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Article 1

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In recent decades, the legal profession has taken a long step forward into the nineteenth century. During the last few years alone, we have witnessed striking changes. Courts have legalized price competition and advertising among attorneys;[1] the National Labor Relations Board has applied collective bargaining legislation to law firms;[2] Congress has created the Legal Services Corporation;[3] and the federal government has preempted state regulation of union group legal services plans.[4] Change is continuing. The Federal Trade Commission, for instance, has been prowling about the activities of bar associations for potential antitrust violations,[5] and the American Bar Association plans to replace the Code of Professional Responsibility.[6]

It remains to be seen whether we are heading for some goal, rushing off in all directions, or merely milling in the same place. Is it consistent to trust the public to assess the spiels of competing lawyers, and also to forbid conflicts of interest to which all clients consent?[7] Will measures to

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1 *See, e.g.,* Bates v. State Bar, 433 U.S. 350 (1977) (rule prohibiting attorney advertising violates first amendment); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (attorney price fixing violates Sherman Act).

2 *See, e.g.,* Camden Regional Legal Servs., Inc., 231 N.L.R.B. 224 (1977); Foley, Hoag & Eliot, 229 N.L.R.B. 456 (1977); UNIONIZATION IN THE LEGAL PROFESSION (BNA Special Rept. 1981).

3 *See* Legal Services Corporation Act of 1974, 42 U.S.C. § 2996 (1976 & Supp. IV 1980).

4 *See* 29 U.S.C. §§ 1002(1)(A), 1144; *see also* Pfennigstorf & Kimball, *Employee Legal Service Plans: Conflict Between Federal and State Regulation,* in LEGAL SERVICE PLANS: APPROAGHES TO REGULATION 189-252 (1977). The Court had previously used the first and fourteenth amendments to invalidate the bar's barriers against group legal service plans. *E.g.,* United Mineworkers v. Illinois Bar Ass'n, 389 U.S. 217 (1967).

5 *See State Bar Associations Won't Get ABA Advice on FTC's Questionnaire,* [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1001, at D-7 (Feb. 12, 1981); *cf. In re* American Medical Ass'n, 94 F.T.C. 701 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court,* American Medical Ass'n v. FTC, 102 S. Ct. 1744 (1982) (FTC investigation of AMA for anticompetitive practices).

6 ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981) [hereinafter cited as Proposed Final Draft]. In discussing the Model Rules, I have not gone beyond the 1981 draft to cover in detail the version found in the Commission's June 30, 1982 Report to the House of Delegates, which that House is now revising further. Winter, *Lawyer Ethics on Trial,* 68 A.B.A. J. 1197 (1982).

7 *Compare* Bates v. State Bar, 433 U.S. 350 (1977) (attorney advertising permitted) *with*

make legal services more widely available by marketing them through mass production clinics promote or subvert efforts to free clients from domination by their own lawyers?[8] Do present rules inhibit trial advocacy too much or not enough?[9] Commitment to change does not itself reveal what changes are desirable. Without a definition of what constitutes improvement, we are likely to enact clashing solutions, or solutions that will seem as self-interested as some of the currently challenged practices. Yet to draft a blueprint for reform in the abstract, without regard for proposals now being pressed, would be foolish. Those proposals indicate where the shoe is thought to pinch, what repairs some find desirable, and what changes lie within the realm of possibility.

This article discusses three models of professional reform implicit in current proposals. The first, a market view, seeks to provide the best services at the lowest prices by permitting informed clients to choose among competing lawyers and nonlawyers. The second model treats legal services as a public utility requiring regulatory intervention to increase its availability and efficiency; it regards the enforcement of legal rights as a vital part of our governmental system. The third view, more vague and with perhaps more radical implications, rests on a critique of the personal relations between lawyer and client as manipulative and alienating. Some extreme proponents of this third model even challenge the necessity for lawyers.

I will refer to these models as the market, the public utility, and the personal responsibility models. Each, however, has economic, political, and personal implications of its own. These models are general approaches to change, not rigid schemes. They are ideal types, guides for orientation, discussion, and evaluation of more specific proposals, rather than closed systems that anyone would be likely to follow in every detail.[10] Because each model responds to the weaknesses of the traditional system of professional organization and behavior, the rise and fall of that system is the natural starting point for presenting the models.

I

THE RISE AND FALL OF PROFESSIONALISM

In the last century we have witnessed an extraordinary transforma-

Developments in the Law—Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1303-06 (1981) (client cannot consent to attorney's conflict of interest in same case); *see generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1980).

8 *Compare* Jacoby v. State Bar, 19 Cal. 3d 359, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977) *with* D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974).

9 *Compare* M. FRANKEL, PARTISAN JUSTICE (1980) (present system has excessive tolerance for efforts to distort the truth) *with* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975) (advocating total dedication to client's case).

10 An author cited here as discussing a particular reform does not necessarily accept the general model to which I relate it.

tion of the practice of law. An organized legal profession emerged, one that promulgated and occasionally enforced its own rules of professional responsibility.[11] Graduation from a law school became a prerequisite for admission to the bar.[12] Lawyers excluded nonlawyers from a wide range of legal activities,[13] while Jews, women, and Blacks strove with varying degrees of success to enter the profession.[14] Single practitioners yielded vast areas of practice to lawyers in large firms, corporations, and government agencies.[15] More recently, lawyers formed legal aid societies, public defender offices, and the Legal Services Corporation to provide a variety of legal services to those unable to afford lawyers.[16] A vast expansion of the substantive law accompanied these changes, which in turn required more and more lawyers[17] and generated an outpouring of scholarly analysis and criticism.

The ideology that justified and perhaps influenced this transformation emphasized faith in lawyers. Clients were to entrust their affairs to the professional judgment of counsel, who would serve them with selfless devotion.[18] In turn, the legal profession would protect clients from ignorance and unreliability by preventing them from hiring anyone not enlightened by a legal education and warrantied by bar membership.[19] Furthermore, the bar would prevent abuses by its own members through the establishment and enforcement of rules, such as those protecting clients from the wiles of advertising attorneys.[20]

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11 In particular, lawyers formed the American Bar Association and other professional organizations. *See* V. COUNTRYMAN, T. FINMAN & T. SCHNEYER, THE LAWYER IN MODERN SOCIETY 412-30 (2d ed. 1976); J. HURST, THE GROWTH OF AMERICAN LAW 285-89 (1950). On professional rules and their enforcement, see A.B.A. SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970); Armstrong, *A Century of Legal Ethics,* 64 A.B.A. J. 1063 (1978).

12 *See* Stevens, *Two Cheers for 1870: The American Law School,* in 5 PERSPECTIVES IN AMERICAN HISTORY 403 (D. Fleming & B. Bailyn eds. 1971).

13 *See* Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?,* 1980 AM. B. FOUND. RESEARCH J. 159.

14 *See* J. AUERBACH, UNEQUAL JUSTICE 65-66, 107-08, 125-29, 159, 184-88, 265, 293-95 (1976); C. EPSTEIN, WOMEN IN THE LAW (1981); W. LEONARD, BLACK LAWYERS (1977).

15 AMERICAN BAR FOUNDATION, THE 1971 LAWYER STATISTICAL REPORT 10-12 (1973); *see* J. CARLIN, LAWYERS ON THEIR OWN (1962); J. HURST, *supra* note 11, at 306-08.

16 *See* E. JOHNSON, JUSTICE AND REFORM 37-103 (new ed. 1978); L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 40-41 (1965). The Reagan administration has cut back but not yet destroyed the Legal Services Corporation.

17 Schwartz, *The Reorganization of the Legal Profession,* 58 TEX. L. REV. 1269, 1270 (1980).

18 *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 4, 5, 6, 7 (1980); Leubsdorf, *Communicating With Another Lawyer's Client: The Lawyer's Veto and the Client's Interests,* 127 U. PA. L. REV. 68 (1979).

19 *See, e.g.,* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101, DR 3-102, DR 3-103 (1980).

20 *See id.* DR 2-101, DR 2-102, DR 2-103, DR 2-104, DR 2-105. The original, 1970 version of the Code regulated advertising and solicitation more stringently than the current version. *See also id.* Canons 1, 8 (lawyers' duty to maintain the profession's integrity and competence and to improve the legal system).

A second set of beliefs legitimized the legal system as a whole and helped justify the autonomy of the legal profession. Lawyers portrayed themselves not as powerful social actors but as invisible guardians who helped clients assert rights. Any resulting injustice was attributable to the courts and legislature that conferred those rights, or the client who exercised them.[21] Such beliefs neutralized to some extent the traditional reputation of lawyers for chicanery,[22] and the growing recognition that social choice, not scientific expertise, establishes legal rules and institutions.

In retrospect, legal professionalism mirrors the efforts of other professionals to seek autonomy, prestige, and profit.[23] Like other professionals, lawyers sought to protect their interests,[24] in part by securing a governmentally-guaranteed monopoly.[25] They, like others, justified their special treatment on the basis of their neutral scientific knowledge (evolved and imparted by scholars and incomprehensible to the public) and their disinterested devotion to the public interest.[26] They evolved an ideology demonstrating their profession's vital importance, and justifying its peculiar practices.[27] Lawyers also had several special advantages: they belonged to a traditional profession, had the training to influence and infiltrate the governmental agencies from which protection and regnlation flow, and worked in a society increasingly pervaded by law.

Although the numbers, prosperity, and prestige of the legal profession show no signs of decline, the traditional principles of professional practice are under heavy attack.[28] Critics, moreover, have cast doubt on many of the assumptions that justified the traditional system. Proponents of alternative models argue that many rules, once defended as protecting clients, in fact subordinate clients' interests to those of their

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21 *See, e.g.,* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,* 86 YALE L.J. 1060 (1976); *The Lawyer and His Clients—Correspondence of Messrs. David Dudley and Dudley Field of the New York Bar, With Mr. Samuel Bowles, of the Springfield Republican* (1871), *reprinted in part in* A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 249-66 (1975).

22 *See, e.g.,* G. GAWALT, THE PROMISE OF POWER 81-128 (1979); Ives, *The Reputation of the Common Lawyers in English Society, 1450-1550,* 7 BIRMINGHAM UNIV. HIST. J. 130 (1959-61).

23 *See generally* M. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977).

24 *See* Green, *The ABA as Trade Association,* in VERDICTS ON LAWYERS (R. Nader & M. Green eds. 1976); C. GILB, HIDDEN HIERARCHIES: THE PROFESSIONS AND GOVERNMENT (1966).

25 *See* Christensen, *supra* note 13; Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study,* 53 CALIF. L. REV. 487 (1965); Kessel, *The A.M.A. and the Supply of Physicians,* 35 LAW & CONTEMP. PROBS. 267 (1970).

26 *See, e.g.,* F. BENNION, PROFESSIONAL ETHICS (1969); B. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM (1976).

27 *See* A. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980).

28 *See supra* notes 1-6 and accompanying text.

lawyers.[29] Even more unsettling is the realization that the traditional emphasis on the attorney-client relationship is too narrow. Providing a client with competent and devoted counsel increases the likelihood that the two will inflict damage on opposing and unrepresented parties. That advancing a client's interests in every way short of illegality will promote justice seems less plausible than it once did, especially when lawyers act outside the courtroom or when not everyone concerned is competently represented.[30]

Like the rise of professionalism, challenges to it have affected all professions. Critics have portrayed the professionals' claims of neutral expertise and concern for public welfare as masks for self-interest and domination.[31] Even when professionals persuade the public that they are so vital that the government should fund them, their success undermines their autonomy; regulation follows funding.[32] Furthermore, market forces have weakened the ideal of a working relationship between a professional on one side of the desk and a client on the other. More frequently, professionals work for large institutions whose clients are other large institutions.[33]

The legal profession has not met outside criticism and pressure with a united front. While some lawyers denounce the status quo and propose a variety of changes, others resist change or attempt to deflect it with cosmetic code-making.[34] Moreover, the profession itself is a house divided. Different bar associations propose competing codes of conduct;[35] judges strike down bar rules;[36] and academics criticize the bench, the bar, and each other. The practicing bar is further divided by class, ethnic origin, prestige, income, and clientele.[37] Thus, it is not surprising

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29 *See, e.g.,* Morgan, *The Evolving Concept of Professional Responsibility,* 90 HARV. L. REV. 702 (1977). *See generally* J. LIEBERMAN, CRISIS AT THE BAR (1978).

