suppress and control these activities as a protection against the creeping commercialization, or lack of professionalism, of the bar.[118] Commentators, however, have seen a clear effort to repress competition, and maintain or raise pricing levels.[119] Regardless of how valuable the goal of

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109. Bates v. State Bar of Ariz., 433 U.S. 350, 382-83 (1977); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 (1980).

110. Goldfarb v. Va. State Bar, 421 U.S. 773, 791-92 (1975).

111. Supreme Court of N.H. v. Piper, 470 U.S. 274, 288 (1985).

112. MODEL RULES OF PROF'L CONDUCT R. 7.1 to 7.3 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 (1983).

113. MODEL RULES OF PROF'L CONDUCT R. 7.1, 7.3 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101, 2-104 (1983).

114. MODEL RULES OF PROF'L CONDUCT R. 7.2(c) (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101, 2-103(B) (1983).

115. MODEL RULES OF PROF'L CONDUCT R. 7.4 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-105(A) (1983).

116. MODEL RULES OF PROF'L CONDUCT R. 7.5 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-102 (1983).

117. MODEL RULES OF PROF'L CONDUCT R. 5.5 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 3-101 (1983).

118. William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 326 & n.4 (1996).

119. *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 252-54 (1996); Cramton, *supra* note 36, at 544; Morgan, *supra* note 74, at

professionalism, attorney-drafted rules suppressing certain forms of competition are not in society's best interest, and cannot be justified.

D. Proposed Alternative

Entry regulations have been defended primarily as a protection for the public from substandard lawyers.[120] The need for such protection is questionable, however, and the current, sweeping entry regulations are ill-fitted to the narrow problem of information asymmetry. Moreover, entry regulations cannot be defended on the basis of a public need for law as a profession.

Nevertheless, some entry regulations may be justified as a response to the needs of courts. As currently structured, state and federal courts rely upon competent practitioners to shepherd cases through procedural and conceptual hurdles, in a timely and comprehensible fashion. Given the current caseloads before both the federal and state courts,[121] full deregulation would likely cripple court processes. As such, any revision of current entry regulations should be tailored to the legitimate needs of the courts.

Any regulatory response to the needs of the courts, however, must also consider the costs that society bears when entry barriers are introduced. Barriers to entry restrict the number of lawyers.[122] As the number of lawyers is restricted, the costs listed earlier are introduced.[123] Thus, entry regulations should balance the costs to society from barriers to entry with the costs of increasing judicial infrastructure (by hiring more judges or clerks, or building court houses).

There are two keys to successfully calibrating entry regulations to the needs of the courts. The first is to tailor the entry regulations as specifically as possible to the needs of courts. The second is to set fairly the level of the entry barriers, considering the cost to society from entry regulations, the cost to society of maintaining the judicial system, and the overall societal resources available to supply "justice" or court output.

712-26; Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 692-706 (1981).

120. *See supra* notes 23-25 and accompanying text.

121. *See generally* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985); Gregory E. Maggs, *Ipse Dixit:* The Restatement (Second) of Contracts *and the Modern Development of Contract Law,* 66 GEO. WASH. L. REV. 508, 540 & n.234 (1998) (noting the current concern over state and federal court caseloads).

122. They also set a minimum price for lawyers: entrants must be able to recoup their investment once they enter the profession. *See supra* notes 42-49 and accompanying text.

123. *See supra* notes 42-54 and accompanying text.

1. Justifiable Entry Regulations

Entry barriers are expensive. If necessary to protect and assist the courts, entry regulations should closely fit the rationale, so the benefits of the barriers exceed the costs. As currently structured, however, there are multiple entry regulations that inflict costs upon the public with little accompanying gain in court efficiency. The clearest are laws against unauthorized practice that are aimed at any legal work not directly court-related.[124] The only services that should be limited to lawyers are those that directly affect the workings of the courts, for example, signing and filing court papers and appearing in court. Any other services, from giving legal advice to drafting legal documents such as wills or contracts, should be fully deregulated and open to full competition.[125] These activities do not involve significant information asymmetries or irremediable harms, and the public should have a choice to purchase their services from providers with varying levels of expertise and prices.

Current educational requirements also appear to be substantially overblown in light of the limited interests of courts. Most licensed lawyers are required to attend three to four years of college prior to law school, and then pass three years of full-time study at an ABA accredited law school.[126] The connection between these requirements and the needs of the courts is tenuous at best. Law schools have come under increasing fire for their failure to prepare students in the nuts and bolts of legal practice, that is, in exactly the skills most critical to courts.[127]

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124. *See supra* note 96 and accompanying text.

125. Others have suggested deregulating "routine legal services." LUBAN, *supra* note 9, at 269 (proposing "to deregulate, wholly or partially, the market for routine legal services—wills, probate, real estate closings, uncontested divorces, and so forth—by allowing non-lawyers and paralegals to perform them"); Cramton, *supra* note 36, at 571. Deborah Rhode has proposed an alternative approach to limited deregulation: "For [other] occupations that are already subject to licensing requirements, it is time to recognize reality and eliminate prohibitions on the unauthorized practice of law." Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Non-Lawyer Practice,* 22 N.Y.U. REV. L. & SOC. CHANGE 701, 714-15 (1996). This Article's proposal is more far-reaching than these proposals, and focuses its analysis upon the only legitimate worry involved in unauthorized practice regulation: the interests of the courts.

126. *See supra* notes 17-20 and accompanying text. These educational requirements are generally defended on the basis that substandard lawyers would harm unsuspecting clients. *See* Shepherd & Shepherd, *supra* note 19, at 2104.

127. These criticisms have come from the judiciary, *see* Edwards, *supra* note 95; Hon. Robert R. Merhige, Jr., *Legal Education: Observations and Perceptions from the Bench*, 30 WAKE FOREST L. REV. 369, 372 (1995) ("As a federal district judge for nearly thirty years, I have witnessed young lawyers in court who have not been fine-tuned, so to speak, in the many facets of being a good lawyer."), from professors, *see* Timothy W. Floyd, *Legal Education and the Vision Thing*, 31 GA. L. REV. 853, 856-67 (1997); Leonard D. Pertnoy, *Skills is Not a Dirty Word*, 59 MO. L. REV. 169 (1994), and bar associations themselves, *see* MACCRATE REPORT, *supra* note 94, at 4-7.

There can be little question that lawyers who have passed through multiple years of undergraduate work and three years of law school have been trained to think analytically, "like a lawyer." Nevertheless, on the whole these students are not trained in the specific tasks necessary to file or defend a lawsuit in court. Consequently, a regulatory system that focused upon court processes would narrow the educational requirements to only those necessary to meet the minimum needs of the courts: filing procedures, elementary legal argumentation and research, and civil procedure. These subjects could be covered in a much shorter period than three years, possibly as short as six months.[128] Furthermore, under a properly functioning entrance exam and ongoing conduct regulation there would be little need for *any* particular educational requirements. Schools would prepare applicants for any necessary examination, and the length or subject matters covered at these schools would depend upon the specific skills tested by the court licensing authority.

The current bar examination, however, focuses almost exclusively on substantive legal issues and "thinking like a lawyer" and dedicates little, if any, space to the specifics of practice before courts.[129] The bar examination has thus been questioned as a measure of competence.[130] More importantly, the current bar examination does little to guarantee that applicants will be able to follow the policies and procedures of court systems. Presumably, young lawyers are learning these skills in their first years of practice. A revised examination would focus solely upon the skills necessary for processing lawsuits through the courts.

Therefore, a focus upon the needs of the courts results in a much narrower set of entry regulations. The entire system could consist of a relatively simple test focusing upon specific areas identified by courts as critical to their smooth

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128. This does not mean, of course, that current law schools would cease to exist (thus costing me a job), or that they do not serve a valuable purpose. Many students would undoubtedly still choose to attend "traditional" law schools, and many clients would likely still hire these lawyers, regardless of the cost. The problem is that the current entry regulations require all clients to hire lawyers who have been through the required rigors and years of study (and the accompanying costs), regardless of the client's needs, or ability to pay.

129. Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives,* 45 CASE W. RES. L. REV. 1191, 1203-07 (1995) (describing the current bar examination's focus upon legal doctrines, at the expense of legal practice).

130. Leon Green, *Why Bar Examinations?*, 33 U. ILL. L. REV. 908 (1939); Hansen, *supra* note 129, at 1206-10; Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 382 (1996); Susan R. Martyn, *Peer Review and Quality Assurance for Lawyers*, 20 U. TOL. L. REV. 295 (1989); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 690 (1994) ("No showing has ever been made that performance either on bar exams or in law school correlates with performance in practice."); Ken Myers, *Bar Exams Under Examination as Dean Decries Wasted Time*, NAT'L L.J., Oct. 17, 1994, at A11.

operation.[131] This would eliminate a number of the current superfluous entry regulations, and fit the justification for such regulation more narrowly.

2. Setting the Balance

Refocusing the entry regulations solely upon the needs of the courts, however, does not end the inquiry. It will still be necessary to set the entry barriers to maximize efficiency, which requires balancing the costs to the courts of lower entry barriers with the costs to society of higher entry barriers.

Assuming that entry barriers were reformulated to narrowly fit the needs of the courts, there would be a direct correlation between the level of the entry barriers and the efficiency of the courts. As the reformulated entry barriers rise, practitioners before the court would be better at filing, framing, and maintaining lawsuits, and the costs to the courts would shrink.[132] As these barriers lower, the costs to the courts would increase, because practitioners would be less able.[133]

But, instituting even these reformulated entry barriers is not without costs; as the barriers to entry rise, the costs to society associated with those barriers also rise. The total amount spent by society on both of these goods (entry barriers and court infrastructure) will result in a certain amount of "justice," that is, court output.[134] The critical point of equilibrium to be found is where an additional dollar shifted from entry barriers or the costs of maintaining the courts to the other would result in a lower overall amount of "justice"

131. Even this relatively limited barrier to entry will prove unacceptable to hard-core critics of licensure. These critics are so suspicious of licensing, and the motives of producer cartels, that they even argue against registration of members of a profession, let alone limited licensing. The professionals "will inevitably press for the extension of registration to certification and of certification to licensure." FRIEDMAN, *supra* note 13, at 148. The continuous push of the bar for higher quality standards, that is, higher barriers to entry, well exhibits this constant drive to restrict competition. Nevertheless, as argued above, under the current structure of the court system, there is a legitimate need for some guarantee of competence for practitioners before the courts.

132. Costs would shrink *per case*, as each case was managed and pursued more effectively. Nevertheless, the effect upon overall costs and caseload would be harder to predict. On the one hand, more efficient litigators might also prove more efficient in drumming up business, adding to the caseload. On the other hand, rising entry barriers means fewer practitioners, so it seems likely that even if each lawyer brought more suits, the absolute number of cases would fall, because there would be fewer practitioners to bring these suits.

133. Again, costs would rise per case, and also in caseload, because additional lawyers would bring additional lawsuits.

134. Consider the following simple equation: The costs to society of entry barriers + The costs to society of maintaining the court system = "Justice."

provided.[135] The further challenge would be to set the overall level of "justice" that the society wished to provide.

