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Deborah J. Cantrell

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## The Obligation of Legal Aid Lawyers To Champion Practice by Nonlawyers

### Cover Page Footnote

Clinical Lecturer of Law; Director of the Arthur Liman Public Interest Program, Yale Law School. My sincere thanks to Sheila Nagaraj for her research assistance and to Gene Coakley of the Yale Law School Library who found even the most hidden sources. Thanks also to Deborah Rhode and Gary Blasi for their thoughts and comments.

# THE OBLIGATION OF LEGAL AID LAWYERS TO CHAMPION PRACTICE BY NONLAWYERS

Deborah J. Cantrell\*

## INTRODUCTION

There is a familiar jeremiad of many who advocate for better access to legal services. It is that more people would receive legal services if there were changes to the laws, court rules, and regulations concerning unauthorized practice of law (“UPL”).<sup>1</sup> Most reformers call for refinements to existing laws and regulations to create a licensing scheme so that paraprofessionals and nonlawyer professionals can qualify to perform certain tasks currently handled solely by lawyers.<sup>2</sup> Others have suggested that restrictions on who may provide legal services should be abandoned and replaced with a system where all may provide services, with only licensed lawyers being able to hold themselves out as such.<sup>3</sup> It is notable that the most sustained calls for reform have come in academic forums.<sup>4</sup>

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\* Clinical Lecturer of Law; Director of the Arthur Liman Public Interest Program, Yale Law School. My sincere thanks to Sheila Nagaraj for her research assistance and to Gene Coakley of the Yale Law School Library who found even the most hidden sources. Thanks also to Deborah Rhode and Gary Blasi for their thoughts and comments.

1. See, e.g., Deborah L. Rhode, Access to Justice 79-102 (2004) [hereinafter Rhode, Access to Justice]; Ralph C. Cavanagh & Deborah L. Rhode, Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 Yale L.J. 104 (1976); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 Geo. J. Legal Ethics 209 (1990) [hereinafter Rhode, *Delivery*]; Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. Rev. L. & Soc. Change 701 (1996) [hereinafter Rhode, *Professionalism in Perspective*]; see also Reference Staff of the Fordham Law Sch. Library, *Bibliography to the Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 Fordham L. Rev. 2731, 2737-42 (1999) [hereinafter *Bibliography*].

2. See, e.g., Rhode, Access to Justice, *supra* note 1, at 90-91.

3. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1269-70 (1995).

4. Deborah Rhode’s pro se divorce project while a law student in the early 1970s is an example of one of the early calls for reform. See Cavanagh & Rhode, *supra* note 1; see also Rhode, *Professionalism in Perspective*, *supra* note 1, at 702-04 (describing the genesis for Rhode’s pro se divorce project). To see the predominance of academic reform voices, see *Bibliography*, *supra* note 1. There is at least one consumer group whose purpose is to challenge UPL restrictions. See HALT – An Org. of Ams. for Legal Reform, Major Reform Projects, at

Why has there not been a sustained call for reform in other forums championed by lawyers for the poor? Legal aid lawyers see daily how many people they are unable to help, while also knowing that many of those who do not receive service could have been helped by straightforward advocacy and assistance. Further, legal aid lawyers speak regularly about their clients' lack of access to legal services or lack of access to justice, but seldom consider UPL restrictions as potent barriers for their clients.<sup>5</sup> This Essay reviews the case for eliminating UPL restrictions, and then argues that legal aid lawyers must take the lead in advocating for reform.

### I. WHY THE MIDDLE ROAD IS NOT ENOUGH—THE CASE FOR COMPLETE ELIMINATION OF UNAUTHORIZED PRACTICE OF LAW RESTRICTIONS

As many have noted, the standard justification for UPL restrictions is that the law is a complicated and specialized field not known well by most consumers and not practiced well by those who do not complete law school.<sup>6</sup> Thus, in order to ensure that consumers get appropriate legal services, only licensed lawyers should be authorized to provide those services.<sup>7</sup> The standard consumer protection justification may be scrutinized from several angles.