30 *See* M. FRANKEL, PARTISAN JUSTICE (1980); D. Luban, The Adversary System Excuse (Center for Philos. & Pub. Policy, U. Md. 1981); Califano, *The Washington Lawyer: When to Say No,* in VERDICTS ON LAWYERS 187 (R. Nader & M. Green eds. 1976); Schwartz, *The Professionalism and Accountability of Lawyers,* 66 CALIF. L. REV. 669 (1978); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics,* 1978 WIS. L. REV. 29.

31 *See, e.g.,* I. ILLICH, DISABLING PROFESSIONS (1977); Barber, *Control and Responsibility in the Powerful Professions,* 93 POL. SCI. Q. 599 (1978-79); authorities cited *supra* notes 23-26.

32 *See, e.g.,* E. JOHNSON, *supra* note 16; W. KAPLIN, THE LAW OF HIGHER EDUCATION 387-438 (1978); R. & R. STEVENS, WELFARE MEDICINE IN AMERICA (1974).

33 *See* Engel & Hill, *The Growing Industrialization of the Professions,* in THE PROFESSIONS AND THEIR PROSPECTS 75 (E. Freidson ed. 1973).

34 *See* Frug, *The Proposed Revisions Of The Code Of Professional Responsibility: Solving The Crisis Of Professionalism, Or Legitimating The Status Quo?,* 26 VILL. L. REV. 1121 (1980-81).

35 *Compare* Proposed Final Draft, *supra* note 6, *with* AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT (1980).

36 *See, e.g.,* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (ban on lawyer advertising invalidated); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (minimum fee schedule struck down).

37 *See* V. COUNTRYMAN, T. FINMAN & T. SCHNEYER, *supra* note 11, at 1-61; Laumann & Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference,* 1977 AM. B.

that currents of change are flowing in different directions.

Each of the following models of professional reform addresses the loss of consensus within the legal profession and within society. The market model views society as an aggregate of personal desires, whose satisfaction can be maximized by unfettered private contracts. The public utility model probes deeper; it views the marketplace itself as an institution in which some impose decisions on others. Nevertheless, the public utility model hopes that a democratically-constituted political order can protect the public interest. The personal responsibility model, on the other hand, rejects this hope of a political solution; it finds the current political order just as assailable as the economic order. The professional responsibility model abandons the search for consensus, and calls on each lawyer to follow his own moral and political insights.

II

A MARKET MODEL

The movement to dismantle barriers to competition in providing legal services has been one of the most striking developments in the legal profession. Trust in the market has replaced professional regulation as a means of preventing abuse. Lawyers are suddenly free to advertise, solicit clients,[38] lower their prices,[39] and devise new arrangements to deliver their services more economically.[40] The ABA's barriers against practice by nonlawyers have begun to crumble.[41] Even law schools face

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FOUND. RESEARCH J. 155; Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code,* 37 GEO. WASH. L. REV. 244, 250-66 (1968).

38 *See, e.g., In re* R—M. J—, 102 S. Ct. 929 (1982); Bates v. State Bar, 433 U.S. 350 (1977) (Court relies on market theory in upholding newspaper advertising); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 532 N.Y.S.2d 872 (1980), *cert. denied,* 450 U.S. 1026 (1981) (written solicitation); CAL. BUS. & PROF. CODE § 6076 (West 1977), Rule 2-101 (1982) (written solicitation); *see also* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 765 (1976) (using free market and first amendment reasoning to invalidate ban on drug price advertising). *See generally* L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION (1980).

39 *See, e.g.,* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); *see also* Winter, *See Fee Changes for Assigned Counsel,* 67 A.B.A. J. 32 (1981) (competitive bidding).

40 *See, e.g.,* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(4) (1980) (group legal services); J. JENKINS, FUTURE LAW: LAWYERS CONFRONT THE 21ST CENTURY 8-9 (1979) (legal clinic with offices in two states); Podgers, *Tort Defense Law Firms to Affiliate,* 66 A.B.A. J. 437 (1980). One commentator has argued that the developments described in the text do not reflect a genuine commitment to competition, but instead are part of an effort to expand the demand for legal services to maintain the income of an expanding bar. Abel, *Why Does the ABA Promulgate Ethical Rules?,* 59 TEX. L. REV. 639, 657-62 (1981).

41 Christensen, *supra* note 13, at 160, 197-200; *see* Virginia State Bar v. Surety Title Ins. Agency, 571 F.2d 205 (4th Cir. 1978); *see also* Faretta v. California, 422 U.S. 806 (1975) (right of criminal defendant to represent himself); Procunier v. Martinez, 416 U.S. 396, 419-22 (1974) (unconstitutional to bar law students and paralegals from interviewing prisoners); Johnson v. Avery, 393 U.S. 483 (1969) (prohibition against legal assistance by prisoners unlawful).

unaccustomed competition as a result of California's authorization of law schools without national accreditation.[42] Important in themselves, these changes may prompt even more important changes in the way that society provides legal services, for the assumptions underlying the market model differ radically from traditional assumptions. If carried to their extreme, these assumptions call for changes in virtually every aspect of legal life.

A. *Premises and Problems*

Reliance on the market presupposes that clients are able to choose lawyers (or nonlawyers) to represent them, to make satisfactory arrangements with their representatives, and to police those arrangements themselves. These presuppositions are very different from the traditional assumption that clients need protection because legal matters are too complex for them, and because the trust that clients should repose in their lawyers discourages scrutiny of their lawyers' performance. That traditional assumption has recently been reborn in economic form, as commentators argue that professionals can create demand for their own services.[43] Of course, in our society the market reigus in many areas in which consumers have difficulty choosing among competing products. And even if one accepts the assumption of client vulnerability, it does not necessarily follow that the traditional system adequately protects clients. Indeed, market proponents argue that market restrictions are more likely to impoverish clients than to improve the quality of the legal services that they receive.

Several problems are inherent in the market model. Assuming that a client can safeguard his own interests, what effect does the lawyer have on third parties? A lawyer acting as a lobbyist or corporate adviser helps his client to affect consumers, pollution victims, and others. Similarly, a litigator's impact may extend beyond the parties to nonparties affected by the case or the precedent it establishes. Indeed, clients typically hire lawyers to protect their own interests by limiting those of others. Market believers, like believers in the traditional scheme of professional regulation, tend to disregard these externalities. Proponents of the market model need not, however, subscribe to the traditional assertion that nonclients will be protected by the adversary system and their own lawyers. They might confine reliance on the market to transactions

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42 CAL. BUS. & PROF. CODE § 6060.9 (West 1974) provides that "[a]pproval of any agency or agencies not existing under and by virtue of the law of this State shall not be made a condition for accredition of any California law school."; *Bar Exam Statistics,* 55 CAL. ST. B.J. 91 (1980). *See generally* Fossum, *Law School Accreditation Standards and the Structure of American Legal Education,* 1978 AM. B. FOUND. RESEARCH J. 515.

43 *See, e.g.,* Evans, *Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?,* in OCCUPATIONAL LICENSURE AND REGULATION 225, 250-59 (S. Rottenberg ed. 1980).

that generate few externalities. Alternatively, they might grant nonclients a cause of action against the lawyer or client who has harmed them, thereby forcing him to secure the consent of nonparties in advance or to bear the consequences of failing to do so.[44] Nonclient victims might also be allowed to buy off the lawyer or his client in advance.[45] In one way or another, those who wish to justify reliance on the market must address the impact of lawyers on nonclients.

A second problem with the market approach is that only those with money or other assets can participate in a market.[46] The market model, therefore, implies that the poor will not participate in the legal services market. This approach departs from traditional thought which insists, at least in theory, that all individuals have access to legal services.[47] To correct this weakness, a market proponent might support a proposal to redistribute wealth, enabling everyone to afford a lawyer. The market proponent would be hard pressed, however, to justify subsidizing legal services for the poor, who might consider other benefits more valuable.[48] Subsidizing legal services implies that the public has an interest in the availability of some legal service to all, the market notwithstanding.

Finally, a market approach, almost by definition, requires that neither the government nor the bar regulate private arrangements for legal services. Under the traditional system, the government implements the bar's rules by controlling admission to legal practice, banning the unauthorized practice of law, and imposing the bar's standards of behavior on lawyers. A market approach would reduce, but not eliminate, even this minor governmental role. At the very least, the market approach would require the government to enforce contracts between lawyers and clients, and between lawyers and their partners or co-workers. The government, moreover, defines the substantive rights that lawyers enforce and establishes the procedures for enforcement. The ideal of a market free of governmental involvement—always a paradoxical one—thus seems particularly unattainable when the organization of legal services is concerned.

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44 *See infra* notes 84-92 and accompanying text.

45 *See generally* Coase, *The Problem of Social Cost,* 3 J. L. & ECON. 1 (1960).

46 The other assets include monetary claims substantial enough to attract contingent fee lawyers.

47 *E.g.,* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-16 (1980).

48 *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 355-59 (2d ed. 1977); Humbach, *Serving the Public Interest: An Overstated Objective,* 65 A.B.A. J. 564, 565 (1979); *cf.* M.FRIEDMAN, CAPITALISM AND FREEDOM 177-95 (1962) (criticizing social welfare programs but supporting negative income tax); Landes, *An Economic Analysis of the Court,* 14 J. L. & ECON. 61, 74-77 (1971) (criticizing free courts).

B. *The Market Model's Applications*

Among the most important applications of the market approach is the elimination of restraints on who may practice law. As long as they do not misrepresent their credentials, the model frees lawyers to compete with lawyers for discerning customers[49] and lawyers from other states to compete with in-state lawyers.[50] Courts should also permit litigants to conduct and argue their own cases.[51]

The market model's impact on requirements for lawyer certification is less clear. Admission to the bar might be abolished, leaving everyone free to peddle his credentials, or admission to the bar might be retained as a labeling device.[52] A less drastic alternative would be to retain the bar admission requirement, but reduce the requirements needed to become admitted, for instance by requiring only two years of law school.[53] Law schools could then compete for students by offering shorter and less expensive courses of study without being restrained by accreditation agencies.[54]

As traditional restraints on law firms[55] were abolished, lawyers would taste all of the delights of capitalism. Nationwide law firms, franchising arrangements,[56] group legal service plans, and legal insur-

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49 *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 346-48 (1972); Christensen, *supra* note 13; Kennedy, *The Lawyer as Professional: Examination, Licensing, and the Problem of Deceptive Packaging,* 7 FLA. ST. U.L. REV. 601 (1979). *See generally* OCCUPATIONAL LICENSURE AND REGULATION (S. Rottenberg ed. 1980). In England nonlawyers are free to perform many although not all "legal" functions. THE ROYAL COMM'N ON LEGAL SERVICES, FINAL REPORT 203-31, 243-86 (1979) (Cmd. 7648).

50 *See* Leis v. Flynt, 439 U.S. 438, 445-58 (1979) (Stevens, J., dissenting); Brakel & Loh, *Regulating the Multistate Practice of Law,* 50 WASH. L. REV. 699 (1975); Note, *A Constitutional Analysis of State Bar Residency Requirements,* 92 HARV. L. REV. 1461 (1979). *See generally* Pashigian, *Occupational Licensing and the Interstate Mobility of Professionals,* 22 J.L. & ECON. 1 (1979); Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155 (D.S.D. 1982).

51 *See* Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis,* 86 YALE L.J. 104 (1976).

52 Similar labeling might be provided for professionals and paralegals. Proponents of the market model, however, are likely to oppose this system. *See, e.g.,* Elzinga, *The Compass of Competition for Professional Services,* in REGULATING THE PROFESSIONS 107 (R. Blair & S. Rubin eds. 1980).