This analysis, however, establishes the importance of focusing the entry regulations upon the needs of the courts. Superfluous regulations exacerbate the costs associated with entry barriers, and result in less "justice" for the money.

3. In Defense of This Reformulation

The above analysis helps to highlight some of the shortcomings of the current system of entry regulations. The regulators have focused mainly upon a faulty consumer protection rationale, resulting in numerous regulations that increase costs to consumers, with little or no resulting increase in the provision of justice. Because of these superfluous, but expensive regulations, the "cost" to society of adding any additional justice is much higher than it would be under a system aimed solely at the needs of the courts.

The obvious objection to the proposed system is that it fails to protect consumers sufficiently. Ironically, reformulating the bar examination to fit the minimum needs of the courts would also likely result in *more* information for clients, because lawyers would likely accelerate the current movement towards various levels of certification to establish their qualifications for clients.[136] More lawyers would become "certified trial attorneys," or other certified specialists. Each of these special certifications would offer vastly more information to clients than the current bar passage system.

Moreover, removing any educational requirements would likely result in an explosion of new law schools, aimed at every educational level, every possible specialty, and for varying amounts of time and expense. The ABA and the

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135. Assume that society wishes to spend a total of $100 on the provision of justice between the costs of the courts and the cost of entry barriers. We could spend the whole $100 on the courts, but given the inefficiencies that open access would create, the total amount of justice provided would be limited. Similarly, purchasing only entry and spending nothing on the courts would offer no justice. Further, the first dollar spent on either entry barriers or the courts would buy little or nothing. A substantial initial investment in both would be necessary before any amount of justice could be provided. The goal is to find the optimal level of expenditures on both items. The trick is that every dollar spent on each item does not purchase an equal amount of justice; as more is spent, eventually less justice is purchased per dollar. *See* KARL E. CASE & RAY C. FAIR, PRINCIPLES OF MICROECONOMICS 275-83 (2d ed. 1992) (explaining the law of diminishing returns). As such, the levels of the entry barriers and the costs to the courts should be set according to corresponding levels that maximize overall justice.

136. This process has already begun, regardless of the current entry system. Melissa M. Serfass, *Standards for Certification of Appellate Specialists,* 1 J. APP. PRAC. & PROCESS 381, 381-82 (1999) (describing the increasing movement towards legal certification for specialties). *See generally* Kilpatrick, *supra* note 68.

American Association of Law Schools ("AALS") have long been criticized for repressing innovation in law school form and content;[137] removing any particular educational requirement would allow for the rebirth of part-time schools,[138] apprenticeships,[139] or schools focused more specifically upon a single area of expertise.[140] Many students would no doubt continue to attend traditional law schools. The legal education market, however, would likely revert to its status in the early-twentieth century, where alternative routes into the practice abounded and law schools "rooted in our colleges and universities . . . teaching national law by the case method"[141] produced a minority of lawyers.

In sum, the public would not count on a single, unworkable standard—membership in the bar—to provide information about an attorney's skills. Between innovation in legal education and increased certification and specialization, clients would have a number of new measures to consider in selecting a lawyer.

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137. *See, e.g.,* Harry First, *Competition in the Legal Education Industry (II): An Antitrust Analysis,* 54 N.Y.U. L. REV. 1049, 1076-78 (1979) (arguing that "the AALS-ABA standards must be held at least partly responsible for [the] stagnation in legal education"); Richard A. Matasar, *The MacCrate Report From the Dean's Perspective,* 1 CLINICAL L. REV. 457, 487 n.64 (1994) ("Despite the ABA accreditation committee's very strongly held public stance that they want to encourage innovation, experimentation, and difference, the regulatory process has lead to sameness among law schools that could be different."); Shepherd & Shepherd, *supra* note 19, at 2182-84 ("The ABA controls reduce the pace of innovation.").

138. In the early part of the twentieth century, "the largest group" among law schools was "part time schools." REED, *supra* note 6, at 415-16; *cf.* Michael J. Mazza, Comment, *The Rise and Fall of Part-Time Legal Education in Wisconsin: 1892-1924*, 81 MARQ. L. REV. 1049 (1998) (describing the prevalence of part-time law schools in Wisconsin at the turn of the century). Ironically, Alfred Reed, the earliest scholar of American legal education, concluded in 1921 that "it is neither possible, nor, having due regard to the fundamental principles for which the American commonwealth has been supposed to stand, would it be desirable, to abolish [part-time law schools,] now definitely established and rapidly growing." REED, *supra* note 6, at 416.

139. If the entry exam focused upon court procedures and litigation, an apprenticeship could be the most efficient, and least costly option for learning the ropes. Up until the mid-nineteenth century "the main path to practice still went through apprenticeship for the overwhelming majority of lawyers." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 282 (1973); *see also* Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124, 125-26 (1976); Roithmayr, *supra* note 54, at 759-60.

140. Law schools have already become increasingly specialized. Some offer specialized courses of studies. Peter V. Letsou, *The Future of Legal Education: Some Reflections on Law School Specialty Tracks*, 50 CASE W. RES. L. REV. 457, 459-60 (1999) (describing and defending the trend towards specialized law school tracks); Robert A. Stein, *The Future of Legal Education,* 75 MINN. L. REV. 945, 959 (1991) ("The law school curriculum in the future will offer far more specialized courses and seminars, and some law schools will offer specialization tracks. This development is a reaction to the ever-increasing specialization in the practice of law."). Others offer LLM programs for post-graduate study in a particular area. Linda R. Crane, *Interdisciplinary Combined-Degree and Graduate Law Degree Programs: History and Trends*, 33 J. MARSHALL L. REV. 47, 58-64 (1999) (describing LLM programs).

141. REED, *supra* note 6, at 416-17.

Further, ongoing competence could be monitored much more closely by conduct regulations. If attorney regulatory authorities investigated, publicized, and punished incompetence, there would be little need for entry regulations as a guarantee of competence. Lastly, since competition would be greatly increased, the costs of services would likely decline overall, and there would be greater access to legal services for all income levels.

Another possible objection is that lower barriers to entry will severely harm indigent criminal defendants who rely upon court-appointed counsel for their defense. Complaints of ineffective assistance of counsel are already standard fare in criminal appeals,[142] and if the barriers to entry were lowered, indigent defendants would arguably be the first to suffer. First, the current licensing system has done little to guarantee indigent defendants competent representation, as the volume of ineffective assistance claims alone establishes. Second, forcing every client to purchase services from a lawyer licensed under the current system to protect the needs of a relatively narrow group—indigent defendants—is an extremely costly and ineffective way of guaranteeing competent representation. It would be more preferable to lower overall entry barriers, and guarantee competent services to the indigent by appointing a lawyer who reached some relevant level of experience or expertise, for example, a certified trial lawyer or defense attorney.[143] This would actually offer greater protection to indigent defendants, and would not require the current wide-ranging barriers to entry.

All in all, reconfiguring entry regulation would serve the interests of the courts, lower the costs of hiring a lawyer, and allow greater access to legal services for all income levels. Moreover, if conduct regulations were similarly

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142. John K. Van de Kamp, *The Right to Counsel: Constitutional Imperatives in Criminal Cases,* 19 LOY. L.A. L. REV. 329, 330 (1985) (noting the increasing frequency of complaints about incompetence of counsel); Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling,* 39 B.C. L. REV. 841, 851 (1998) (noting "the vast number of claims of ineffective assistance of counsel").

143. The Sixth Amendment guarantees the "right to the effective assistance of counsel" in criminal prosecutions, that is, competent representation. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). *See generally* Shannon McNulty & Brian C. O'Fahey, *Right to Counsel*, 88 GEO. L.J. 1317, 1329-39 (2000) (surveying current ineffective assistance of counsel jurisprudence). Nevertheless, this does not guarantee any particular level of attorney expertise, beyond membership in the bar. *Cf.* United States v. Rosnow, 981 F.2d 970, 972 (8th Cir. 1992) (holding that counsel's disbarment while representing defendant on appeal was not ineffective assistance because defendant was also represented by licensed attorney throughout the appellate process); United States v. Novak, 903 F.2d 883, 886-90 (2d Cir. 1990) (holding that representation was per se ineffective because counsel later revealed that he gained admission to bar by fraudulent means). *But cf.* United States v. Stevens, 978 F.2d 565, 567-68 (10th Cir. 1992) (counsel's disbarment seven days before trial without notice was not denial of effective assistance because defendant did not establish prejudice). A right to counsel that guaranteed a higher level of competence ahead of time, would reduce ineffective assistance claims, and actually better serve indigent defendants.

reformulated to focus upon providing information and monitoring competence, the change in entry standards would not harm consumers.

II. A COMPARISON BETWEEN CURRENT CONDUCT REGULATION AND ITS JUSTIFICATIONS

This section discusses the potential justifications for regulation of attorney conduct, and compares these rationales to the current state of attorney regulation. Conduct regulation governs the behavior of existing lawyers. Attorney conduct is controlled in forty-nine states by either the *ABA Model Rules of Professional Conduct* or the *ABA Model Code of Professional Responsibility*, with varying degrees of local modifications.[144] The actual enforcement of these regulations has long been criticized as egregiously lax.[145] Only about five percent of all complaints result in any sanction against

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144. *See* LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 01:3 to 01:63 (2000); Gregory C. Sisk, *Iowa's Legal Ethics Rules—It's Time to Join the Crowd*, 47 DRAKE L. REV. 279, 283-85 (1999). Although California has not adopted either the *Rules* or *Code*, it has borrowed from both. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 5 (5th ed. 1998). The majority of Federal Courts apply the professionalism rules adopted in the state where the federal court sits. H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 97-98 (1997); *cf.* Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473, 475 (1995) (noting that federal courts apply state rules of professionalism, as well as federal common law).

State supreme courts control regulation of practicing lawyers. MCKAY REPORT, *supra* note 63, at 2-3. Again, this power is tempered by supreme courts that delegate the task of drafting these regulations to the ABA, and the adoption and enforcement of these regulations to unified bar associations and separate agencies focused solely on lawyer regulation. For a full description of these court-created entities, see MCKAY REPORT, *supra* note 63, at 1-5, 23; Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 921-33. State disciplinary counsel is affiliated with a unified state bar in twenty states. *See* Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 10 & n.41 (1998).

145. An early systematic study of bar discipline covered the New York City Bar between 1951 and 1962. The study concluded that "[t]he organized bar through the operation of its formal disciplinary measures seems to be less concerned with scrutinizing the moral integrity of the profession than with forestalling public criticism and control." JEROME E. CARLIN, LAWYERS' ETHICS, A SURVEY OF THE NEW YORK CITY BAR 150-56 (1966). The issue came to the fore with the publication of the Clark Report, an ABA study that was highly critical of the bar's disciplinary procedures. *See* CLARK REPORT, *supra* note 63. Later studies have shown that despite some improvements since the Clark Report, serious problems remain. MCKAY REPORT, *supra* note 63; SHARON TISHER ET AL., PUBLIC CITIZEN, INC., BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS 86-111 (1977); Abel, *supra* note 2, at 219-20 ("Today, only about 1 percent of lawyers accused of misconduct are suspended from practice or disbarred.").

lawyers.[146] Even amongst this five percent the great majority of lawyers receive private sanctions, the lightest possible punishment.[147]

The first two justifications for conduct regulations were discussed in Part I. First, the existence of information asymmetry in pockets of the legal market is a rationale for regulations encouraging the free flow of information to potential clients.[148] This justification does not match current regulations, however. Current conduct regulation—through dampers on advertising, client solicitation, and referrals—actually exacerbates any information asymmetry.