53 *See, e.g.,* Stolz, *Training for the Public Profession of the Law (1921): A Contemporary Review,* in H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 227 (1972); Ass'n of Am. Law Schools, *Training for the Public Professions of the Law: 1971* (the "Carrington Report"), in *id.* at 106-07, 117-19, 143-47.

54 *See* First, *Competition in the Legal Education Industry* (pts. 1 & 2), 53 N.Y.U. L. REV. 311 (1978), 54 N.Y.U. L. REV. 1049 (1979); authorities cited *supra* note 42. For a description of anticompetitive collusion between law schools, see Stolz, *The Two-Year Law School: The Day the Masic Died,* 25 J. LEGAL EDUC. 37 (1973).

55 *See, e.g.,* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D), DR 3-101, DR 3-102, DR 3-103 (1980).

56 *See* M. POLLARD & R. LEIBENLUFT, ANTITRUST AND THE HEALTH PROFESSIONS 6, 61 (FTC 1981) (retail dental clinies); *The Nationwide Law Firm Aims for Middle Income Litigants,* 64 A.B.A. J. 1481 (1978) (law firm expands to fill middle-class market); authorities cited *supra* note 40.

ance would flourish.[57] Lawyers might form partnerships with marketing professionals, or they might market their services through profit-making corporations controlled by nonlawyers.[58] Law firms, moreover, could use modern management techniques to chart their growth and train and control their lawyers, paralegals, and staff personnel.[59] In that environment, traditions of craftsmanship and autonomy[60] might yield to standardization and bureaucratization.[61] The right of lawyers and law firm employees to unionize[62] might then take on increased importance.

The ability to advertise[63] and to solicit[64] clients without traditional restraints should foster the development of larger firms. Only advertising can generate the business needed to support mass-production techniques, and only large firms can afford the advertising campaigns needed to create their reputations. Unhindered competition may, therefore, lead to its own demise, or at least to the demise of some benefits that market theorists expect. Oligopolists able to create their own demand through advertising, rather than quality or low cost, may come to dominate the legal services market.[65]

If the market model benefits clients at all, it should be through keeping prices down. The elimination of minimum fee scales[66] has already opened the way to more vigorous price competition, while the legitimation of some price advertising[67] has made price information

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57 W. PFENNIGSTORF, LEGAL EXPENSE INSURANCE: THE EUROPEAN EXPERIENCE IN FINANCING LEGAL SERVICES (1975); *see also* Schwartz, *Foreword: Group Legal Services in Perspective,* 12 U.C.L.A. L. REV. 279 (1965).

58 Proposed Final Draft, *supra* note 6, Rule 5.4; Huber, *Competition at the Bar and the Proposed Code of Professional Standards,* 57 N.C.L. REV. 559, 579-821 (1979); *cf. In re* American Medical Ass'n, 94 F.T.C. 701, 1016-18 (1979), *enforced,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court,* American Medical Ass'n v. FTC, 102 S. Ct. 1744 (1982) (restraint on physician association with nonphysicians constitutes unfair trade practice); Evans, *supra* note 43, at 239-50 (dominance of professional firms by the professionals is inefficient).

59 *See* Montagna, *The Public Accounting Profession,* in THE PROFESSIONS AND THEIR PROSPECTS 135 (E. Freidson ed. 1973) (describing large accounting firms). *See generally* Cantor, *Managing Legal Organizations in the 1980's,* 11 U. TOL. L. REV. 311 (1980); J. JENKINS, *supra* note 40, at 10.

60 *See* Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms,* 1981 AM. B. FOUND. RESEARCH J. 97.

61 Schwartz, *The Reorganization of the Legal Profession,* 58 TEX. L. REV. 1269, 1274-88 (1980); *see* H. BRAVERMAN, LABOR AND MONOPOLY CAPITAL (1977); Engel, *The Standardization of Lawyers' Services,* 1977 AM. B. FOUND. RESEARCH J. 817.

62 *See supra* note 2.

63 Authorities cited *supra* note 38. *See generally* Note, *Sherman Act Scrutiny of Bar Restraints on Advertising and Soliciting By Attorneys,* 62 VA. L. REV. 1135 (1976).

64 *Id.;* CAL. RULES OF PROFESSIONAL CONDUCT, Rule 2-101 (1982).

65 *See, e.g.,* J. GALBRAITH, THE NEW INDUSTRIAL STATE 198-212 (2d ed. 1971). *But see* Demsetz, *Advertising in the Affluent Society,* in ADVERTISING AND SOCIETY 67 (Y. Brozen ed. 1974).

66 *See, e.g.,* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

67 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1980); authorities cited *supra* note 38; *cf.* Benham, *The Effect of Advertising on the Price of Eyeglasses,* 15 J.L. & ECON. 337 (1972) (advertising lowers prices).

more accessible to consumers. Competitive bidding[68] and legal services purchased with credit cards and bank loans[69] are on the way. Market logic would also authorize lawyers to advance a client's litigation expenses and to accept divorce and criminal cases on a contingent fee basis.[70] Yet clients could suffer from the abolition of price restrictions. The same antitrust laws that condemn the minimum fee also forbid maximum price-fixing arrangements, including, perhaps, bar restrictions on unreasonably high fees;[71] laissez-faire principles would allow even the most exorbitant fees as long as the client agrees to them.[72]

Under the market view, the duties a lawyer owes to a client should be as negotiable as their price. If a client can hire an untrained lawyer to transact his legal business, he should also be able to hire a lawyer who will devote only a few hours to the case. Conversely, the lawyer should be able to insist on skimpy representation as a condition of accepting the case.[73] Similarly, the lawyer might try to increase his income and publicity by insisting on the power to make settlement decisions or to control other aspects of the case.[74] Even the lawyer's duties of loyalty and confidentiality, as traditionally conceived,[75] might be bargained away. Indeed, there are already tendencies in that direction. Courts, for example, have permitted sophisticated clients to waive their rights to require their lawyers to decline representation of other clients who might pose a potential conflict of interest.[76] Some have urged that lawyers be free to

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68 *See* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978); *In re* American Medical Ass'n, 94 F.T.C. 701, 1012-15 (1979), *enforced,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court,* American Medical Ass'n v. FTC, 102 S. Ct. 1744 (1982) (AMA practice setting minimum fee level illegal); Winter, *supra* note 39.

69 *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 338 (1974); Nat'l L.J., Oct. 16, 1980, at 3, col. 1 (loans to finance suits); *Public Is Cool to Lawsuit Stock,* 63 A.B.A. J. 166 (1977) (sale of stock interest in lawsuit).

70 *See* Proposed Final Draft, *supra* note 6, Rule 1.5(c); Huber, *supra* note 58, at 588-95. *But see* Person v. Association of the Bar, 554 F.2d 534 (2d Cir. 1977) (upholding prohibition on contingent fees for expert witnesses).

71 *See* Arizona v. Maricopa County Medical Soc'y, 102 S. Ct. 2466 (1982).

72 *See* Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866 (9th Cir.), *cert. denied,* 444 U.S. 981 (1979) (enforcing contract for one-million dollar minimum fee for preparing certiorari petition).

73 *See* Boston Bar Ass'n, Comm. on Professional Responsibility, Op. No. 79-3, *reprinted in* 24 BOS. B.J. 24 (1980) (lawyer may comply with client's request for cursory opinion); *cf.* S. NAGEL & M. NEEF, DECISION THEORY AND THE LEGAL PROCESS 217-48 (1979) (using portfolio theory to analyze how lawyer should allocate his time among cases to maximize his profit); Epstein, *Medical Malpractice: The Case for Contract,* 1976 AM. B. FOUND. RESEARCH J. 87 (contracting out of medical malpractice liability).

74 *See* L. NIZER, THE IMPLOSION CONSPIRACY 199-200 (1973); D. ROSENTHAL, *supra* note 8.

75 *See supra* notes 18-20 and accompanying text.

76 *E.g.,* Interstate Properties v. Pyramid Co., 574 F. Supp. 178, 182-83 (S.D.N.Y. 1982); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 203-05 (N.D. Ohio 1976), *aff'd,* 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978); Note, *Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest,* 79 MICH. L. REV. 1074 (1981). On waiver of the right to confidentiality, see Maxwell v. Superior Court, 30 Cal. 3d 606, 621-

act as intermediaries between negotiating parties.[77]

Would such an approach leave a client with any protection against her lawyer? She could buy insurance[78] or insist that the employment contract include appropriate restrictions. Even without an explicit agreement, customary expectations[79] or the lawyer's representations might give rise to implicit restrictions.[80] Clients, however, are unlikely to foresee all the dangers of hiring an unconstrained attorney and cannot easily change lawyers in the middle of a case. The law could meet this problem, albeit at some sacrifice of pure market principles, by requiring the lawyer to secure the client's informed consent before departing from traditional norms.[81] Two sources of exploitation would still remain: the market power of lawyers, and the trust with which clients are encouraged to approach lawyers. Market proponents would argue that the reforms already mentioned would dispel any lawyer market power. Moreover, they would replace whatever trust in lawyers exists[82] with a more critical approach to attorney-client relationships, an approach appropriate for dealing with self-interested businessmen.[83] Market proponents would further claim that when lawyers now refrain from abusing their clients, they do so not because of rarely-enforced legal requirements and professional canons, but because of their own principles and their desire, stimulated by the market, to secure the confidence of clients and colleagues.

The difficulties of protecting clients in a market system pale in comparison to those of protecting nonclients. Some marketeers might indeed

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22, 639 P.2d 248, 257, 180 Cal. Rptr. 277, 186-87 (1982) (criminal defendant may sell publication rights to obtain counsel).

77 *See, e.g.,* Proposed Final Draft, *supra* note 6, Rule 2.2; Note, *Simultaneous Representation: Transaction Resolution in the Adversary System,* 28 CASE W. RES. L. REV. 86 (1977); *see also* Frank, *The Legal Ethics of Louis D. Brandeis,* 17 STAN. L. REV. 683, 698-703 (1965) (Brandeis as "counsel for the situation").

78 *See* Havighurst, *"Medical Adversity Insurance"—Has Its Time Come?,* 1975 DUKE L.J. 1233.

79 *See* Epstein, *supra* note 73.

80 Steinberg & Rosen, *Legal Advertising and Warranty Liability: "Let the Lawyer Beware,"* 1978 WASH. U.L.Q. 443.

81 *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.5(b), (c) (Discussion Draft 1980) [hereinafter cited as Discussion Draft] (watered down in Proposed Final Draft, *supra* note 6, Rule 1.2(c) (1981)); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession,* 128 U. PA. L. REV. 41 (1979). Such measures would sacrifice pure market principles because they assume that clients neglect their own best interests, and because they impose on lawyers and clients who do not explicitly agree otherwise terms that are not based on what the parties have agreed to or would agree to.

82 *See* B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 230-32 (1977) (reporting generally high opinions of lawyers' trustworthiness to client, but also widespread beliefs that lawyers will help client with unethical or illegal behavior).

83 *See* Burt, *Conflict and Trust Between Attorney and Client,* 69 GEO. L.J. 1015 (1981) (arguing that hostility between lawyers and clients is inevitable and should be brought into the open).

stop at this point and keep the present prohibitions against injuring nonclients. The current Code of Professional Responsibility contains only a few such prohibitions, and most of these forbid conduct that is plainly illegitimate in even the most boisterous market, such as bribing witnesses and officials, using fraud and deceit, and aiding a client's illegal schemes.[84] All but two of the remaining prohibitions[85] are directed primarily against the overzealous conduct of litigation. They prohibit lawyers from asserting baseless claims,[86] communicating with a represented party without his lawyer's permission,[87] using threats of criminal prosecution to extort concessions,[88] and prejudicing the tribunal with pretrial publicity.[89] One might internalize the costs of such conduct by making the offending lawyer liable for them.[90] The same approach could be used when lawyers injure nonclient third parties.[91] A market approach, however, does not compel such liabilities; it is also compatible with a system under which lawyers and their clients are free to harm third parties, whose only recourse is to buy them off if they can. The economic reasoning behind the market approach does not determine what rights should be allocated to whom.[92] Society makes such determinations when it decides, for instance, whether a lawyer whose client tells him that he is considering baseless litigation against an enemy has a right to keep the disclosure secret, or whether the lawyer must inform the enemy of that fact.

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84 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(3), (4), DR 7-102(A)(4), (5), (6), (7), DR 7-109(c), DR 7-110(A), DR 8-101 (1980).

85 *Id.* DR 7-106(C)(2), DR 8-102 (protecting witnesses from harassment and judges from abuse).

86 *Id.* DR 7-102(A)(1), (2), DR 7-103(A).

87 *Id.* DR 7-104(A)(1).

88 *Id.* DR 7-105.

89 *Id.* DR 7-107, DR 7-108; *see* Stewart, *Professional Ethics for the Business Lawyer: The Morals of the Market Place,* 31 BUS. LAW 463, 467 (1975) (legal ethics reflect a few precepts of decency and common sense, plus enlightened self-interest).

90 *See* 28 U.S.C. § 1927, *amended by* Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1156 (Supp. 1981) (lawyer liable for costs and attorney's fees caused by unreasonable and vexatious multiplication of proceedings); Greenbaum, *Physician Countersuits: A Cause Without Action,* 12 PAC. L.J. 745 (1981) (urging courts and legislatures to relax their discouragement of suits by physicians against lawyers who sue them unsuccessfully for malpractice).

91 *See, e.g.,* Junker v. Crory, 650 F.2d 1349 (5th Cir. 1981) (liability of corporate lawyer who prepared document for transactions to defraud stockholder); Tarasoff v. Regents of Univ. of Cal., 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974) (liability of psychiatrist for failing to warn stranger of his client's threat), *vacated,* 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (liability of lawyer to frustrated beneficiaries of will he negligently drafted), *cert. denied,* 368 U.S. 987 (1962); Parker, *Attorney Liability Under the Securities Laws After* Ernst & Ernst v. Hochfelder, 10 LOY. L.A.L. REV. 521 (1977) (attorney liability to investing public).

92 *See, e.g.,* Horwitz, *Law And Economies: Science Or Politics?,* 8 HOFSTRA L. REV. 905, 905-06 (1980); Kennedy & Michelman, *Are Property And Contract Efficient?,* 8 HOFSTRA L. REV. 711 (1980).

The market approach, moreover, does not provide any clear answers for reforming the procedural system within which legal services are rendered. Few market proponents would leave adjudication entirely to private agreements; indeed, a court system empowered to enforce contracts and to prevent theft is a prerequisite for a market system.[93] Those who approve of the market approach because of a libertarian belief that it maximizes individual autonomy[94] might approve the present adversary system, for it too values individualism. These market proponents, however, would probably support changes that broaden the rights of the parties to contract for extra-judicial alternatives, such as arbitration or mediation.[95]

Those who value the market because they believe that it maximizes society's wealth, rather than for libertarian reasons,[96] might reshape the court system to increase efficiency by curbing adjudication and error costs.[97] The adversary system is inefficient; it requires each party to pay for its own investigation of a case and then pays a judge and jury to go over the ground once again.[98] The present financing system, which requires each party to pay his own counsel fees (except in special circumstances) and the state to pay for the court system, increases this inefficiency. Parties have little incentive to minimize the costs of their opponents and of the court system; indeed, they often benefit by increasing those costs. Reformers interested in efficiency, therefore, would be likely to replace the adversary system with one in which a neutral judge or agency investigates the case, and either both parties or the losing party bears the full costs.[99]

Whatever effects a market revolution might have on lawyers and courts, it is not likely to help those without money.[100] Even if, as some have claimed, subsidized legal services can remedy the market failure that occurs when group members cannot unite,[101] many legal problems

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93 *See* P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 71, 329-32 (1979).

94 *See* Epstein, *Causation and Corrective Justice: A Reply to Two Critics,* 8 J. LEGAL STUD. 477, 487-504 (1979); *see also* Posner, *Epstein's Tort Theory: A Critique,* 8 J. LEGAL STUD. 457 (1979).

95 *See* Christensen, *Private Justice: California's General Reference Procedure,* 1982 AM. B. FOUND. RESEARCH J. 79 (trial of cases by retired judges).

96 *See* Posner, *Utilitarianism, Economics, and Legal Theory,* 8 J. LEGAL STUD. 103 (1979). On the distinction between the libertarian and the efficiency approach, see Epstein, *supra* note 94.

97 R. POSNER, *supra* note 49, at 333-56; *see* Landes & Posner, *Adjudication as a Private Good,* 8 J. LEGAL STUD. 235 (1979).

98 G. TULLOCK, TRIALS ON TRIAL 87-99 (1980).

99 *See id.;* R. POSNER, *supra* note 49, at 350-51, 354-56; Landes, *supra* note 48.

100 *See supra* note 49 and accompanying text.

101 *See* PUBLIC INTEREST LAW (B. Weisbrod ed. 1978). Even in such situations, it is not clear that legal action will permanently help the group. *See* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change,* 9 L. & SOC'Y REV. 95, 140-41 (1974); Hazard, *Social Justice through Civil Justice,* 36 U. CHI. L. REV. 699 (1969).

of the poor—for example, domestic relations problems—would not qualify for this remedy. Although market reforms might reduce the cost of legal services and enable indigents with valuable claims to finance legal proceedings by borrowing against their claims,[102] many poor people with perceived legal needs would remain without lawyers.[103] If society decides to fill part of this gap, about the only advice that market proponents can offer is to select a Judicare system that enables subsidized clients to choose lawyers as do other market participants.[104] Even this advice is questionable. In the medical profession, for example, some argue that fostering competition among group service organizations is more promising than waiting for a genuine market to develop between physicians and patients.[105] At this point, we arrive where we began: skeptical of whether the ideal of a free market resembles anything that is likely to exist between buyers and sellers of legal services or, indeed, anywhere in today's economy.

III

A PUBLIC UTILITY MODEL

Instead of relying on competition, other theorists call on the government to regulate the legal profession as a public utility.[106] One might justify regulation of the legal profession, like regulation of other public utilities, by arguing that a monopoly requires control. This argument, however, is wrong—the legal services market is neither a monopoly nor an oligopoly in the economic sense. Reforms, such as those that market theorists propose, could abate many of the anticompetitive practices now present in the legal services market. The inherently political function of the bar in controlling the ability of citizens to enforce their rights, and in shaping the law that defines those rights, yields better justifications for regulating the legal services market. The legal profession's public and quasi-governmental function has long been recognized

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102 *See supra* notes 52-54 and accompanying text.

103 *See generally* B. CURRAN, *supra* note 72; 1 ACTION PLAN FOR LEGAL SERVICES TO THE POOR, REPORT ON THE LEGAL PROBLEMS OF THE POOR IN BOSTON 23-64 (R. Spangenberg dir. 1977).

104 *See* S. BRAKEL, JUDICARE (1974).

105 The group service organizations contract to insure all of a subscriber's medical needs and may be both sophisticated enough and strong enough to control physicians. L. GOLDBERG & W. GREENBERG, THE HEALTH MAINTENANCE ORGANIZATION AND ITS EFFECTS ON COMPETITION (1977) (FTC Staff Report); Havighurst, *Health Maintenance Organizations and the Market for Health Services,* 35 LAW & CONTEMP. PROBS. 716 (1970). For similar points in the legal context, see S. TISHER, *infra* note 108, at 32-35, 81-82.

106 The public utility analogy is set forth in F. MARKS, K. LESWING & B. FORTINSKY, THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY 288-93 (1972). The authors use the analogy primarily to argue that lawyers should be required to represent the unrepresented. I do not know if the authors would accept all of my applications of the analogy.

as a ground for treating it differently from a club or a business.[107]

Because of the public utility approach's concern with the legal profession's public and quasi-governmental function, it diverges from both the traditional professional approach and the market approach. The model goes beyond an examination of the relations between clients and their lawyers to consider representation for the unrepresented, the impact of lawyers on nonclients, and the relationship between what lawyers do and the substantive and procedural law with which they deal. The model also differs from the traditional and market approaches because it relies on government regulation, not just on self-regulation or the discipline of the market. The public utility model, however, is flexible or formless enough to recognize a potential regulatory role for both the profession and the market. Even those without a commitment to laissez-faire economics, for instance, can support legal advertising as a way to make legal services cheaper and more accessible to the public.[108] The public utility approach, in short, is the theoretical counterpart of the mixture of competition, organization, and regulation that characterizes most of our economy.

Perhaps because of its flexibility, the public utility model recently has influenced the legal services market more than the more intellectually incisive market model. Measures to represent the formerly unrepresented have been particularly prominent: the Legal Services Corporation has helped poor people in civil matters,[109] and courts have required counsel in many criminal actions.[110] Furthermore, the Court and the bar have recognized the right of workers to join group legal services plans,[111] and Congress has passed legislation encouraging such plans.[112] A variety of groups and interests, following the example set by Blacks,[113] have secured representation by public interest law organizations.[114] Finally, law schools have tried to introduce minoritics and women into the profession;[115] the public utility approach supports such

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107 *See, e.g.*, A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 37-43, 237 (1921) (discussing free access to the profession).

108 *See, e.g.*, S. TISHER, L. BERNABEI & M. GREEN, BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS (1977).

109 *See, e.g.*, E. JOHNSON, *supra* note 16, at 187-234.

110 *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972).

111 *See, e.g.*, United Transp. Union v. State Bar, 401 U.S. 576 (1971); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(4) (1980).

112 29 U.S.C. § 186(c)(8) (1976 & Supp. 1980) (legalizing employer contributions to union plans that offset legal fees); 29 U.S.C. §§ 1002(1)(A), 1144 (1976) (welfare plans can include prepaid legal services; state regulation preempted); I.R.C. § 120 (1981) (employer contributions not taxable to employees).

113 *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963); R. KLUGER, SIMPLE JUSTICE (1976).

114 *See, e.g.*, COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE (1976); PUBLIC INTEREST LAW (B. Weisbrod ed. 1978); *see* Rev. Proc. 75-13, § 3, 1975-1 C.B. 662 (requirements for tax-exempt public interest firm).

115 *See* authorities cited *supra* note 14.

efforts because they improve legal representation for these groups and bring some of their members into the legal system.

The public utility approach has also effected reforms that do not create more positions for lawyers. The hegemony of the organized bar has been shaken as courts,[116] government officials,[117] and nonlawyers[118] took a hand in professional matters. The government has occasionally sought to encourage nonlitigious dispute resolution,[119] use trained nonlawyers in administrative proceedings,[120] and eliminate complex litigation issues.[121] Yet, as with the market approach, past attempts to implement the public utility approach have not realized the model's potential.

A. *Premises and Problems*

The public utility approach rejects the central premise of the market theory: that consumers can obtain adequate legal services through private transactions in the market, without outside help. It would take far more than legal advertising services to enable those ignorant of the law to make a truly informed choice.[122] No matter how informed and vigilant a client is, the organization of the legal system in general, and legal offices in particular, make it virtually impossible to receive legal help that is both effective and cheap. Reformers must, therefore, go beyond the market to implement their goals.

The government, of course, may not succeed where the market has failed. Indeed, some current problems result from government rather than market action. One might question whether those unable to protect themselves as consumers will be more effective when they act as citizens, and whether lawyers' inertia and self-interest which resist market forces so successfully will be more likely to succumb to political

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116 *See, e.g.,* cases cited *supra* notes 1, 98, 100. The increase in disciplinary proceedings, legal malpractice suits, counsel disqualification motions, and claims of ineffective assistance of counsel is bringing an expanding number of professional issues before the courts; court decisions are beginning to outweigh bar association ethics opinions in defining professional standards.