Second, the interests of courts in competence does not end with entry regulations, regardless of how well formulated. Ongoing regulation of lawyer competence in court procedures could well serve the interests of the courts in maximizing their output, and also limit the harms that incompetent attorneys inflict upon clients as a result of information asymmetry. Again, current conduct regulation offers little in the way of competence regulation, and even the nominal regulations are not enforced by regulators.[149]

Other regulatory justifications are addressed at length below. Sections II.A and II.B evaluate agency costs and externalities as justifications for conduct regulation, and conclude that regulation is justified, but that current regulation tilts more towards the interests of lawyers than the interests of the public or the courts. Sections II.C and II.D appraise two rationales that have not resulted in substantial regulation, recompensing clients for damages inflicted by lawyers, and providing the broad public good of justice. Sections II.E and II.F analyze two principles that cannot support lawyer regulation, lawyers as monopolists and lawyer independence. Section II.G proposes an alternative set of conduct regulations.

A. Agency Costs

Several commentators have defended various aspects of conduct regulation as a fruitful response to the agency costs between lawyers and clients.[150]

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146. *See* Levin, *supra* note 144, at 8-9.

147. *See id.* at 9.

148. *See supra* Part I.A.

149. *See supra* Part I.B.

150. Epstein, *supra* note 10, at 590-93; Macey & Miller, *supra* note 10, at 968-74; Ribstein, *supra* note 10, at 1708-20. Agency relationships arise when a principal (client) decides to hire an agent (lawyer) to perform a duty (legal services) on the principal's behalf. Agency costs arise when there is a conflict between the interests of the agent and the principal, or in the legal market, a disjunction between the interests of the lawyer and the client. Generally speaking, an agent always has some incentive to pursue her own interests, including an interest in shirking or providing sub-standard work, at the expense of the principal. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 23-24 (1998); Epstein, *supra* note 10, at 580-81; Macey & Miller, supra note 10, at 968-70. For a more complete exposition on the

These commentators have noted that because of the difficulties clients face in monitoring lawyers, there are incentives to either shirk and underperform, or perform unnecessary services and overbill.[151] Because clients may not be able to assess the quality of the legal services they receive, the traditional responses to agency costs—express contractual protection, closer monitoring of the agent, or a later lawsuit—are insufficient.[152] Clients may also not be directly responsible for paying lawyers. When a lawyer is being paid by a contingent fee or under an insurance arrangement the interests of the lawyer and client may diverge substantially.[153]

The willingness to regulate as a response to the agency costs between a lawyer and client depends upon the level of information asymmetry detected in the market. If principals and agents are able to contract for a certain level of services ahead of time, or if principals can easily monitor the work of

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nature of agency costs, see Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 ECONOMETRICA 7 (1983); Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, AM. ECON. REV. May 1973, at 134. Principals can guard against this phenomena by closely monitoring the work of the agent, or by doing the work themselves. But this impinges upon the original purpose of the agency relationship—the principal preferred hiring an agent to performing the work herself. Furthermore, in a market dogged by information asymmetry, the costs of monitoring an agent's behavior will be high. Consider, for example, hiring a second lawyer to monitor the work of the first. Note that this is precisely what many corporations have done by hiring in-house lawyers to manage their outside counsel.

151. Ribstein, *supra* note 10, at 1709-13.

152. *See* Macey & Miller, *supra* note 10, at 972-73; Ribstein, *supra* note 10, at 1712-13.

153. For example, a lawyer has a strong incentive to attempt to settle a contingency fee case before performing substantial work. By contrast, a lawyer representing a class action has every incentive to maximize the billings on a case, because there will be little monitoring by the far-flung clients, and the lawyers are typically paid by the hour. A lawyer who is hired and paid by an insurance company may have an incentive to follow the insurance company's interests ahead of the interests of the nominal client. *See generally* Michael A. Berch & Rebecca White Berch, *Will the Real Counsel for the Insured Please Rise?*, 19 ARIZ. ST. L.J. 27 (1987). As such, there are structures of lawyer representation that may require regulation to ensure that the lawyer/agent is properly representing the interests of the client/principal.

Note that in the legal market, the problems tend to involve the lawyer over-representing the interests of the insurer, that is, the party paying for the services. In other markets, regulation has been proposed to combat "moral hazard," situations where someone other than the buyer is paying for a good. *See* BREYER, *supra* note 14, at 33. The typical problem involved with moral hazard is that the buyer will overconsume the good, because it is being purchased by a third party. Nevertheless, in order to justify attorney regulation to prevent moral hazard, these situations must display some overconsumption on the part of buyers, and an inability on the part of the paying party to control consumption. As a general rule, the legal market has not shown such overconsumption. Class action prosecution, however, has shown some signs of moral hazard: lawyers have been accused of "churning" and driving up their bills, with little or no oversight from their far-flung clients. Courts regulate this problem by reviewing the plaintiffs' lawyers claimed fees for "reasonableness," and then by actually setting the fee recovery. William J. Lynk, *The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class-Action Litigation,* 23 J. LEGAL STUD. 185, 187-89 (1994) (describing the procedure for setting the attorneys' fees in successful class action litigation).

agents,[154] regulation is unnecessary, and potentially harmful. If not, conduct regulation may be justified to control agency costs.[155]

There are a number of current behavior regulations that are conceivably aimed at lessening the perceived effects of agency costs between a client and lawyer.[156] By and large the regulations dealing with client confidentiality and conflicts of interests are justifiable attempts by regulators to protect the interests of clients. The justifiable attorney regulations act as "gap-fillers" in the contract between the lawyer and the client; the regulation obviates the need for specific bargaining over possible harm that the lawyer can do to the client.[157] These default rules also allow lawyers as a whole to offer a more attractive product to clients, that is, a product that has built-in rules controlling conflicts of interests and client confidentiality.[158]

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154. The efficacy of client monitoring of attorney incompetence, however, is open to doubt given bar disciplinary authorities' long history of ignoring complaints of attorney incompetence. *See supra* note 145 and accompanying text. Monitoring may be ineffective because even if a client detects incompetence, her options for disciplining the misbehaving agent may be limited by the relatively high standards involved in a suit for lawyer malpractice on the one hand, *see* John Leubsdorf, *Legal Malpractice and Professional Responsibility,* 48 RUTGERS L. REV. 101, 108-12 (1995) (describing the necessary elements of a lawyer malpractice claim), and the disinterest of bar disciplinary authorities on the other hand.

155. Note that agency costs could arguably justify entry regulations as well. Presumably, the point of the character and fitness requirement is to bar "unethical" individuals from practicing law, and prevent fraud or abuse of clients. There is little evidence, however, that these requirements are effective. To the contrary, the available evidence establishes that the regulations are haphazard and unevenly applied. *See* McChrystal, *supra* note 22, at 68-73; Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 507-46 (1985). The history of these requirements also fosters skepticism. The requirements were originally strengthened as a response to an influx of foreign-born and other undesirable bar applicants during the first third of the twentieth century. ABEL, *supra* note 10, at 69-71 (arguing that character and fitness exams "were deliberately introduced in order to exclude immigrants and their sons"); AUERBACH, *supra* note 101, at 125-29 (1976) (describing Pennsylvania's character and fitness scheme, which discouraged Jewish and African-American bar applications); Deborah L. Rhode, *supra*, at 499-500 (noting that although character and fitness exams were "'aimed in principle against incompetence, crass commercialism, and unethical behavior,' the ostensibly 'ill-prepared' and 'morally weak' candidates were often in fact 'of foreign parentage, and, most pointedly, Jews'" (quoting M. LARSON, THE RISE OF PROFESSIONALISM 173 (1977))).

156. *See* Epstein, *supra* note 10, at 590-93; Macey & Miller, *supra* note 10, at 997-1004; Ribstein, *supra* note 10, at 1713-38.

157. Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1105 (1995) ("Many of the rules of professional responsibility are directed at reducing this agency-cost problem by providing a set of default rules that fill in the gaps in the contractual relationship that exists between lawyers and their clients, thereby reducing agency costs.").

158. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6-1.10 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105, DR 4-104, DR 5-101(A), DR 4-101(B) (1983). The lawyer/client relationship regularly involves clients sharing confidential and strategic information with their lawyers. In the absence of default conflict of interest and confidentiality rules, a lawyer could use this information to the disadvantage of the client, either by breaching the client confidence, or joining forces with a party adverse to the original client.

Nevertheless, despite the efficacy of these rules as a default protection for clients, the rules governing confidentiality and conflicts of interest actually hew somewhat more closely to the interests of lawyers than clients or the public at large.[159] Model Rule 1.6, for example, has two exceptions to the otherwise absolute ban on revealing client confidences that demonstrate that the confidentiality rules favor the interests of lawyers. A lawyer *may*, not must, reveal a confidence "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[160] In situations where the harm falls below "imminent death or substantial bodily harm," no client confidences may be revealed, even to prevent other types of harms or illegal actions. Thus, a lawyer is never actually required to breach a client confidence, even when "imminent death" or "substantial bodily harm" is possible. The stringency of this requirement greatly benefits clients at the expense of the public at large, and in turn benefits lawyers, who can sell their confidential services to clients.

The second exception allows a lawyer to breach confidentiality "to respond to allegations in any proceeding concerning the lawyer's representation of the client," that is, in defense of a malpractice or disciplinary claim.[161] This regulation can only be motivated by self-interest. The juxtaposition of these two exceptions establishes that confidentiality rules have gone beyond a response to agency costs, to favor lawyer self-interest.[162]

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159. Note that the interests of clients and the public are not co-extensive on confidentiality. The amount of confidentiality that best suits a lawyer and a client may in fact be deleterious from a societal point of view. Morgan, *supra* note 74, at 737-38 (arguing that strict client confidentiality "is a wonderful thing—for the lawyer who can sell these 'services'" but is harmful to the public interest at large); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 361-70 (1989) (questioning the strength of the typical justifications for confidentiality rules); Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 629 (1990) (describing strict confidentiality provisions as self-serving). For an objection to the waiver provisions of the *Rules*, see generally Fred C. Zacharias, *Waiving Conflicts of Interest,* 108 YALE L.J. 407 (1998).

160. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1999).

161. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (1999).

162. Another example is the requirement of zealous advocacy on behalf of the client's interests. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101 (1983). There has been a lively debate over whether this requirement over-represents the client's interests and harms society at large, *see, e.g.,* SIMON, *supra* note 9, at 7-53; David Luban, *The Adversary System Excuse, in* THE GOOD LAWYER 83 (David Luban ed., 1984); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988), or in fact best serves the public interest by guaranteeing every client a zealous advocate, *see* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9-26 (1975). Regardless, it seems clear that like confidentiality, guaranteeing a client a zealous advocate—who will take every step not explicitly barred by law to forward the client's interests—allows lawyers to sell a more attractive product to clients at the expense of the public at large.

Other regulations that may be defended on the basis of agency costs are more suspect. Consider, for example, the regulations covering attorney fees. In theory, clients may have a hard time determining a fair price for services rendered, so there is the possibility for lawyer misbehavior, and regulation of attorney's fees could address that possible harm. But, as Adam Smith warned, "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[163] This is especially so when members of the same profession meet to regulate fees. For example, until 1975 bar associations directly fixed prices with minimum fee schedules.[164]

The current Model Rule 1.5 is more circumscribed, but still allows a lawyer to consider "the fee customarily charged in the locality for similar legal services" in setting a price,[165] a process that allows for price-fixing. Further, Rule 1.5 contains so many allowable variables for setting a fee that the rule actually offers little protection to clients, or guidance to lawyers.[166]

B. Externalities

Conduct regulation of lawyers has also been defended as a response to externalities caused by the actions of lawyers on behalf of clients.[167] The

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163. ADAM SMITH, THE WEALTH OF NATIONS 144 (Edwin Cannan ed., 1976).

164. ABEL, *supra* note 10, at 118-19. These practices were struck down by the U.S. Supreme Court in 1975. Goldfarb v. Va. State Bar, 421 U.S. 773 (1975).

165. MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(3) (1999); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(B)(3) (1983).

166. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (1999) (listing eight factors for determining whether a fee is "reasonable"); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(B) (1983) (same). The draft version of Rule 1.5, however, did offer clients some possible protection from excessive or unforeseen fees; the first several drafts required a written fee agreement. Ted Schneyer, *Professionalism as Bar Politics: The Making of the* Model Rules of Professional Conduct, 14 LAW & SOC. INQUIRY 677, 695 (1989). Interestingly, the draft rule requiring a written fee agreement was pressed by the only non-attorney member of the Commission that drafted the *Rules*. *Id.* Following attorney objections the standard was lowered to "preferably in writing," MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (1999), which offers no concrete protection.

167. Carrie Menkel-Meadow, *Toward a Theory of Reciprocal Responsibility Between Clients and Lawyers: A Comment on David Wilkins'* Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars, 11 GEO. J. LEGAL ETHICS 901 (1998); Wilkins, *Who Should Regulate?, supra* note 10, at 819-21. The classic example of a negative externality is pollution. A polluting industry generally sells its goods to customers at a price that covers production costs, but does not include the societal cost of pollution. When the external costs generated are sizeable, or concentrated on few people, the costs may be substantial enough to justify the cost of a lawsuit for nuisance or trespass. When the costs are low and diffuse, however, the cost of suing to correct the externality, or even organizing to oppose the offending activity, are too high, and society at large bears the externality. Thus, the problem with externalities involves more than an industry or an occupation choosing a procedure that harms the public at large; the problem arises because of the costs associated with organizing the affected public, and bargaining with the offending producer. In

externalities can be grouped into three general categories: harms to adversaries, harms to the court system, and harms to the public at large.[168] Each of these categories can serve as a justification for regulation. Regulation to control the potential externalities imposed upon courts has already been discussed in Part I.B.[169]

1. Externalities Affecting Opposing Parties

There are a number of attorney behaviors that may benefit a client, but harm an opposing party. Examples range from hiding relevant information, to "scorched earth" litigation or negotiation tactics, to suborning perjury. One reason to doubt the necessity of conduct regulation is that the parties involved, a client and lawyer, and an adversary, are already involved in litigation or

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assessing the effects of externalities, therefore, it is worth considering the size of the affected group, and its proximity to the offending conduct. Various forms of regulation have been justified as responses to externalities that the market or the courts have been unable to handle. *See, e.g.*, Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1503-08 (1999) (discussing externalities and environmental regulation); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 117 (1999) (discussing externalities and regulation of the criminal process); Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1349 (1998) (discussing externalities and regulation of the market for cigarettes).

Whatever externalities exist in the legal market generally arise out of the relationship and actions of attorneys representing clients. The relationship between the lawyer and the client need not be the only source of possible externalities in the legal market. The relationship between a lawyer and the court could generate externalities. Lawyers have long been considered "officers of the court," and arguably, the relationship between lawyers and the courts could cause spillover costs to the public-at-large, or more specifically to clients. The many commentators who have discussed the tension between a lawyer's role as an officer of the court versus a client advocate have noticed exactly the possibility that a lawyer might harm her client out of loyalty to her role as an officer of the court. *See* Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 677 (1997); David A. Kessler, *Professional Asphyxiation: Why the Legal Profession is Gasping for Breath*, 10 GEO. J. LEGAL ETHICS 455, 481-82 (1997); J. Kevin Quinn et al., *Resisting the Individualistic Flavor of Opposition to Model Rule 3.3*, 8 GEO. J. LEGAL ETHICS 901, 913-22 (1995). There are two baseline realities that make this worry somewhat academic. First, the client pays the lawyer, so the lawyer has a naturally built-in incentive to guard the client's interests instead of a general duty to the legal system as a whole. Furthermore, as currently constructed, there are little or no requirements associated with the title "officer of the court." *See* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 63-71 (1989).

168. Although this section focuses on the negative externalities that lawyers and clients may create, there are also possible positive externalities, such as the positive externalities that lawyer regulation confers upon the courts. Further, while dishonest lawyers can create negative externalities as society loses faith in the justice system, especially upstanding lawyers can create positive spillovers. *See, e.g.*, HARPER LEE, TO KILL A MOCKINGBIRD (1988).

169. Part I.B argued that entry regulations may be justified as a response to the potential costs that lawyers may inflict upon the courts. For the reasons already listed therein, conduct regulation of attorneys may also be justified to limit the costs that poor practice can impose upon the courts.

negotiations and are therefore known to each other.[170] The bargaining costs between the parties should be low; presumably in every litigation or business transaction there is already some level of negotiation involved, and further negotiations over any externalities could be encompassed in those negotiations.[171]

Further, there are already existing common law remedies for some of these activities, such as the torts of abuse of process, malicious prosecution,[172] fraud, or misrepresentation. Much of the regulation of externalities merely echoes these common law duties. For example, a number of proscriptions specifically refer to outside sources of law in defining a lawyer's obligations.[173] Other regulations are already covered by existing laws covering suborning perjury or obstruction of justice,[174] or by court procedural rules like Rule 11,[175] or Rule 26.[176]

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170. Recall that the primary difficulty with externalities is that the parties are not able to bargain over the costs and benefits because they are unknown to each other, or the costs associated with bargaining are prohibitive. Despite the possibilities of negotiation, many commentators worry about whether these negotiations will be fair, given possible disparities in bargaining power. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-78 (1984).

171. Although the actual bargaining process will be simple on a case-by-case basis, organizing the general class of persons harmed by certain common attorney conduct may be difficult or impossible. For example, assume that being uncivil to adversaries in the legal process is likely to result in a higher chance of winning lawsuits or favorable settlements, despite the fact that it imposes significant costs upon everyone else involved in the lawsuit. While the individual parties can negotiate over this tactic, there are substantial barriers to organizing the people harmed by this tactic across society to lobby for regulation or legislation. This collective action problem may serve as a secondary justification for regulating externalities generated by attorney-client behavior.

172. For a description of the current operation of these torts, see Crystal, *supra* note 167, at 687; J. Randolph Evans & Ida Patterson Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. REV. 803, 805-09 (1994).

173. *E.g.,* MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (1999) ("A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."); MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (1999) ("A lawyer shall not . . . offer an inducement to a witness that is prohibited by law."); MODEL RULES OF PROF'L CONDUCT R. 3.5 (1999) ("A lawyer shall not . . . seek to influence a judge, juror, prospective juror or other official by means prohibited by law [or] communicate *ex parte* with such a person except as permitted by law."); MODEL RULES OF PROF'L CONDUCT R. 4.4 (1999) ("[A] lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of" a third person).

174. *E.g.,* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (1999) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."); MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (1999) ("A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely.").

175. *Compare* FED. R. CIV. P. 11(b)(2) (stating that signature of pleading certifies that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law") *with* MODEL RULES OF PROF'L CONDUCT R. 3.1 (1999) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is

Nevertheless, there are circumstances where the actions of the attorney and client fall below the threshold for these common-law remedies but still harm opposing parties and counsel, or where the externality is hidden to the adversary,[177] or situations where the legal process itself is being subverted.[178] There are a number of regulations that provide independent protection for these harms. Lawyers have a duty to "make reasonable efforts to expedite litigation consistent with the interests of the client,"[179] not to engage in certain types of trial publicity,[180] and not to "make a false statement of material fact or law to a tribunal"[181] or a third person.[182] Other regulations bar an attorney from directly contacting a represented party,[183] from misrepresenting that she is disinterested to an unrepresented party,[184] or from harassing third parties.[185]

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not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

176. *Compare* FED. R. CIV. P. 26(g) (stating that signature certifies that discovery request, response or objection is "consistent with these rules . . . not interposed for any improper purpose . . . and not unduly burdensome") *with* MODEL RULES OF PROF'L CONDUCT R. 3.4(d) (1999) ("A lawyer shall not . . . make a frivolous discovery request or fail to make [a] reasonably diligent effort to comply with a legally proper discovery request by an opposing party.").

177. Consider the possible spillover costs generated by the attorney-client privilege and attorney-client confidentiality. A lawyer and client may meet specifically to discuss imposing costs upon a third-party (or parties), and have these communications fully protected. For example, a client who has murdered someone meets with his attorney to discuss the arrest and prosecution of an innocent person. The actions (or non-actions) of the lawyer and client may well have significant (and unknown) costs to the innocent person.

178. In these cases the ability of the parties to negotiate is of little use, because the lawsuit or motion has most likely been filed to force the adversary to settle under artificial terms to avoid the unwarranted litigation. Thus, leaving the parties to negotiate does not result in the efficient result we are expecting from a free exchange, because one party is subverting the system to her advantage.

179. MODEL RULES OF PROF'L CONDUCT R. 3.2 (1999); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(1) (1983) (stating that a lawyer shall not delay a trial to harass an opponent).

180. MODEL RULES OF PROF'L CONDUCT R. 3.6 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107 (1983). The regulations barring certain types of trial publicity are meant to prevent lawyers from trying a case to the press, and thus prejudicing the opponent and the trial court. The regulation may also be a vestige of previous, clearly anti-competitive regulations barring lawyer publicity or advertising.

181. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(5) (1983).

182. MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(5) (1983).

183. MODEL RULES OF PROF'L CONDUCT R. 4.2 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1983).

184. MODEL RULES OF PROF'L CONDUCT R. 4.3 (1999); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(2) (1983).

185. MODEL RULES OF PROF'L CONDUCT R. 4.4 (1999); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(1) (1983). Each of these protections also assists in limiting attorney behavior that can harm the courts.

Note that many of these conduct regulations also serve to deter externalities imposed upon the courts.