117 *See, e.g.,* authorities cited *supra* notes 2, 4, 6; Tunney & Frank, *Federal Roles in Lawyer Reform,* 27 STAN. L. REV. 333 (1975); Speech of President Carter, I PUBLIC PAPERS: JIMMY CARTER 834 (May 4, 1978).

118 Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996c(a), 2996f(c) (1976 & Supp. IV 1980) (composition of boards of Legal Services Corporation and grantees respectively); CAL. BUS. & PROF. CODE §§ 6013.5, 6086.6 (West Supp. 1981); *see* Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession,* 62 MINN. L. REV. 619 (1978).

119 Dispute Resolution Act, Pub. L. No. 96-190, 94 Stat. 17 (1980); 15 U.S.C. § 2310(a) (1976) (encouraging manufacturers to set up informal dispute resolution procedures).

120 Brickman, *Expansion of the Lawyering Process Through A New Delivery System: The Emergence and State of Legal Paraprofessionalism,* 71 COLUM. L. REV. 1153, 1189-1210 (1971); *see* KY. SUP. CT. R. 3.700(2) (1982) (paralegal may practice law under lawyer's supervision).

121 *See, e.g.,* N.Y. INS. LAW §§ 670-678 (McKinney Supp. 1981-82) (no-fault automobile insurance); Project, *supra* note 51, at 106-09 (no-fault divorce).

122 *See generally* ADVERTISING'S ROLE IN SOCIETY (1974).

measures.[123]

Just as they reject the idea that the market's invisible hand will protect clients, proponents of the public utility model reject the idea that the adversary system will protect represented adverse parties. They view the courtroom, at least in part, as a political arena, in which parties with wealth and power can rely on their resources to drown their adversaries in a flood of high-priced legal talent. These resources are even more effective in negotiating, lobbying, and other areas in which the adversary system does not purport to operate.[124] At the very least, countervailing measures are needed to enhance equal representation. Yet if all forums are political, those with greater wealth and power will usually prevail, even when their opponents are well represented.[125] One appropriate role for the lawyer who represents the poor and weak, therefore, will be to aid those groups in their efforts to increase their power.[126]

According to the public utility model, access to legal services is essential to full citizenship.[127] Without lawyers, people and groups cannot participate effectively in the governmental system, or enforce rights that the system provides them. A predominant aim of public utility thinkers, therefore, has been to extend legal services to the poor and to members of other disadvantaged groups. Some, of course, criticize this transcendent view of the importance of lawyers. They argue that people often find many goods and services more desirable than legal services, and that to enforce the law completely would be expensive, intrusive, and disruptive.[128]

Because providing legal services is an essential part of our political system, the public utility approach will not relinquish the responsibility for regulating legal services to nongovernmental entities, including the bar or the market. Indeed, government involvement is unavoidable. The rights and remedies that the government creates inevitably shape the organization and behavior of the legal profession. The adversary system itself, for instance, rewards some kinds of lawyer behavior, but requires other behavior to be forbidden for the system to work fairly and

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123 *See, e.g.,* Weingast, *Physicians, DNA Research Scientists, and the Market for Lemons,* in REGULATING THE PROFESSIONS 81 (R. Blair & S. Rubin eds. 1980).

124 *See, e.g.,* M. GREEN, THE OTHER GOVERNMENT (1975).

125 Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?,* 1 L. & POLICY Q. 5 (1979); Galanter, *supra* note 101.

126 Wexler, *Practicing Law for Poor People,* 79 YALE L.J. 1049 (1970).

127 Breger, *Legal Aid for the Poor: A Conceptual Analysis,* 60 N.C.L. REV. 281 (1982); Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services,* 48 N.Y.U. L. REV. 595 (1973); Stumpf, *Law and Poverty: A Political Perspective,* 1968 WIS. L. REV. 694; *see* NAACP v. Button, 371 U.S. 415, 429-30 (1962).

128 Friedman, *Access to Justice: Social and Historical Context,* in II ACCESS TO JUSTICE 3, 33-36 (1978); *see* INNOVATIONS IN THE LEGAL SERVICES 177-230 (1980); Hazard, *The Effect of the Class Action Device Upon the Substantive Law,* 58 F.R.D. 307 (1973).

effectively.[129] Similarly, the development of the class action brought with it important changes in the rules regulating solicitation, attorney fees, a lawyer's duties to his clients, and other matters of professional concern.[130] The government, moreover, defines the legal structure of corporations, government agencies, classes in class actions, and other entities that lawyers represent. The government, therefore, helps decide to whom lawyers owe their primary duties, and how those duties should be reconciled with the interests of others.[131]

Although government involvement is inevitable, its impact is not. The government's efforts to make legal services available to all will inevitably conflict with funding constraints. Bureaucratic rigidity, the influence of lawyers on the government, and political moods that discourage law reform meant to aid the disadvantaged might also restrict the government's effectiveness.[132] Indeed, as the public utility model itself proclaims, the distribution and nature of legal services are important constituents of our governmental system; reformers, anti-reformers, and other groups, therefore, will seek to mold them to advance their own goals. The public utility model, like the market model, thus leaves room for disagreement over the desirability of specific reforms.

B. *Applications of the Public Utility Model*

The public utility model brings three often overlapping goals to the process of licensing lawyers: broader availability, lower cost, and higher quality. Allowing and encouraging paralegals to work with or without lawyers, for example, would reduce the costs of lawyers and enable lawyers to serve more people,[133] while some form of licensing or accreditation would exclude or discourage the untrained.[134] Similarly, the unitary bar could be abandoned. States could license lawyers after two

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129 *See, e.g.,* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101, DR 5-101(B), DR 5-102, DR 7-102, DR 7-106, DR 7-108, DR 7-109 (1980).

130 *See* Dam, *Class Action Notice: Who Needs It?,* 1974 SUP. CT. REV. 97; Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation,* 88 HARV. L. REV. 849, 915-29 (1975); *Developments in the Law-Conflicts of Interest in the Legal Profession,* 94 HARV. L. REV. 1244, 1447-57 (1981).

131 G. HAZARD, ETHICS IN THE PRACTICE OF LAW 8-10, 37-38, 43-57 (1978); *see Developments in the Law, supra* note 130, at 1334-52, 1413-22, 1447-57.

132 *See* Legal Services Corporation Act of 1974, 42 U.S.C. § 2996f(b) (1976 & Supp. 1980) (prohibiting Legal Services Corporation involvement in certain cases).

133 *See, e.g.,* T. EHRLICH & M. SCHWARTZ, REDUCING THE COSTS OF LEGAL SERVICES: POSSIBLE APPROACHES BY THE FEDERAL GOVERNMENT 9-11 (1975); J. LIEBERMAN, CRISIS AT THE BAR 223 (1978); Brickman, *supra* note 120; *see* Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions,* 34 STAN. L. REV. 1 (1981).

134 R. LECLAIR, LEGAL ASSISTANT PROGRAMS: A GUIDE TO EFFECTIVE PROGRAM IMPLEMENTATION AND MAINTENANCE (1978); AMERICAN BAR ASSOCIATION LEGAL ASSISTANTS UPDATE '80 (C. Farren, D. Weisberg & R. Larson eds. 1980); Haskell, *Issues in Paralegalism: Education, Certification, Licensing, Unauthorized Practice,* 15 GA. L. REV. 631 (1981); *see* Paralegal Inst., Inc. v. American Bar Ass'n, 475 F. Supp. 1123 (E.D.N.Y. 1979).

years of law school and fewer than four years of college,[135] while imposing requirements more stringent than the current ones for some functions.[136]

Public utility proponents, thus differ from proponents of the traditional model. They would permit paralegals to work without a lawyer's supervision, even though such a measure would lower fees and reduce the income of some lawyers. Similarly, they tend to draw away from measures such as the certification of specialists that, while in some ways consistent with their program, tend to enrich the bar more than improve service.[137] Public utility proponents also differ from market theorists, for they would limit the unauthorized practice of law, retain other quality controls, and actively encourage new alternatives, instead of leaving their development to the market.

Because the public utility approach seeks to make competent lawyers broadly available, it would seek to foster changes in law schools. Public utility proponents encourage law schools to admit more minorities,[138] more poor people,[139] more women, and perhaps even students with low grades.[140] The goal is not simply to benefit those students admitted, but to produce lawyers who will be more responsive to the needs of all citizens. That goal would also influence placement offices, which should serve needs beyond those of large corporate firms.[141] Moreover, during the period between admission and placement—if such a period still exists—schools would devote greater attention to teaching the skills needed for client service, including the service of less traditional clients.[142] Because of the public importance of legal training, public utility proponents would impose such changes even on unwilling law schools if necessary.[143]

Proponents of the public utility model also would foster new meth-

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135 A. REED, *supra* note 107, at 220, 238-39, 417-19; authorities cited *supra* notes 52-53.

136 *See, e.g.*, Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?*, 42 FORDHAM L. REV. 227 (1973); Comm. to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, *Final Report*, 83 F.R.D. 215 (1979) (the "Devitt Committee" report).

137 *See, e.g.*, S. TISHER, *supra* note 108, at 71-85; R. ZEHNLE, SPECIALIZATION IN THE LEGAL PROFESSION: AN ANALYSIS OF CURRENT PROPOSALS (1975); Mindes, *Proliferation, Specialization and Certification: The Splitting of the Bar*, 11 U. TOL. L. REV. 273, 291-94 (1980).

138 *See* DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *dismissed as moot*, 416 U.S. 312 (1974); *Disadvantaged Students and Legal Education—Programs for Affirmative Action*, 1970 U. TOL. L. REV. 277.

139 20 U.S.C. § 1134r-1 (aiding legal education of the disadvantaged), *repealed by* Pub. L. No. 96-374, § 902(b), 94 Stat. 1484 (1980); 20 U.S.C. §§ 1087aa-1087ii (Supp. 1980) (low-interest loans to graduate students).

140 *See* Frierson, *And the C Students Make Money*, 59 A.B.A. J. 61 (1973).

141 Phelps, *Law Placement and Social Justice*, 53 N.Y.U. L. REV. 663 (1978).

142 ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979); Nader, *Law Schools and Law Firms*, 54 MINN. L. REV. 493 (1970).

143 *See* Beytagh, *Prescribed Courses as Prerequisites for Taking Bar Examinations: Indiana's Exper-*

ods of obtaining legal services. Some of these—advertising, requiring lawyers to contribute time to the poor,[144] and requiring defendants to pay the legal fees of certain successful plaintiffs[145]—simply bring clients into contact with lawyers who presumably provide services in the traditional way. Other methods seek to cut the costs of legal services by standardizing them, while improving competence through quality control or governmental regulation. These methods include legal services offices that the Legal Services Corporation sponsors,[146] public defender offices,[147] group service and legal insurance plans,[148] legal clinics,[149] and class actions.[150] One logical extension of these ideas is a governmentally employed bar established to provide legal services for all members of society.[151] Another extension is encouraging measures desigued to channel legal talent into litigation or other activities of special importance.[152]

Because of the political importance that the public utility model ascribes to legal services, proponents of the model have emphasized group representation. Since the War on Poverty introduced federal legal services to help the poor organize themselves, expanding the availability of lawyers to the poor has been viewed as a means by which groups lacking political power could bring their concerns to bear on the government.[153] The large size of excluded groups, combined with the small number of available lawyers, has encouraged reformers to think in terms of mass remedies. The political aspect of the public utility ap-

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iment in Controlling Legal Education, 26 J. LEGAL EDUC. 449 (1974) (criticizing court-imposed prerequisites); Slonim, *State Court Tells Law School What to Teach,* 67 A.B.A. J. 26 (1981).

144 *See, e.g.,* Christensen, *The Lawyer's Pro Bono Public Responsibility,* 1981 AM. BAR FOUND. RESEARCH J. 1; Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives,* 2 CARDOZO L. REV. 255 (1981). *But see* Shapiro, *The Enigma of the Lawyer's Duty to Serve,* 55 N.Y.U. L. REV. 735 (1980).