There are, however, legitimate questions whether these protections go far enough. Many have argued that lawyer regulation focuses on the attorney-client relationship to the detriment of opponents and society at large.[186] For example, the requirement that a lawyer "disclose a material fact to a tribunal" is limited to situations where "disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."[187] Lawyers thus have considerable latitude in dealing with omissions of material facts or the presentation of questionable or even perjured evidence, and multiple commentators have complained that the regulations undersell candor for the good of clients.[188] A careful reading of the regulations establishes that the ABA sought to strike a balance between the interests of the court system and justice, and the interests of clients. The balance leans heavily toward lawyers and clients, however. The regulations require actual knowledge of falsity on the part of the lawyer before any action is required; even in those circumstances a lawyer must offer a client every possible chance to rectify the situation, and in criminal cases a lawyer may even withdraw before disclosure to the court.[189] If lawyers are to have a role in the court's truth-seeking function these regulations hew too closely to the clients' interests.[190]

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186. *See, e.g.,* SIMON, *supra* note 9, at 7-52; Luban, *supra* note 162, at 83; Shaffer, *supra* note 162, at 699-715.

187. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (1999); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(3) (1983). Similarly, a lawyer "may," not "must," "refuse to offer evidence that the lawyer reasonably believes is false." MODEL RULES OF PROF'L CONDUCT R. 3.3(c) (1999).

188. Gordon J. Beggs, *Proverbial Practice: Legal Ethics from Old Testament Wisdom,* 30 WAKE FOREST L. REV. 831, 841-43 (1995) (arguing that omission of a material fact is indistinguishable from lying); Marianne M. Jennings, *The* Model Rules *and the* Code of Professional Responsibility *Have Absolutely Nothing to Do with Ethics: The Wally Cleaver Proposition as an Alternative,* 1996 WIS. L. REV. 1223, 1233-34 (arguing that technical legalisms may allow lawyers to evade the regulations on attorney candor to the court); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1344-46 (1995) (noting that rules allow lawyers substantial opportunities for lack of candor in court).

189. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 4-7 (1999).

190. Similarly, under Rule 1.2(d) a lawyer may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but the lawyer may discuss the legal consequences of any proposed course of conduct with a client." MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1999); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A), DR 7-106 (1983). Although this bars a lawyer from directly advising a client to violate a criminal law, it requires no affirmative actions on behalf of the lawyer and allows the lawyer to discuss all the options, even illegal ones, with the client. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1587-98 (1995) (arguing that a lawyer may "provide accurate information about the law ([and] 'legal consequences'); and apparently may do so even if that information functions as recommendation or assistance").

2. Externalities and the Public

The attorney-client relationship generates a number of externalities that affect society at large.[191] Whenever a lawyer advises a client on ways to circumvent the law, or violate the law without detection, there is a cost borne by society at large. Consider, for example, the actions of attorneys and clients in avoiding environmental laws. In the situation of tax advice, successful attorneys can impose costs on the entire society in the form of lost governmental revenue. Certain legal tactics may be enormously successful on an individual basis, but may erode faith in the justice system as a whole.[192] A number of courts have recognized this phenomena and justified regulation of attorneys as necessary to preserve public confidence in the justice system.[193]

Some regulation of lawyers' conduct may be justified to correct for negative externalities that affect society at large.[194] There are, however, few

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191. At this juncture it is worth echoing a caveat from Breyer's *Regulation and Its Reform*. Breyer warns that almost any societal problem can be restated as an externality, and that as the costs involved become more theoretical and difficult to quantify, characterizing a problem as an externality becomes less helpful as a policy tool. This is especially true when the cost to society is measured as a loss of "justice" or a loss of faith in the government. BREYER, *supra* note 14, at 26.

192. The defense strategies used by the attorneys for O.J. Simpson and the attorneys for the police officers accused of assaulting Rodney King are recent examples. While these strategies carried great benefits for the individual clients, there was a substantial cost to society when segments of the public lost faith in the justice system. It is worth considering, however, how high a value our society places upon faith in the justice system. To a certain extent, every time a lower court is overturned by a higher court, or a convicted criminal is found innocent, public faith in the justice system erodes. Critics of the effort to free prisoners from death row have argued that these efforts undermine faith in the courts. *See* David Frum, *The Justice Americans Demand,* N.Y. TIMES, Feb. 4, 2000, at A29. As such, depending upon the value placed upon faith in the courts, some might argue against efforts to free innocent inmates because of the possible resulting cynicism about the court system. It may be misguided, therefore, to rank the importance of the reputation of the justice system above the operation of the justice system.

193. *E.g.*, Elledge v. Ala. State Bar, 572 So. 2d 424, 425 (Ala. 1990); Colangelo v. State Bar of Cal., 812 P.2d 200, 206 (Cal. 1991); *In re* Agostini, 632 A.2d 80, 81 (Del. 1993).

194. Entry regulations could also arguably be justified as a bulwark against a potential erosion of faith in the justice system if the public viewed attorneys as unethical. Supposedly, high entry barriers foster public confidence. Concern over the reputation of lawyers, however, cannot justify entry regulations. First, the entry standards for law are already high and rising; simultaneously the public's perception of the courts and lawyers has been declining. For commentary on the public's low opinion of lawyers and the courts, see, for example, Michael Asimov, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 536-44 (2000); Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 EMORY L.J. 1255, 1258 & n.7 (1999); Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context,* 52 STAN. L. REV. 269, 322 & n.343 (2000). Second, regulations actually focused on the behavior of lawyers, rather than the onetime screening of lawyers, are sure to be more successful in curbing abuses of the system that affect the public's view of the legal system. Again, the relative neglect of the regulation of practicing attorneys undermines the argument for entry regulation. Lastly, there is a strong likelihood that self-regulation itself fosters cynicism on the part of both lawyers and the public alike. The public may well think that the rules are drafted by lawyers, for lawyers, and then systematically under-enforced by a nominally "self-regulating" profession.

lawyer regulations that even arguably address these externalities, and those regulations are non-mandatory. For example, the entire section of the *Model Rules* entitled "Public Service" is basically stated in hortatory or permissive terms: "[a] lawyer should aspire to render at least (50) hours of pro bono publico services per year,"[195] or "[a] lawyer may serve as a director . . . of a legal services organization."[196]

C. Assisting Injured Clients in Seeking Compensation

A frequently overlooked advantage to the regulation of lawyers, or occupations as a whole, is the assistance that the regulation can offer to injured parties seeking recompense. First and foremost, state licensing authorities keep an up-to-date list of the names and addresses of every lawyer licensed to practice law in that state. This offers information to potential clients, and assistance to wronged clients in finding the negligent lawyer for a later lawsuit.

In theory, state licensing authorities could also offer two other, interconnected services to injured clients. Regulators could recompense clients for harms that are too small to justify a full-fledged malpractice trial, or for claims that would not meet the strictures of a legal malpractice claim.[197]

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195. MODEL RULES OF PROF'L CONDUCT R. 6.1 (1999); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1983) (stating that "[e]very lawyer . . . should find time to participate in serving the disadvantaged"). Regardless of this admonition, pro bono work has been falling. *See* Winter, *supra* note 108.

196. MODEL RULES OF PROF'L CONDUCT R. 6.3 (1999). Even the section on accepting court appointments allows rather sizeable exceptions to the rule in that a lawyer may decline the appointment for a possible "unreasonable financial burden" or if "the client or the cause is so repugnant . . . as to be likely to impair the client-lawyer relationship." MODEL RULES OF PROF'L CONDUCT R. 6.2 (1999); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY EC 2-29 to 2-30 (1983). The preamble to the *Rules* includes language describing the lawyer's role as a "public citizen," but requires no specific activities. MODEL RULES OF PROF'L CONDUCT Preamble, para. 5 (1999). This lack of mandatory regulation may be because the harms that lawyers inflict upon society at large are diffuse and immeasurable. Or it may be because lawyers inflict no negative externalities upon society. The attitude of the public at large concerning lawyers casts serious doubt upon the latter hypothesis, however. It may be that lawyer regulation has focused first on lawyers' self-interest, then on the interests of clients (which generally benefits lawyers, as long as it does not increase supply or competition, or lower prices), and finally on the interests of courts and opposing parties, with no real attempt to protect society at large. The regulation thus follows the model of collective action down the scale: the parties closest to the problems and best organized (opposing counsel and courts) receive what little protection is available. The public at large, which is diffuse and disorganized, receives little or nothing. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 22-52 (1965) (describing the dominance of small groups over large groups in the political and regulatory process).

197. Legal malpractice claims generally require a plaintiff to prove a "case within a case," that is, a plaintiff must prove that malpractice occurred, and that barring the malpractice, the plaintiff had a potentially successful claim. Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial—A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 MARQ. L. REV. 40,

Given that regulators are already investigating and prosecuting complaints,[198] it would be relatively simple to include some process meant to compensate the complaining party.

The current regulatory system, however, is poorly equipped to serve this purpose. The current system is set up to sanction, suspend, or disbar attorneys, not recompense clients for harms.[199] Although an *ex post* system could be geared towards recompensing clients for incompetence, the current regulatory system generally fails to even sanction or disbar lawyers for incompetence, let alone repay the clients for damages.

As a second potential benefit, attorney regulation could be used to guarantee that injured plaintiffs who are successful in a malpractice action could collect from the offending lawyer. In short, regulation could require licensed attorneys to carry malpractice insurance. Currently, only Oregon requires licensed attorneys to carry malpractice insurance.[200] By contrast, attorneys in Canada, England, Ireland, and Australia must carry a minimum amount of insurance as a condition to licensure.[201] A recent ABA study estimates that 30-50% of licensed attorneys in the United States do not carry

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72-75 (1989) (discussing the problems created by the unique nature of establishing a trial-within-a-trial in a professional legal negligence action). Obviously, this allows for many areas where clients are harmed by attorney misconduct, but cannot collect through a legal malpractice action.

198. Students of the actual bar disciplinary processes may wish to add "theoretically" before this clause. *Cf.* ABEL, *supra* note 10, at 143-50 (describing the lack of enforcement by bar disciplinary agencies).

199. Consider the following from the ABA's McKay Report:

> Discipline primarily offers prospective protection to the public. It either removes the lawyer from practice or seeks to change the lawyer's future behavior. Protection of clients already harmed is minimal. Respondents are sometimes ordered to pay restitution in disciplinary cases. However, in many states, the failure of a lawyer to make restitution ordered in a disciplinary proceeding will not bar subsequent readmission to practice.
>
> Clients can seek restitution from client protection funds in those states that have them. . . .
>
> However, the ability of client protection funds to compensate clients is limited. Restitution is generally available only when a lawyer has stolen client funds. Many client protection funds have limitations on the amounts that will be paid on any one claim. Many client protection funds require a finding of misconduct by the disciplinary agency before a claim will be considered, delaying reimbursement sometimes for years.

MCKAY REPORT, *supra* note 63, at 12. In short, the current regulatory system sporadically and incompletely recompenses clients even for harms as clear as attorney embezzlement, let alone the harms that may occur as a result of incompetence.

200. George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 341 n.126 (1998).

201. Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors,* 70 TUL. L. REV. 2583, 2611 n.137 (1996); Nicole A. Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?*, 8 GEO. J. LEGAL ETHICS 637, 665-66 (1995).

malpractice insurance.[202] Excluding Oregon, however, current attorney regulation does little to guarantee that aggrieved clients will be able to collect from lawyers.[203]

D. The Provision of Justice

This section considers some of the broader policy arguments that might be made for regulating lawyers, loosely centered around the idea that lawyers are intimately involved in the provision of justice, and some regulation may be necessary to further the interests of justice.[204] This section concludes that these broader issues may well justify lawyer regulation. The difficulty is determining which regulations would be successful.

Some have justified the regulation of lawyers as a means of providing the public good of justice. Economists have noted that the market will typically undersupply public goods, and as such, regulation may be necessary to supply a good like justice.[205] Similarly, some commentators have taken a broad philosophical view of regulation in terms of justice, the purposes behind democratic governance, and the intrinsic value of human life.[206] Multiple

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202. *See* STANDING COMM. ON LAWYERS' PROF'L LIAB., AM. BAR ASS'N, LEGAL MALPRACTICE CLAIMS IN THE 1990'S (1997).

203. As noted above, the closest that regulators have come is the creation of client protection funds, which only partially recompense clients when lawyers have absconded with their money. *See* MCKAY REPORT, *supra* note 63, at 12.

204. Note that Part I.B, *supra*, already addressed the advantages of well-trained attorneys in creating a smoothly run justice system. This section addresses broader issues in the provision of justice.

205. *See* A.J. CULYER, THE POLITICAL ECONOMY OF SOCIAL POLICY 29-76 (1980); Mancur Olson, *On the Priority of Public Problems, in* THE CORPORATE SOCIETY 294, 320-36 (1974). "Public goods are [marked] by . . . *jointness of supply* and *impossibility of exclusion*." RUSSELL HARDIN, COLLECTIVE ACTION 17-20 (1982); *see also* BARRY M. MITNICK, THE POLITICAL ECONOMY OF REGULATION 315-16 (1980). Jointness of supply means that one person's consumption of the good does not reduce the consumption level of others. HARDIN, *supra*, at 17. Impossibility of exclusion implies that once the good is produced no one can be excluded from consuming the good. *Id.* Examples of public goods include national defense or the justice system. Public goods are typically undersupplied in a competitive market. Individuals have little incentive to provide a public good because everyone may partake equally, limiting the provider's possible return on investment. Thus, we generally rely upon the government to tax its citizens and supply public goods. *See* OLSON, *supra* note 196, at 13-15 & n.21.

206. *E.g.*, A. Don Sorenson, *Freedom and Regulation in a Free Society, in* THE CONSTITUTION AND THE REGULATION OF SOCIETY 67-91 (Gary C. Bryner & Dennis L. Thompson eds., 1988); *cf.* JOHN RAWLS, A THEORY OF JUSTICE 54-60 (Clarendon Press 1972). Such a broad conception of justice is non-economic in a fundamental way, but may still justify regulation of lawyers. Specifically, the more philosophical call for the provision of justice differs from the economic justification of providing the public good "justice" because a philosophical commitment to a just society is not necessarily based upon maximizing economic utility. In other words, a commitment to a philosophically "just" society may be valued above, and pursued regardless of, economic utility.

philosophers of law, from Aristotle to John Rawls, have focused on the societal advantages of a clearly stated and fairly applied rule of law.[207] The rule of law allows individuals to adjust their behavior to the law, and to predict the outcomes of their actions. This allows individuals the maximum personal freedom to pursue their own goals or ideals.[208]

The first question, therefore, is what role, if any, lawyers play in providing or maintaining the rule of law. Some would argue that lawyers form the very bedrock of the rule of law; lawyers continually seek to maximize the individual rights of every member of society and act as a constant buffer to government oppression.[209] Alternatively, lawyers may well be the enemies of

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Both John Rawls and Ronald Dworkin specifically reject utilitarianism—that is, a system designed to maximize the utility of society as a whole—in favor of a system that maximizes personal liberty. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 94-100 (1978); RAWLS, *supra*, at 27-33.

207. In Aristotle's *Politics*, for example, there is a lengthy comparison of governance under the "best man," a benevolent monarch, versus "the best laws." Aristotle comes to the conclusion that rule under the best laws would be preferable. First, even the "best man" would need to create laws, because the best man would certainly rule by fixed, general principles. Second, for cases where the law was not specific, it would be better to have a group of persons, rather than a single king decide. As such, the rule of law is preferable to the rule of a king. ARISTOTLE, POLITICS, BOOK III, § 15, at 53-56 (Richard Robinson trans., 1995).

John Rawls' *Theory of Justice* details some of the features of a successful "rule of law," including precise laws, fair trials, and precedent. RAWLS, *supra* note 206, at 235-43. Rawls next connects the idea of the rule of law to the concept of liberty: "The principle of legality has a firm foundation, then, in the agreement of rational persons to establish for themselves the greatest equal liberty. To be confident in the possession and exercise of these freedoms, the citizens of a well-ordered society will normally want the rule of law maintained." *Id.* at 239-40.

Friedrich Hayek places a similar importance upon the rule of law. *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72-87 (1944). Hayek argues that the greatest priority of a free society is the rule of law, "which means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty" whether the government will punish certain behavior. *Id.* at 72. This maximizes personal freedom, and allows the greatest possible individual planning for the future unfettered by fear of an arbitrary state.

Other notable proponents of the importance of the rule of law to a just society include thinkers as diverse as H.L.A. Hart, Frederick Schauer, Cass Sunstein, and Justice Antonin Scalia. *See* H.L.A. HART, THE CONCEPT OF LAW 100-10 (2d. ed., 1994) (describing the importance of a "rule of recognition," that is, a legal system where rules are clear and uniformly enforced); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 135-66 (1991) (describing the "reasons for rules" and the superiority of clear, well-defined rules); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 101-20 (1996) ("A system of rules is often thought to be the signal virtue of a regime of law."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-1186 (1989) (defending the judicial use of flat rules rather than case-by-case decisions).

208. *See* HAYEK, *supra* note 207, at 73 ("Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts."); RAWLS, *supra* note 206, at 235 (stating that just rules "establish a basis for legitimate expectations" but if the rules are unclear "so are the boundaries of men's liberties").

209. The Preamble to the *Code* makes a very similar argument:

the rule of law. A lawyer's job is to take previously clear rules and milk them for exceptions and indeterminancy. Moreover, while the rule of law is aimed at maximizing individual liberties, an army of lawyers zealously representing the divergent goals and interests of large segments of society could turn the rule of law on its head. Instead of allowing members of society to go about their business unmolested, lawyers acting upon individual clients' interests might disrupt the fabric of society by multiplying ambiguity throughout the rule of law.

As such, it is unclear exactly what role a lawyer should play in protecting and forwarding the rule of law. Moreover, it is particularly unclear what type of regulation, if any, would best forward the provision of justice. As noted above, there is little or no binding regulation that focuses on a lawyer's duty to provide justice, or to serve the public interest.[210] While lawyers have long been thought of as "officers of the court," and therefore intimately involved in the production of justice, there has been little or no actual content to the title "officer of the court."[211]

A related justification considers the effect that lawyers may have upon the provision of justice to individuals who cannot afford an attorney. David Luban, among others, argues that some rough equality of access to the legal system, regardless of the ability to pay for legal services, is necessary to legitimate our form of government.[212]

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for the law is destroyed, and rational self-government is impossible.
>
> Lawyers, as guardians of the law, play a vital role in the preservation of society.

MODEL CODE OF PROF'L RESPONSIBILITY Preamble (1983). Whether or not lawyers regularly perform this role is, however, open to question.

210. Both the *Rules* and the *Code* contain exhortations that "a lawyer should seek improvement of the law [and] the administration of justice." MODEL RULES OF PROF'L CONDUCT Preamble, para 5 (1999); *see* MODEL CODE OF PROF'L RESPONSIBILITY Preamble (1983). Nevertheless, it is difficult to link any mandatory regulatory requirements to this general concept.

211. Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 42-43 (1989). The only requirements recognized by Gaetke come from the *Rules* or *Code*. *Id.* at 48-71.

212. LUBAN, *supra* note 9, at 248-66; Richard C. Baldwin, *"Rethinking Professionalism"—and Then Living It!*, 41 EMORY L.J. 433, 437-38 (1992); Hedieh Nasteri & David L. Rudolph, *Equal Protection Under the Law: Improving Access to Civil Justice*, 20 AM. J. TRIAL ADVOC. 331, 331-36 (1997); *see also* Legal Corporation Services Act of 1974, 42 U.S.C. § 2996 (1994) (stating that law was meant to provide "equal access to the system of justice"). Without addressing the correctness of this argument as a matter of philosophy or political science, it is apparent that such an argument could justify some regulation of the legal market to promote the provision of legal services to all individuals, regardless of their ability to pay.

Regulation, however, is not necessary to provide these services. A deregulated legal market would likely provide legal services to the poor, because in a deregulated market there would be a much fuller range of professional services available, at all price ranges.[213] Luban would likely argue that provision of services of lower quality, even at a lower price, would not provide equal access to justice.[214] This caveat does not necessarily require regulation of the legal market, however, because the government could simply purchase minimally adequate legal services on the open market for all needy citizens.[215] Moreover, the regulation that currently exists has exacerbated the lack of legal services for the poor.

Regulation of the legal market may also attempt to eliminate any and all discrimination on the basis of race, sex, religion, or national origin from the legal system.[216] In particular, many commentators have been concerned with conscious or unconscious discrimination by judges and juries in determining cases, and by lawyers in preparing and presenting cases.[217] Some progress has

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Luban summarizes his argument into five short points. First, "[a]ccess to minimal legal services is necessary for access to the legal system." LUBAN, *supra* note 9, at 264. Second, "[a]ccess to the legal system is necessary for equality . . . before the law." *Id.* Third, "[e]quality of legal rights is necessary to the legitimacy of a [constitutional democracy]." *Id.* Fourth, as a necessary element of our government, we should grant equal access to the legal system as a matter of right. *Id.* Fifth, there is a right to legal services. *Id.*

213. *See* YOUNG, *supra* note 13, at 75-80. Interestingly, W. Clark Durant, former chairman of the Legal Services Corporation, has argued for deregulation of the legal market for precisely the same reason. W. Clark Durant, *Maximizing Access to Justice: A Challenge to the Legal Profession*, *in* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 832-40 (1992).

214. His argument is built around "[a]ccess to *minimal* legal services," which includes a minimum standard of quality that would likely not be met by the market at large. LUBAN, *supra* note 9, at 264 (emphasis added).

215. Note that this argument echoes the dispute over mandatory pro bono. Some argue that equal access to justice should be provided by all lawyers pro bono as a result of regulation, and others argue that the government should simply spend its tax revenue to hire lawyers to perform these services. In light of the substantial costs associated with licensing, it would be less burdensome to directly supply services to the needy.

216. S*ee generally* DENNIS L. DRESANG & JAMES J. GOSLING, POLITICS, POLICY & MANAGEMENT IN THE AMERICAN STATES 294 (1989) (describing equity concerns as a justification for state regulation). Although there is an ongoing debate over whether racism or sexual discrimination are, in fact, "market failures," or can be addressed by regulation at all, compare Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667, 678 (1997) (arguing that racism cannot be classified as a market failure, nor be remedied by traditional economic regulation because of the nature of hate) with POSNER, *supra* note 15, at 651-62 (discussing racism as a market failure), seeking an end to these practices can be a justification for regulation.