145 *See, e.g.,* Equal Access to Justice Act, Pub. L. No. 96-481, § 204(a) (1980), 42 U.S.C. § 1988 (1976).

146 *See* 42 U.S.C. §§ 2996e(a)(3), 2996f(a)(1-3), (g); LEGAL SERVICES CORPORATION DELIVERY SYSTEMS STUDY: A RESEARCH PROJECT ON THE DELIVERY OF LEGAL SERVICES TO THE POOR (1977).

147 *See, e.g.,* NATIONAL STUDY COMMISSION ON DEFENSE SERVIGES GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976).

148 *See* L. DEITCH & D. WEINSTEIN, PREPAID LEGAL SERVICES (1976); AMERICAN BAR FOUNDATION, LEGAL SERVICE PLANS: APPROACHES TO REGULATION (W. Pfennigstorf & S. Kimball eds. 1977).

149 *See, e.g.,* Jacoby v. State Bar, 19 Cal. 3d 359, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977); Q. JOHNSTONE & D. HOPSON, JR., LAWYERS AND THEIR WORK 543-45 (1967).

150 *See* Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action,* 80 COLUM. L. REV. 299 (1980) (describing Justice Department proposals for regulation of class actions).

151 *See, e.g.,* M. FRANKEL, JUSTICE: COMMODITY OR PUBLIC SERVICE (1978).

152 *See* Leubsdorf, *The Contingency Factor in Attorney Fee Awards,* 90 YALE L.J. 473, 497-507 (1981) (discussing litigation incentives).

153 *See, e.g.,* NAACP v. Button, 371 U.S. 415, 429-30 (1963); J. CARLIN, J. HOWARD & S. MESSINCER, CIVIL JUSTICE AND THE POOR (1967); Cahn & Cahn, *The War on Poverty: A Civilian Perspective,* 73 YALE L.J. 1317 (1964); Marks, *A Lawyer's Duty to Take All Comers and Many Who Do Not Come,* 30 U. MIAMI L. REV. 915 (1976).

proach also emphasizes legal services for the poor and unrepresented as a way to counterbalance the power that the rich enjoy both within and without the legal system.[154] The implication of this approach is that the poor should receive representation equal to or better than that available to the rich. Only a nonlawyer has suggested the logical conclusion that access of wealthy clients to legal services be limited.[155]

Although the public utility model would design legal services delivery systems with internal controls to ensure low cost and high quality, direct government control would further protect the public. The government, for example, could prohibit excessive fees,[156] and remodel the system for calculating fees to remove some of the conflicts of interest between lawyer and client inherent in today's contingent and hourly fee systems.[157] The government could also promulgate standards of competence[158] and enforce them through disciplinary proceedings.[159] Finally, the government could require lawyers to participate in continuing legal education and retesting to retain bar membership[160] and subject their work to peer review.[161]

In some ways, the public utility approach would simply reinvigorate goals that the traditional system of professional responsibility articulated but did not fulfill. The Kutak Commission, for instance, proposed to strengthen the lawyer's duties to provide competent service,[162] to keep her client informed, to leave ultimate decisions to the client,[163] to refrain from adversary tactics likely to lead to erroneous results,[164] and to attempt to restrain clients from committing illegal acts.[165] These proposals simply remove the tendency of the old rules to

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154 *See, e.g.,* COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 104; Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381 (1965). *But see* Abel, *supra* note 125; Galanter, *supra* note 101.

155 A. STRICK, INJUSTICE FOR ALL 216-17 (1977) (lawyers paid from central fund; fees proportioned according to client's wealth).

156 *E.g.,* Tunney & Frank, *supra* note 117, at 342; *see* J. LIEBERMAN, CRISIS AT THE BAR 227 (1978) (lawyers should renounce wealth).

157 *See* Clermont & Currivan, *Improving On The Contingent Fee,* 63 CORNELL L. REV. 529 (1978).

158 *See, e.g.,* Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978).

159 *See* Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar,* 69 GEO. L.J. 705 (1981).

160 *See* Parker, *Periodic Recertification of Lawyers: A Comparative Study of Programs for Maintaining Professional Competence,* 1974 UTAH L. REV. 463.

161 *See* ALI-ABA COMMITTEE ON PROFESSIONAL EDUCATION, A MODEL PEER REVIEW SYSTEM (1980 draft); Winter, *Enhancing Lawyer Competence,* 67 A.B.A. J. 265 (1981).

162 Proposed Final Draft, *supra* note 6, Rules 1.1, 1.3.

163 *Id.* Rules 1.2(a), 1.4.

164 *Id.* Rules 3.1, 3.2, 3.3, 3.4(a), (b), 3.8(a), (d); *see also* Discussion Draft, *supra* note 81, Rule 3.1. (Proposed Rules 3.3 and 3.4(a) were diluted in the June 30, 1982, version cited *supra* note 6).

165 Earlier drafts went further. *See* Discussion Draft, *supra* note 81, Rules 1.7, 2.3, 2.4; Proposed Final Draft, *supra* note 6, Rules 1.2(d) (diluted in the June 30, 1982, version), 1.6(b), 2.1 (1981).

subordinate the public's interests to the client's interests and the client's interest to his lawyer's interests.[166] That the Kutak Commission's proposals have aroused so much controversy[167] demonstrates the difficulty of professional self-reform. Whether the government can raise the quality of legal services more than the organized bar has remains to be seen.

The problems of reshaping professional norms become far thornier, however, when one confronts the premise of the public utility model: that a lawyer's acts have a broad social impact. Corporate lawyers, for instance, can assist management behavior that harms shareholders, consumers, and others. Because the adversary system and the market may not prevent such harm, the government should intervene. It will require, perhaps, the corporate lawyer to consider shareholder and public interests when he makes his decisions.[168] But how much consideration must he give? If the interests of only one other group prevail, for example those of corporate customers, the lawyer may become as dangerously one-dimensional as he is under the current system of loyalty to management—if, that is, management does not fire him first. Alternatively, if the lawyer considers all interests, he will have the ultimate authority to decide which interest prevails, and may impose his own views on the corporation in legal matters.[169]

These problems are not limited to corporate lawyers; they arise when lawyers represent government agencies, parties in class actions, unions, and others in legal acts that affect third parties.[170] Indeed, the public utility model views every lawyer as a public figure who stands in the center of a web of effects and, therefore, a web of duties. Avoiding conflicts of interest is impossible; it is necessary to resolve them in light of public policy. No scheme of public regulation can fully implement this goal. Nor, perhaps, should it, unless society is willing to replace the traditional lawyer with a new kind of government official. Moving beyond the traditional system's broad disregard for the social impact of legal relationships, however, is possible.

Whatever the details of the rules that define the lawyers' duties, public utility proponents agree that the rules should be more vigorously enforced in the future than they have been in the past. The importance of the public interest involved and the bar's history of nominal enforce-

166 *See* Morgan, *supra* note 29.

167 *See* Hodes, *The Code of Professional Responsibilty, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod,* 35 U. MIAMI L. REV. 739 (1981).

168 *E.g., In re* William R. Carter, FED. SEC. L. REP. (CCH) ¶ 82,847 (S.E.C. 1981) (lawyers' duty to prevent corporate illegality); Discussion Draft, *supra* note 81; *see* Lorne, *The Corporate and Securities Adviser, The Public Interest, and Professional Ethics,* 76 MICH. L. REV. 425 (1978).

169 *See* Hegland, *Beyond Enthusiasm and Commitment,* 13 ARIZ. L. REV. 805, 811-17 (1971).

170 *See, e.g.,* authorities cited *supra* note 129.

ment[171] require that nonlawyers participate in regulating lawyers.[172] Although effective control of abuses cannot be left solely to private remedies, private damages actions could supplement the disciplinary system, with a jury of nonlawyers serving in effect as a supplementary disciplinary panel.[173]

One of the strengths of the public utility model is its tendency to promote the reshaping of the economic and political context in which lawyers operate, rather than merely redefining lawyers' duties within the present system. Organizing legal services in a new way is one method of reorientation; changes in procedural and substantive law are another. Limiting pleading and discovery in civil cases, devising settlement incentives, requiring the loser to pay litigation costs, or diverting court cases into arbitration and mediation might ease access to the legal system.[174] More radically, the adversary system could be partly dismantled and the burden of investigating cases shifted to a neutral official.[175] Changes in the substantive law could reduce and simplify litigation by eliminating complex and frequently-litigated issues.[176]

Although supporters of such changes often emphasize the financial savings of these proposals,[177] other goals are also at stake. Reductions in complexity and expense will enable the poor and legally unsophisticated to participate in the system, albeit at the cost of routinization and perhaps lower quality.[178] Low cost and simplicity, however, are only one side of a system of reforms. The public utility model's ultimate goal is to expand the governmental functions of our legal system—as though the ideal society were a kind of perpetual class action, with everyone properly represented.[179] Yet those who regard lawyers and legal proceedings

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171 *See* A.B.A. SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *supra* note 11; S. TISHER, *supra* note 108, at 86-111; Steele & Nimmer, LAWYERS, CLIENTS AND PROFESSIONAL REGULATION, 1976 AM. BAR FOUND. RESEARCH J. 917.

172 *See* authorities cited *supra* notes 118, 126.

173 This technique has dangers, as medical malpractice law demonstrates. *See* Symposium, *Medical Malpractice,* 1975 DUKE L.J. 1177.

174 *E.g.,* E. JOHNSON, A PRELIMINARY ANALYSIS OF ALTERNATIVE STRATEGIES FOR PROCESSING CIVIL DISPUTES 26-37, 57-71, 80-88 (1978); Nader & Singer, *Dispute Resolution,* 51 CAL. ST. B.J. 281 (1976); statutes cited *supra* note 119.

175 E. JOHNSON, *supra* note 174, at 72-79; A. STRIGK, *supra* note 155, at 218; *see* L. WEINREB, DENIAL OF JUSTICE 122-34 (1977).

176 For example, many states have adopted no-fault divorce and no-fault insurance statutes to reduce unnecessary litigation. *See, e.g.,* statutes cited *supra* note 121; *see also* Carter, *supra* note 117; J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM 182-90 (1969); E. JOHNSON, *supra* note 174, at 38-45, 50-55.

177 *See, e.g.,* T. EHRLICH & M. SCHWARTZ, *supra* note 133.

178 *See, e.g.,* Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law,* 79 YALE L.J. 1005 (1970); Galanter, *The Duty Not to Deliver Legal Services,* 30 U. MIAMI L. REV. 929 (1976).

179 *See also* Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1669 (1975); Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case,* 25 U.C.L.A. L. REV. 244 (1977).

as unnecessary evils, and believe that people can resolve their own disputes through compromise and conciliation, can also espouse some of these reforms.[180] With this suggestion of conflict between legality and humanity, we reach the third approach to the future of the legal profession.

IV

THE PERSONAL RESPONSIBILITY MODEL

The personal responsibility model calls on lawyers to stop hiding behind rules, roles, and institutions, and to take responsibility for their actions. It tells lawyers to replace the traditional lawyer-client relationship, which is often exploitative and dehumanizing, with a relationship between equal human beings. It denies lawyers the license to do anything not actually illegal to promote their clients' interests. In short, the model deprofessionalizes the lawyer by requiring him to justify his behavior morally and socially without relying on a code applieable only to lawyers.

Few recent changes implement this model. The model is relatively novel, and its supporters disagree about both the causes of dehumanization and its cures. Some emphasize the morality and humanity of the individual lawyers, while others adopt a political or social stance.[181] Furthermore, the personal responsibility approach tends to depreciate the significance of changes in lawyers' codes; it requires a change of heart, a change in society, or both. This view's impact on the real world is, therefore, difficult to trace. We may find evidence of it in a greater willingness to emphasize values and feelings in law schools,[182] in a new recognition of the potential for eonflict between lawyers and clients,[183] and in a certain malaise with the practice of law and the moral and personal distortions it is thought to require.[184] Such changes of attitude are not meaningless; the willingness of young lawyers to forego traditional legal careers has helped expand the availability of legal services for the poor.[185]

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180 *See* A. STRICK, *supra* note 155, at 208-09; Christie, *Conflicts as Property,* 17 BRIT. J. CRIMINOLOGY 1 (1977).