217. *See* Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999) (discussing race and the justice system); Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) (discussing race and the justice system); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994) (considering the intersection of gender and ethics in the law); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation"*, 48 HAST. L.J. 1293 (1997) (discussing the justice system and sexual orientation); David B. Wilkins, *Identities and Roles:*

been made by the Supreme Court as a result of interpretations of constitutional law,[218] and a few states have instituted mandatory CLE programs to address racial bias.[219]

The elimination of bias is a salutary goal for regulation. Current regulation is, however, silent on issues of discrimination. The regulations' predilection for zealous advocacy, however, suggests that utilizing race or gender in a morally questionable but tactically fruitful manner is allowed, if not required.

E. Regulating Lawyers as Monopolists

Some have argued that lawyers must be regulated because they have a monopoly over the provision of legal services.[220] The classic and most prevalent economic justification for regulation is the existence of a natural monopoly.[221] As a baseline justification for regulation, however, the existence of a legal monopoly—if monopoly is the right word—is not persuasive because the provision of legal services does not involve a natural monopoly. To the contrary, any monopoly characteristics that are present exist as a result of regulation itself. The combination of laws governing unauthorized practice

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Race, Recognition, and Professional Responsibility, 57 MD. L. REV. 1502 (1998) (discussing intersection of race and attorney ethics).

218. *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127 (1994) (barring a lawyer's use of gender-based peremptory challenges); Batson v. Kentucky, 476 U.S. 79, 84 (1986) (barring a lawyer's use of racially based peremptory challenge).

219. *See* Kari M. Dahlin, Note, *Actions Speak Louder Than Thoughts: The Constitutionally Questionable Reach of the Minnesota CLE Elimination of Bias Requirement*, 84 MINN. L. REV. 1725, 1727-33 (2000) (describing the Minnesota bias requirement).

220. LUBAN, *supra* note 9, at 285-89 (arguing for mandatory pro bono); Edward J. Cleary & William J. Wernz, *The Future of Callings—An Interdisciplinary Summit on the Public Obligations of Professionals into the Next Millennium: Ethics and Enforcement*, 25 WM. MITCHELL L. REV. 143, 155 (1999) (arguing that regulation of lawyers is necessary in light of lawyers' monopoly); Dean, *supra* note 36, at 866 (arguing for more pro bono work); Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity*, 96 W. VA. L. REV. 367, 399 (1993) (arguing for more pro bono work).

221. The traditional examples of natural monopolies are companies providing electricity, telephone services, oil or gas. These industries involve natural monopolies because it would be economically wasteful for more than one company to incur the expense of running electrical lines or gas pipes or phone lines to consumers. RICHARD SCHMALENSEE, THE CONTROL OF NATURAL MONOPOLIES 3-5 (1979). Rather than have several companies provide these products, a single company, subject to government oversight, provides the product. Regulation is necessary to keep the single provider from charging a non-competitive monopoly price for its product. ALFRED E. KAHN, THE ECONOMICS OF REGULATION, PRINCIPLES AND INSTITUTIONS 11-19 (1988); STONE, *supra* note 26, at 68-74. Although there have been a number of persuasive criticisms of the economic theories underlying this justification, *see, e.g.*, Richard J. Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 HARV. L. REV. 345 (1983); Richard Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969), it remains the most basic justification for government regulation of an industry.

and the necessity of a government license, grant attorneys sole possession over the practice of law. A defense of lawyer regulation as necessary to control a monopoly is misplaced, since the monopoly itself is a product of regulation. Furthermore, the typical goal of regulating a monopoly is to control price; in the case of lawyers, any inflation in price is a result of regulation.[222]

The market for legal services does not involve the type of natural monopoly that typically justifies regulation. A natural monopoly generally involves an industry where there is a single provider of a good (due to economies of scale or other reasons), where it is difficult to substitute for the good, and where there are high or insurmountable barriers to entry for additional providers. Clearly the legal profession does not fit this definition. First, there are multiple and diverse providers of legal services, and a great diversity among legal services, from *Perry Mason*-type trial work to Wall Street tax advice.[223] Second, although barriers to entry—such as the bar exam, the requirement of attendance in law school, and character tests—have tightened, there has been an explosive growth in the number of lawyers.[224] This growth suggests that although lawyers have been able to charge a premium for their services as a result of licensing and the prohibition of unauthorized practice, this premium is tempered by increased entry, and by changes in the nature of the practice.[225]

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222. Another possible goal of regulation of a monopoly is to ensure that the monopoly serves every element of society, for example, to ensure that as many areas of the country are wired for electricity and phone service as possible. Although some have argued that legal services should similarly be provided to all levels of society, *see supra* note 212 and accompanying text, the shortage of affordable legal services for the poor can again be traced to regulation and barriers to the market. *See* YOUNG, *supra* note 13, at 75-80.

223. It is worth considering whether there would be any definable set of "legal services" or "lawyer's work" without regulation. The services we place within these categories have clearly been colored by the existence of laws barring unauthorized practice and licensing.

224. Dean Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275, 275-78 (1992) (detailing the explosive growth of the legal profession from 1960 through 1992).

225. In considering why law is not a natural monopoly, per se, Richard Posner's *Overcoming Law* has an extremely helpful discussion comparing the organization and regulation of lawyers today to a medieval guild. POSNER, *supra* note 33, at 39-46. Posner first notes the attempts by medieval guilds to limit output and increase quality by various regulatory measures, including limitations on apprentices and hours of operation. As scarcity drives the price up, there is enormous pressure on each individual member of the guild to increase output, and therefore profits. As a result of these pressures, as well as increased specialization and advances in technology, the guild system eventually disintegrates into mass, factory-style production. *Id.* Posner draws a parallel between the historical arc of medieval guilds and the American legal system, noting changes in the practice of law, the provision of legal services and the growth in the number of lawyers. *Id.* at 47-70. Posner's comparison is especially helpful in describing why the legal profession is not a natural monopoly, and is much more akin to a cartel.

F. Lawyer Independence

Many commentators have emphasized the importance of lawyer self-regulation or independence.[226] The lawyer independence argument generally relies upon the lawyers' role in society as a bulwark against government or societal oppression.[227] These arguments, however, are either arguments for *deregulation*, that is, lawyers should not be subject to any government regulation, or arguments for a particular *kind* of regulation—self-regulation. Lawyer independence is therefore not a justification for regulation, but rather an argument for who should regulate lawyers.

Lawyers are a de facto self-regulating profession.[228] Whether the ideal of lawyer independence justifies self-regulation, however, is dubious. There is little evidence to support the claim that self-regulation has provided clients or lawyers protection from government oppression. To the contrary, the bar itself has regularly oppressed disfavored minority viewpoints, races and religions.[229] For example, the "Communist Tactics Committee" of the ABA, as well as local bar associations, worked to expel and expunge any communists or communist sympathizers from practice in the 1950s.[230]

Furthermore, even if some members of the bar represent clients against government oppression, it is likely a relatively small percentage of the bar. Thus, it is questionable whether we would want to allow the entire bar to self-regulate for the protection of the few brave souls who would not be protected by the bar regardless of regulation.[231]

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226. *E.g.*, BLUEPRINT, *supra* note 24, at 261-62; Robert W. Gordon, *The Independence of Lawyers,* 68 B.U. L. REV. 1, 6-30 (1988) (describing some of the arguments for, and types of, lawyer independence); L. Ray Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695, 695 (1981) ("The purpose of a code of legal ethics is to implement the legal profession's prerogative of self-regulation.").

227. *See* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9-24 (1975).

228. *See supra* notes 16-22, 144-47 and accompanying text.

229. *See, e.g.*, LINOWITZ, *supra* note 102, at 5-6. Consider also the treatment of African-Americans in the "integrated" bars of the south. *See* DAYTON DAVID MCKEAN, THE INTEGRATED BAR 44, 117-20 (1963) (stating that the integrated bar acted as "a device, a sort of gun-behind-the-door, useful to southern white lawyers for the control of Negro lawyers").

230. *See* AUERBACH, *supra* note 101, at 237-62. For a "slice-of-life" view of the atmosphere in the ABA during the 1950s, see 44 A.B.A. J. 1151-54, 1155 (1958) (containing articles by J. Edgar Hoover, claiming that "good law means good order" in reaction to a "powerful, lawless conspiracy—world Communism," and by Madame Chiang Kai-Shek, claiming that trade with the Chinese would be trading "a little lucre" in support of "the Reds' . . . program of world conquest").

231. At most, some more limited protection for unpopular causes could be built in to any attorney regulation. Interestingly, the *Rules* do not include any specific regulations to protect a lawyer for unpopular causes, or to encourage lawyers to battle government oppression. The *Code*, however, has some non-binding language encouraging lawyers to take on unpopular causes. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-27, 2-28 (1983).

G. Proposed Alternative

Part I.D suggested substantially narrowing the barriers to entering the legal profession by focusing upon the main justification for entry regulations, the minimum needs of the courts. This part builds upon the regulatory structure outlined in Part I.D, proposing a structure for conduct regulation based upon the acceptable justifications: information asymmetry, compensating injured clients, agency costs, and externalities. As with the proposed entry regulations, the main focus of the regulation will be upon a minimum level of competence before the courts.

A proposal for conduct regulation in response to the legal market's pockets of information asymmetry is relatively simple. The natural response to an information asymmetry is to provide more information. In the legal market this could take several forms. First, all of the current regulations that bar the free flow of information should be repealed. Much of the current regulation of lawyers, including restrictions on advertising, client referrals, and client solicitation, is plainly aimed at restricting the flow of information, and must be restructured or simply abandoned.[232] Abandoning these limits would maximize the information that lawyers could provide to clients, increase competition, and further educate clients about the costs and nature of legal services.

Second, lawyer disciplinary systems should be altered to allow the greatest possible flow of information to the public. Current lawyer disciplinary systems offer minimal public information about client complaints or lawyer competency.[233] Disciplinary bodies should make all client complaints a matter of public record.[234] Disciplinary authorities should also collect and publish the

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232. Convincing criticisms of each of these aspects of lawyer regulation abound. For a discussion of the anti-competitive effects of the suppression of advertising, see ABEL, *supra* note 10, at 119-22 (describing bans on advertising as an effort to suppress competition from new entrants to the market); Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983); Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers,* 134 U. PA. L. REV. 45, 97-99 (1985) (concluding that "the anticompetitive effect of promotional restrictions is clear"). For a discussion of the anti-competitive effects of client solicitation, see Deborah L. Rhode, *Solicitation,* 36 J. LEGAL EDUC. 317, 326 (1986) (discussing self-serving aspects of anti-solicitation rules).

233. *See* Sandra L. DeGraw & Bruce W. Burton, *Lawyer Discipline and "Disclosure Advertising": Towards a New Ethos*, 72 N.C. L. REV. 351, 357-59 (1994) (describing the "tradition of invisibility" for lawyer disciplinary procedures).