181 *See infra* text accompanying notes 187-92.

182 *See, e.g.,* Himmelstein, *Reassessing Law Schooling: The Sterling Forest Group,* 53 N.Y.U. L. REV. 561 (1978); Meltsner & Schrag, *Scenes From A Clinic,* 127 U. PA. L. REV. 1 (1978).

183 *See* Burt, *supra* note 83.

184 *See* C. REICH, THE SORCERER OF BOLINAS REEF 19-48 (1976); Brazil, *The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice,* 3 J. LEGAL PROF. 107 (1978). *See generally* T. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE (1977).

185 *See* J. HANDLER, E. HOLLINGSWORTH & H. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS (1978); Finman, *OEO Legal Service Programs And The Pursuit of Social Change: The Relationship Between Program Ideology and Program Performance,* 1971 WIS. L. REV. 1001; Comment, *The New Public Interest Lawyers,* 79 YALE L.J. 1069 (1970).

A. *Premises and Problems*

Like the traditional professional system, the personal responsibility model focuses on the lawyer-client relationship[186] and recognizes its potential for abuse. It emphasizes not just the client's vulnerability but the lawyer's potential to exploit clients, a result that professionalism itself may stimulate. The personal responsibility model is concerned with both lawyer and client as victims of a system of domination inherent in the traditional structuring of their roles. Furthermore, the lawyer's license to engage in uninhibited partisanship threatens not only the client, but others as well. The traditional system encourages the lawyer to pursue his client's supposed interests to the limit, perhaps further than the client would have pursued them, without taking responsibility for the results.

There are several possible causes of—and accompanying cures for—this evil. Some personal responsibility proponents point to the personal rigidity and rationalism of lawyers—a problem caused by the personalities of those who decide to become lawyers, and exacerbated by the traditional system's emphasis on logic and pragmatism instead of values and feelings.[187] The cure would be more sensitive and humane lawyers. Others, however, see dehumanization as inevitable in all social roles, part of the perpetual conflict between the individual and society.[188] The role and the social institutions that give rise to the dehumanization might indeed be reshaped to alleviate this conflict, but it can never be competely removed. Ultimately, each lawyer must struggle to preserve as much of his soul as possible.

It is also possible to trace exploitation by lawyers to social defects that should be reformed through political action. Professor Simon, for instance, attacks the belief that it is necessary or desirable to have professional advocates committed to vindicating any plausibly legal goal of a client. He would end the conflicts inherent in the lawyer's traditional role by ending that role itself: he would replace the lawyer with a nonprofessional advocate lacking distinctive codes and prerogatives.[189] Others view the lawyer as so enmeshed in the exploitations and inequalities of our society that they doubt that tinkering with legal services can

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186 *See* Shaffer, *The Practice of Law as Moral Discourse,* 55 NOTRE DAME LAW. 231, 233 (1977) ("The beginning and end of a lawyer's professional life is talking with a client about what is to be done.").

187 T. SHAFFER & R. REDMOUNT, *supra* note 184. *But see* Simon, *Homo Psychologicus: Notes on a New Legal Formalism,* 32 STAN. L. REV. 487 (1980).

188 *See* Shaffer, *Christian Theories of Professional Responsibility,* 48 S. CAL. L. REV. 721 (1975); Wasserstrom, *Lawyers as Professionals: Some Moral Issues,* 5 HUMAN RIGHTS 1 (1975).

189 Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics,* 1978 WIS. L. REV. 29, 130-44; *see also* Postema, *Moral Responsibility in Professional Ethics,* 55 N.Y.U. L. REV. 63 (1980).

be effective.[190] Both of these views call on lawyers to take responsibility for the political and social consequences of their actions. A lawyer sometimes would have to refuse to assist causes of which he disapproved. He might also pursue legally unfounded causes if he found them to be just,[191] or seek to delegitimize all or part of the legal system. A lawyer, of course, may find it hard to pursue this approach and remain an effective advocate within the existing system.[192] Disrespect for the present system may make it difficult to obey its norms, and may evoke hostility from establishment lawyers and judges.

The personal responsibility school has no enthusiasm for reform through the promulgation of rules and procedures, whether by the profession or the government. Indeed, it often views legal rules and procedures as a source of dehumanization and as a means to evade responsibility.[193] The market system is even more threatening. The model, instead, requires autonomous and responsible human beings.[194] Yet relying entirely on personal values and feelings leads to self-indulgence, self-deception, arrogance, and misconduct.[195] Some proponents of the personal responsibility model contemplate that responsible lawyers will engage in principled legal and social action, as well as personal renewal; yet they tell us little about reforms for the legal system, short of general economic and political change. The personal responsibility model is intentionally incomplete; it denies that any professional scheme can yield a generally acceptable answer to some of the questions that lawyers must face. Compared to personal salvation and the reordering of society, codes of professional responsibility are unimportant.

The personal responsibility model provides no more guidance for questions concerning the institutional arrangement of legal services, such as providing lawyers to the poor. Although the model admonishes lawyers to live up to their values, values differ, and even those concerned about poverty and discrimination may consider providing lawyers for the unrepresented a useless or harmful remedy.[196] Yet the personal re-

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190 Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice,* 58 B.U.L. REV. 337, 379-90 (1978); Law, *Personal And Professional Roles In Their Economic And Sexual Contexts,* 53 N.Y.U. L. REV. 628 (1978); Wexler, *supra* note 126; *see* Abel, *supra* note 125.

191 *See* A. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 137-40 (1980) (lawyer should fabricate evidence when childless couple desiring divorce lacks legal grounds for one).

192 *See* Wasserstrom, *Postscript: Lawyers and Revolution,* 30 U. PITT. L. REV. 125, 129 (1968).

193 *See, e.g.,* Elkins, *The Legal Persona: An Essay On The Professional Mask,* 64 VA. L. REV. 735 (1978); *see* J. NOONAN, PERSONS AND MASKS OF THE LAW (1976). *But see* Simon, *supra* note 189.

194 *See generally* W. KAUFMANN, WITHOUT GUILT AND JUSTICE (1973).

195 *See* Simon, *supra* note 187, at 539-50.

196 *See* Griffiths, *The Distribution of Legal Services in the Netherlands,* 4 BRIT. J.L. & SOC'Y 260, 282-86 (1977).

sponsibility approach is not indifferent to the plight of the poor. Undoubtedly, most of the proponents of this model support the expansion of legal services; some are leaders in the development of clinical education programs that address the poor and their problems.[197] This commitment is appropriate. While some lawyers may find personal fulfillment as hired guns,[198] in general those with heightened moral, social, and emotional concerns will care about the needs of the underrepresented. Lawyers, for example, can more easily attain a human, equal relationship with a tenant than with a corporation.

B. *Applications of the Personal Responsibility Model*

The personal responsibility model, like the market and public utility models, relaxes the prohibition on the provision of legal services by nonlawyers. The model also supports lay participation in whatever regulation of the bar exists.[199] While the market and public utility models favor similar reforms primarily to reduce costs, to avoid self-protective practices by the profession, and to maximize consumer choices, the personal responsibility model embraces these aims and cuts deeper. It seeks to abolish the professional caste of lawyers, separated from the multitude by law, education, and mystique, and to impose on lawyers the obligations that society imposes on other members of society. The personal responsibility model views lawyers as people helping people—and sometimes hurting them.[200] The model criticizes the notion that lawyers work in a world of legal concepts requiring unique skills. A lawyer who counsels clients does what other counselors do, and might benefit from courses in psychology more than from courses in constitutional theory.[201] Similarly, many lawyers are wheelers and dealers who try to manipulate bureaucrats, a skill that does not require much legal training.[202]

Because of its concern with personal reorientation, the personal responsibility approach has had a significant impact in thinking about legal education. It has inspired much literature critical of the tendency

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197 *See, e.g.,* Meltsner & Schrag, *supra* note 182.

198 *See* Fried, *The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation,* 85 YALE L.J. 1060, 1076-78 (1976) (lawyer should not allow social considerations to impede upon representation of client).

199 *See* Simon, *supra* note 189, at 140 n.245.

200 *See, e.g.,* Noonan, *Distinguished Alumni Lecture—Other People's Morals: The Lawyer's Conscience,* 48 TENN. L. REV. 227 (1981).

201 *See generally* A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS (1976); Redmount, *Humanistic Law Through Legal Counseling,* 2 CONN. L. REV. 98 (1969); Shaffer, *Will Interviews, Young Family Clients and The Psychology of Testation,* 44 NOTRE DAME LAW. 345 (1969).

202 *E.g.,* J. CARLIN, *supra* note 15; Blumberg, *The Practice of Law as a Confidence Game,* 1 L. & SOC'Y REV. 15, 18-24 (1967). For an early attempt to demystify the law and deprofessionalize—indeed, abolish—the profession, see F. RODELL, WOE UNTO YOU, LAWYERS! (1939).

of law schools to terrify students, suppress concern with values and feelings, and encourage conformity, pragmatism, and verbal manipulation.[203] One proposed response increases the emphasis on personal values and feelings.[204] Another would use clinical education to force students to confront their relations with clients, the discrepancy between legal ideals and realities, and their own ambivalence about being lawyers.[205]

The personal responsibility model provides an interesting perspective on the formation of the lawyer-client relationship. To eradicate the special legal status that divides lawyers from other people, the model would presumably permit all forms of advertising, solicitation, and contractual arrangements not otherwise illegal. Lawyers, however, would remain responsible, morally if not legally, for each decision to solicit or to refrain. Furthermore, lawyers would have to evaluate each decision on its own merits, not on the American Bar Association's code. A lawyer might have a *duty* to solicit certain clients in some circumstances, such as when it is necessary to inform them of the possibility of redress for injuries.[206] On the other hand, lawyers might refrain from mass advertising because of its impersonality and oversimplification.[207]

As with advertising and solicitation, the propriety of various fee arrangements would depend on the lawyer's assessment of the circumstances. The wealth of the client, the merits of the case, the quality of the opposing party's representation, and other factors would affect a lawyer's decision to charge a fee, its size, and whether to set the fee according to a contingency, hourly, or other basis. Under one view, the client should not pay the lawyer directly. Instead, the government, a

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203 *See, e.g.,* Cramton, *The Ordinary Religion of the Law School Classroom,* 29 J. LEGAL EDUC. 247, 250 (1978); Kennedy, *How the Law School Fails: A Polemic,* 1 YALE REV. L. & SOC. ACTION 71 (1970); Savoy, *Toward A New Politics of Legal Eduction,* 79 YALE L.J. 444, 455-62 (1970); Stone, *Legal Education on the Couch,* 85 HARV. L. REV. 392 (1971).

204 *See, e.g.,* Auerbach, *What Has The Teaching Of Law To Do With Justice?,* 53 N.Y.U. L. REV. 457, 466-74 (1978); Himmelstein, *Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology To The Teaching Of Law,* 53 N.Y.U. L. REV. 514 (1978); *see also* authorities cited *supra* note 182.

205 *See, e.g.,* Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology, reprinted in* CLINICAL EDUCATION FOR THE LAW STUDENT 374, 394-401 (1973); Meltsner & Schrag, *supra* note 182.

206 *See In re* Primus, 436 U.S. 412, 422-25 (1978) (first amendment permits nonprofit organizations to solicit prospective litigants as a form of political expression). V. COUNTRYMAN, T. FINMAN & T. SCHNEYER, THE LAWYER IN MODERN SOCIETY 632, 637 (2d ed. 1976) (Report of the Committee on Legal Ethics and Grievance of the Bar Association of the District of Columbia, In the matter of Advertising Conducted by Monroe H. Freedman and The Stern Community Law Firm) (offer of assistance to those wishing to adopt child deemed "reasonably within the bounds of dignity and good taste . . .").

207 This is somewhat contrary to the prevalent approach that views advertising as less coercive than solicitation. *Compare* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454-68 (1978) (state bar could discipline lawyer for solicitation) *with* Bates v. State Bar of Ariz., 433 U.S. 350, 381-83 (1977) (advertising protected by first amendment).

group service plan, or a charitable foundation would finance the lawyer, leaving the attorney-client relationship relatively uncontaminated by financial pressures.[208]

The personal responsibility model's concern with conflict and ambivalence becomes particularly apparent in the area of attorney-client relations. The approach expressly rejects as manipulative the traditional theory's position that the client must place his affairs in the hands of a professional and trust him. Rather, it requires the client to retain responsibility, and the lawyer to inform the client and defer to the client's decisions.[209] Yet the lawyer, like her client, is an autonomous person responsible for her behavior. She retains the right and duty to refrain from morally repugnant acts, to counsel clients against them, and perhaps even to prevent clients from performing them.[210] Indeed, the view of the lawyer as quasi-therapist that some suggest[211] might create a new, albeit concealed, dominance of the lawyer over her client by encouraging her to become involved in the client's decisions.

Several authors have proposed dialogue between lawyer and client as the solution to the conflict in the attorney-client relationship.[212] The two should openly discuss the client's objectives, the lawyer's goals and interests, and the personal and social ramifications of alternative courses of action. It is difficult to conduct a dialogue between equals, however, when one monopolizes the legal knowledge and the other's interests are at stake. Ultimately, dialogue proponents hope, a responsible and mutually acceptable solution will emerge. If not, each party must have a broad right to end the attorney-client relationship.[213] Free exit is not a panacea, however, because it leaves unresolved the difficulties of dealing with the commitments of money and time already invested by the lawyer and client.[214] Nor does free exit address the the possibility that the lawyer will use confidential information acquired from the client for his own benefits or to further social goals.[215] Under a system of deprofessionalization, it is not clear whether anyone could regulate these mat-

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208 The traditional professional view, by contrast, considers such arrangements as sources of interference with the lawyer's duty to his client. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-22, EC 5-23, EC 5-24 (1980).

209 *See, e.g.,* D. ROSENTHAL, *supra* note 8 (suggesting shared responsibility between lawyer and client); Proposed Final Draft, *supra* note 6, Rules 1.2(a), 1.4: Luban, *Paternalism and the Legal Profession,* 1981 WIS. L. REV. 454.

210 *See* Discussion Draft, *supra* note 81 Rule 1.2(c), 1.2(d), 1.6(b)(2) (diluted in Proposed Final Rules, *supra* note 6); Simon, *supra* note 189, at 132.

211 *See* authorities cited *supra* note 201.

212 *E.g.,* Burt, *supra* note 83; Shaffer, *supra* note 186; *see* Lehman, *The Pursuit of a Client's Interest,* 77 MICH. L. REV. 1078 (1979).

213 Discussion Draft, *supra* note 81, Rule 1.16(b) (diluted in Proposed Final Rules, *supra* note 6, Rule 1.16(b)); Simon, *supra* note 189, at 132-33.

214 *E.g.,* Fracasse v. Brent, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972) (lawyer dismissed without cause entitled to quantum meruit recovery rather than contingent fee).

215 *See, e.g.,* Meyerhofer v. Empire Fire & Marine Ins., 497 F.2d 1190 (2d Cir.) (attorney

ters. It does not, however, appear satisfactory to leave them to the consciences of lawyers and clients and the agreements they may have made.

Nonclients pose further problems for the personal responsibility approach. After lawyer and client have concluded their dialogue, they may unite to victimize others, without even the minimal restraints of traditional rules. At least, however, the personal responsibility model encourages lawyers and clients to consider the impact of their decisions on others.[216] Moreover, nonclients may seek to join the dialogue, engaging clients, lawyers, or both in discussions of their plans. Today, such a discussion is difficult. Clients are encouraged to avoid questions with the refrain that "the matter is in legal hands," while lawyers take refuge in their duty to advance their clients' interests, or refuse to discuss legal matters with nonlawyers at all.[217] Under the personal responsibility model, neither lawyers nor clients should be able to avoid questions regarding their affairs—or avoid critical editorials, pickets, and other appeals to the public.

One way of limiting power and protecting third parties is to impose liability on lawyers by treating them like any other of the client's accomplices.[218] The personal responsibility approach, with its belief in deprofessionalization, may require that tort and criminal liability replace professional regulation. This suggestion might not be such a drastic change, because professional discipline now falls primarily on convicted criminals, embezzlers, and other violators of general law.[219] Such an approach still requires the formulation of standards of conduct for those, whether or not lawyers, who represent others in legal matters. Traditional problems of professional responsibility would thus recur.

The organization of legal services presents an even more intractable problem. Proponents of the personal responsibility model tend to support the provision of legal services to the poor and reject the rationing of legal services on the basis of cash.[220] This implies a commitment to publicly-funded legal services offices, group service plans, legal insurance plans, and low-priced legal clinics that attract customers through advertisement. Yet such institutions also generate practices that the personal responsibility model opposes, such as the mass production of legal serv-

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disclosed confidential securities information to SEC and also to defend himself against accusations), *cert. denied,* 419 U.S. 998 (1974).

216 *See* Discussion Draft, *supra* note 81, Rule 3.4(a) (diluted in Proposed Final Draft, *supra* note 6, Rule 4.4).

217 *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (restrictions on communicating directly with adverse party); Leubsdorf, *supra* note 18.

218 *See* cases cited *supra* note 91.

219 *See generally* Steele & Nimmer, *supra* note 171, at 993-99 (disciplinary actions against lawyers).

220 *See supra* text accompanying note 197.

ices, bureaucratic rigidity, and the imposition of policies on lawyers and clients.[221] Expanding the lawyer-client dialogue to include institutional management issues, and including lawyers, other employees, clients, and other groups in the dialogue may alleviate some of these problems. To the extent that problems remain, as they certainly will, proponents of the personal responsibility model can find solace by recognizing that inadequate funding and bureaucracy constrain most institutions in our society, especially those seeking to serve the poor.

The themes of ambivalence and impossibility that pervade this discussion of the personal responsibility approach are not accidental. These problems reflect the model's competing concerns and goals. Some proponents are concerned with the personal insensitivity of lawyers, while others are uneasy with the adversary society in which lawyers must work. The approach proclaims the importance of values, but leaves individuals with the choice of which values to emphasize. It promotes an ideal of personal responsibility, but endorses mass service mechanisms likely to overwhelm individuals. One might consider these contradictions illustrative of a fundamentally flawed approach—an approach born of yearning for an impossible world of wholly personal and moral relationships and reflecting a deep repugnance to lawyering as it is currently practiced. Yet, these difficulties also reflect the unwillingness of the model's proponents to hide behind a set of rules, and a willingness to consider the ideals of justice, the disillusionments of reality, and the depth of today's conflicts. The approach does not provide a wealth of specific proposals for efforts at law reform. It does provide a valid perspective on the problems facing lawyers.

CONCLUSION

It is impossible to reconcile the three views described here. They reflect radically different approaches to the functions of legal services in our society. Nevertheless, they occasionally follow different paths to the same conclusion. All three models undercut, at least in part, two pillars of the old professional system: lawyers' monopoly on the provision of legal services and self-regulation by the bar. Yet, even here agreement is limited. Differences reappear for example when we ask who, if anyone, should regulate the bar.

Although the models cannot be reconciled, compromise is possible. Indeed, while a few authors come close to representing one view or another in its pure form,[222] even they do not necessarily embrace it in all of

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221 *See* Bellow, *Turning Solutions Into Problems: The Legal Aid Experience,* 34 NLADA BRIEFCASE 106 (1977).

222 *See, e.g.,* S. TISHER, L. BERNABEI & M. GREEN, *supra* note 108 (public utility view); Huber, *supra* note 58 (market view); Simon, *supra* notes 187, 189 (personal responsibility approach: sociopolitical variant).

its applications. Conversely, most of us can find some merit in each of the three models. The Kutak Commission's proposed Model Rules of Professional Conduct, for instance, contain some innovations from each model.[223] That is not surprising, because each model grows out of one of the fundamental questions that every thoughtful lawyer has asked: How should lawyers deal with their clients? What may a lawyer do to nonclients? How can I live with myself?

I believe that the public utility approach should be the starting point for thought and reform. That approach is founded on a valid perception of the significance of lawyers in our society and the impact of lawyers on clients and third parties. Reform through the efforts of nonlawyers and lawyers working through the government, while certainly susceptible to failure and capture by those being regulated, seems more promising than reliance on the bar, the market, or the conscience of individual lawyers. The goal of a publicly-regulated profession is a realistic one in our society. Finally, the flexibility of the model makes it possible to shape it to meet particular problems and to incorporate contributions of other models.

The market model also has something to contribute. In those areas in which clients can protect themselves and nonclients will not be harmed, such as the selection of lawyers by paying clients or the use of nonlawyers to provide legal services, the market can regulate adequately. The market model also tends to counterbalance the excesses of the public utility model, such as ascribing a disproportionate value to access to lawyers, underestimating the costs of a society permeated by lawyers, and supporting paternalistic regulation to the extent that it does more harm than good. Yet, abandoning all regulation in favor of the market would be like replacing law itself with the market, or selling court decisions and statutes to the highest bidder.[224] The arrangements affecting legal services, like law, are unavoidably entangled in governmental decisions. Control over those arrangements is needed to ensure the integrity of legal rights traded in the market, to protect third parties, and to limit the power of the wealthy. Furthermore, even when markets are operating within their proper limits, they often fail to bring the benefits their defenders predict.[225] The last thing we need to do is to encourage lawyers to believe that private greed will bring public benefit.

The personal responsibility approach can help guide behavior

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223 *See supra* notes 58, 70, 81, 162-65, 168. The Commission's original 1980 proposals reflecting the personal responsibility view have suffered from subsequent revision and retrenchment. *See supra* notes 6, 209, 210, 213, 216.

224 For favorable account of a market models of lawmaking, see, e.g., Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective,* 18 J.L. & ECON. 875 (1975) (legislation); Rubin, *Why is the Common Law Efficient?,* 6 J. LEGAL STUD. 51 (1977) (adjudication).

225 It is perverse to regard the present arrangements for the creation and marketing of junk foods as an ideal to which lawyers should aspire.

within a given system of rules and institutions. It also provides suggestions for reshaping the system, such as remodeling legal education and rethinking the principles that should govern attorney-client relations. More important, however, is its assertion that no system can excuse lawyers from responsibility for their behavior. It calls on each lawyer to confront the realities of the system in which he works—the disregarded rules, the unjust rules, the rules that are just in themselves, but that amplify injustice elsewhere in society—and to act in the light of those realities. Its weakness is that it offers little guidance on how he should act. Each lawyer must conduct his own appraisal—an appraisal that leads me for the most part to support the public utility model.[226]

In the long run the choice of a model for reform can have important, albeit limited, significance. No theory will prevent some trends in the practice of law from running their course. Larger firms, more lawyers working outside traditional firms, more paralegals working with or without lawyers, more mass production and bureaucratization of legal services, more governmental involvement and regulation, and a somewhat slower expansion of the bar are all inevitable. Yet, ideas have influenced past changes in the legal services system, and will undoubtedly influence future changes.[227] To avoid undesirable changes, we must consider the implications of proposed reforms and their consistency with other proposals. To avoid being carried by piecemeal reforms into a world of unexpected unpleasantness, we must decide where to go and how to get there.

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226 Bellow & Kettleson, *supra* note 190, reach similar conclusions.

227 Who can doubt, for instance, that the legitimation of lawyer advertising by Bates v. State Bar, 433 U.S. 350 (1977) owed much to the erosion over the decades of the theory that commercial speech was exempt from the first amendment? *See, e.g.,* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976); *Developments in the Law—Deceptive Advertising,* 80 HARV. L. REV. 1005, 1027-38 (1967).