234. In many states, a complaint against a lawyer only becomes publicly accessible after a lawyer is officially sanctioned. In others, the information becomes public after a finding of probable cause and the filing of official charges against a lawyer. *See* MCKAY REPORT, *supra* note 63, at 33-34. A system that was aimed at maximizing information for the public would publish all complaints. Further, the lawyer disciplinary authority should set up a single office to collect lawyer complaints, and to make these complaints available to the public upon request. Such a system would thus

names of lawyers sued for legal malpractice. Lawyers who have been disciplined should be required to disclose the discipline to any new customers. In short, lawyer disciplinary bodies should focus their energies on sharing all available information regarding competency with the public.

Concerns over lawyer competence should also be addressed by continuing conduct regulation. The current regulatory system relies almost completely upon entry regulation to guarantee competence. This reliance upon entry regulation has failed both the public and courts.[235] Instead, lawyers should be monitored for continuing competence on two fronts. First, client complaints of incompetence should be carefully investigated,[236] and lawyers found to have provided substandard services should lose their license to practice before the courts.[237] This would allow those most affected by incompetence to bring incompetence to the attention of the regulators.

Second, courts should be encouraged to report incompetence to lawyer regulators.[238] The regulatory structure outlined here focuses its energies upon

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function similarly to the service provided by the Better Business Bureau. Sandra DeGraw and Bruce Burton have addressed this flaw in lawyer regulation, and proposed that the disciplinary system include mandatory "disclosure advertising," that is, mandatory advertising of disciplinary actions against lawyers. DeGraw & Burton, *supra* note 233, at 384-91. For other proposals aimed at expanding the public access to lawyer discipline, see generally Jack A. Guttenberg, *The Ohio Attorney Disciplinary Process—1982 to 1991: An Empirical Study, Critique and Recommendation for Change,* 62 U. CIN. L. REV. 947 (1994); Kristina Sera Fini Pennex, Note, *Lifting the Veil of Secrecy by Opening Michigan's Disciplinary System*, 73 U. DET. MERCY L. REV. 569 (1996).

235. For examples of criticisms of the current state of attorney competence, see Warren E. Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel,* 49 FORDHAM L. REV. 1, 1 (1980) ("[A] broad consensus has now emerged that a significant problem concerning the quality of a substantial number of lawyers' performances in the trial courts does indeed exist."); Burger, *supra* note 55, at 234 (arguing that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation"); Roger C. Cramton & Erik M. Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies,* 30 J. LEGAL EDUC. 253, 256 (1979) (noting a survey wherein 41.3% of the federal judges responding believed there to be a "serious problem of inadequate trial advocacy in their courts"); Irving R. Kaufman, *Attorney Incompetence: A Plea for Reform,* 69 A.B.A. J. 308 (1983).

236. State disciplinary systems currently do little to enforce any standard of lawyer competence. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 190-91 (1986) ("To date, the enforcement of competence standards has been generally limited to relatively exotic, blatant, or repeated cases of lawyer bungling. Lawyers who make some showing of effort, and who do nothing other than perform badly, rarely appear in the appellate reports in discipline cases."); Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 712-13 (1981) (exploring the failure of lawyer discipline systems to address lawyer competence); Susan M. Treyz, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59 FORDHAM L. REV. 719, 732 & n.90 (1991) (noting that "[s]tate bar associations are often reluctant to impose sanctions for attorney incompetence").

237. The definition of "substandard" lawyering, like the level of the entry barriers, would be based upon the minimum needs of the courts for efficient disposition of their cases.

238. Despite frequent worries over lawyer competence from the bench, *see supra* note 235 and accompanying text, courts have not suggested that *they* report incompetence to attorney regulators. *See, e.g.*, William W. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93

the needs of the courts; as such, courts themselves will be in a unique position to identify lawyers who slow or derail the courts' litigation processes. Furthermore, given the problems of agency costs and information asymmetry, courts may well be in a better position to recognize incompetence than clients. Courts may worry that a duty to report incompetent attorneys will interfere with their duty to impartially manage cases, and raise the specter of bias against a particular litigant or attorney; likewise, lawyers will likely worry that this process will allow for judges with a personal bias against a lawyer to report her, regardless of her competence.[239] Nevertheless, judges are a natural first line of administration in a regulatory system aimed at streamlining court processes.[240]

Conduct regulations aimed at facilitating the compensation of injured plaintiffs would further assist the pursuit of attorney competence. This assistance is proposed in two forms. First, all licensed lawyers should be required to carry malpractice insurance.[241] This will increase the possibility that wronged clients will be recompensed for incompetence.[242]

Second, the regulatory system should also attempt to recompense injured clients for instances of incompetence that cannot support a malpractice action, but have still damaged the client.[243] Such a system will better protect clients,

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HARV. L. REV. 633, 669 (1980) (suggesting that trial judges take an active role in supervising the cases on their docket to monitor, and correct for, attorney incompetence, but not suggesting that judges report incompetence to disciplinary authorities).

239. *See* William E. Nelson, *The Integrity of the Judiciary in Twentieth-Century New York*, 51 RUTGERS L. REV. 1, 9 & n.29 (1998) (describing court cases claiming bias from a judge's dislike of a lawyer); Randall T. Shepard, *Judicial Professionalism and the Relations Between Judges and Lawyers,* 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 223, 231-36 (2000) (describing cases of personal dislike between courts and attorneys).

240. Furthermore, the lawyer's worry about biased judges can be controlled by a later, independent investigation by a separate regulator. The above system asks judges to *refer* cases of incompetence, not to prosecute these cases on their own. This extra step will control unsubstantiated judicial claims of incompetence.

241. Some commentators have advocated mandatory legal malpractice insurance. *E.g.*, Ramos, *supra* note 201, at 2623-24; Cunitz, *supra* note 201, at 645-53. *But see* Theodore J. Schneyer, *Mandatory Malpractice Insurance for Lawyers in Wisconsin and Elsewhere,* 1979 WIS. L. REV. 1019 (outlining the arguments against mandatory insurance).

242. Whether mandatory insurance will increase or decrease the occurrences of incompetence is open to question. Lawyers who are insured may suffer from the problems of moral hazard, that is, insured lawyers might take more risks with the knowledge that they are insured. Daniel Keating, *Pension Insurance, Bankruptcy and Moral Hazard,* 1991 WIS. L. REV. 65, 67-68 ("The problem, simply stated, is that those who are insured against certain risks have an incentive to use less than optimal care to avoid those risks."). Regardless, mandatory malpractice insurance would surely assist aggrieved clients in enforcing judgments against attorneys.

243. Several commentators have advocated the use of fines as a lawyer disciplinary measure. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 31-37 (1992); Stephen G. Bené, Note, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions,* 43 STAN. L. REV. 907, 937-38 (1991). These commentators have focused on fines as a deterrent, however, not as a compensation for injured clients.

will serve as a stronger deterrent to attorney misbehavior,[244] and will more likely guarantee competent litigators before the courts. As currently structured, conduct regulation offers little or no compensation to injured clients; the only remedy for a finding of misconduct is censure or disbarment.[245]

As for the remaining justifications,[246] the current regulatory responses to agency costs and externalities are similar: some of the regulation restates common law or statutory protections.[247] Insofar as this regulation is duplicative, its necessity is dubious. The remaining regulation offers additional protections to clients and opponents, but has been criticized as favoring the interests of lawyers over clients.[248] A full redrafting of each of these regulations is beyond the scope of this article, but these regulations should be recast as narrowly as possible to serve the specific rationale, in light of the broader interests of society.[249]

III. CONCLUSION

Lawyer regulation should be reformulated and recast in light of the justifications for that regulation. Such a system would eliminate many, if not all, of the current indefensible regulations that harm the public to the benefit of lawyers. This would have the salutary effect of cutting the wheat (justifiable regulation) from the chaff (lawyer self-interest). A reformulated system would focus on regulations that narrowly serve the interests of the courts and the public. Transforming attorney regulation would simultaneously increase

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244. Bené, *supra* note 243, at 926-29 (describing the deterrent nature of fines).

245. *See supra* note 199 and accompanying text.

246. *See supra* notes 106-96 and accompanying text.

247. *See supra* notes 76-77, 172-76 and accompanying text.

248. *See supra* notes 159-66, 186-90 and accompanying text.

249. Consider a reformulation of the rules governing attorney confidentiality. First, consideration should be given to whether the rule itself serves the interests of society at large, or is based solely on the interests of lawyers and clients. There is already a lively debate on precisely this topic. *Compare* Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 MICH. L. REV. 1469, 1470-74 (1966) (defending the necessity of confidentiality) *with* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 33 (1998) (arguing that lawyer confidentiality benefits lawyers at the expense of society); Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythologizing of the Corporate Attorney-Client Privilege,* 69 NOTRE DAME L. REV. 157, 174-78 (1993) (criticizing the various justifications for corporate attorney-client privilege and advocating its abolition). Assuming that attorney confidentiality as a whole was deemed beneficial to society at large, the specific rule would be examined in light of the problem of agency costs. At a minimum, this examination would likely eliminate the exception to confidentiality for a later client malpractice action; this requirement has no connection to the stated rationale for regulation. *Cf.* Fischel, *supra*, at 10-12 (discussing the apparent hypocrisy of the lawyer self-defense exception to confidentiality); Gillers, *supra* note 76, at 260 (questioning the *Rules*' lawyer self-defense exception).

competition, increase access to all types of legal services, lower the cost of training to become a lawyer, and make courts more efficient.

Sounds too good to be true? As always, it is easier to recognize a problem than to suggest a workable solution. Most current lawyers have already internalized the costs involved under the current system of entry. Any lowering of entry barriers would be disastrous to existing lawyers who will have relied upon the current rate of pay for legal services to repay these sunk costs. If entry barriers shrank, and the price of legal services dropped, these lawyers would experience a devastating loss on their investment to become a lawyer. As such, arguments considering the "quality" of the bar aside, lawyers will fight tooth and nail before a flood of lower-priced competitors enters every area of the legal market.[250]

Likewise, lawyers would have little interest in reforming conduct regulation to lessen information asymmetry or guarantee competence. Publicizing client complaints would prove embarrassing for too many attorneys, and eliminating all bans on advertising or client solicitation would further promote competition at the expense of "professionalism." Any substantial effort to monitor ongoing competence would likewise prove costly for many lawyers, and too costly for implementation in the current system of self-regulation.

Nevertheless, change is on the horizon. As the legal profession slowly transforms into a business many anti-competitive barriers fall of necessity: consider the relative lack of enforcement of laws barring unauthorized practice,[251] and the proposals to allow lawyers to work and partner with non-lawyers in providing legal services.[252] As legal services and advice becomes increasingly available over the internet, and as globalization continues, other barriers are bound to weaken or fall. Hopefully this process can lead to a rational rethinking of the regulatory system as a whole, and to an evolution that serves clients and the public at-large, and not solely lawyers.

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250. Furthermore, any legislative solution would require constitutional amendments in many states, or a federalization of legal ethics. *See* Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 643-46 (1978).

251. *See* Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEG. ETHICS 209, 216-21 (1990).

252. *See generally* John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83 (2000).