First, is it accurate that those who do not complete law school cannot competently practice the law? This Essay will consider the empirical evidence on whether the advanced training received by lawyers means that they are more competent at providing legal services than nonlawyers without that training. Next, if it is true that consumers cannot know the law well because it is a complicated and specialized field, must they rely on some other indicator of competency and must that indicator be a license to practice law?

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[http://www.halt.org/reform\\_projects/](http://www.halt.org/reform_projects/) (last visited Oct. 23, 2004) [hereinafter HALT]. Further, some state bar associations and legislatures have taken up lawyer regulation. See, e.g., Rhode, *Delivery*, *supra* note 1 (discussing activity in California in the early 1990s).

5. See, e.g., Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 *Yale L. & Pol'y Rev.* 369 (1998) (providing extensive recommendations for integrating civil legal assistance for the poor, noting the use of nonlawyers without discussing the role of UPL restrictions in limiting those service providers); Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 *Seattle J. for Soc. Just.* 571 (2004) (noting the high level of need for legal services among poor people in the State of Washington, but arguing that the solution is to recognize a right to counsel in civil cases); Wayne Tanna, *A Message from Our President*, 8 *Haw. Bar J.* 25 (2004) (presenting the president of the Hawaii Bar Association's perception of a high need for legal services among poor Hawaiians, but calling for more pro bono work by members of the bar).

6. See, e.g., Rhode, *Access to Justice*, *supra* note 1, at 83.

7. See, e.g., Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *Fordham L. Rev.* 2581, 2593-97 (1999).

Finally, is it true that UPL prosecutions are used to protect consumers? If, instead, UPL prosecutions are used to protect attorneys from competition, then attorneys must justify why they warrant such protection. They cannot use consumer protection as cover.

#### A. *Who Can Hack the Work?*

Arguments in favor of lawyer exclusivity are replete with statements like the following by the Florida Supreme Court: "Laymen's good faith efforts at what so often turn out to be inartfully drawn wills, have over the centuries cause [sic] untold litigation, needless expense and unjust results."<sup>8</sup> The statement is not buttressed by specific examples or evidence, but instead relies on a broad, unsupported assertion of nonlawyer misconduct to claim notable damages. As Deborah Rhode has noted, opponents of nonlawyer practice often rely on unsupported or anecdotal stories about the misdeeds of nonlawyers and do not consider whether lawyers make similar mistakes in similar volumes as nonlawyers.<sup>9</sup> The question of whether nonlawyers are as skilled as lawyers, at least as to some set of tasks, is empirical and should be answered not with anecdotes, but with appropriately-gathered data. Not surprisingly, attorneys and their professional associations have not actively pushed for such empirical research. Nonetheless, some research exists and it demonstrates that nonlawyers are as competent as lawyers in providing many kinds of services.

One of the earliest research studies was conducted by Deborah Rhode and Ralph Cavanagh.<sup>10</sup> In the mid-1970s, they reviewed court files in about 330 divorce cases in Connecticut, interviewed a subset of the plaintiffs, and sent written questionnaires to plaintiffs' attorneys.<sup>11</sup> They also interviewed slightly over ninety people who had used a do-it-yourself divorce kit provided by a local nonprofit.<sup>12</sup>

Rhode and Cavanagh compared the court forms filled out by attorneys with those filled out by pro se plaintiffs and found that while both made occasional errors, the forms filled out by attorneys were not significantly more accurate than those filled out by the pro se plaintiffs.<sup>13</sup> They also investigated whether lawyers significantly contributed to resolving issues such as division of property, alimony, and child visitation. Over 60% of the interviewed plaintiffs reported that they and their spouses had reached agreement on such issues

8. Florida Bar v. Stupica, 300 So. 2d 683, 687 (Fla. 1974).

9. Rhode, *Professionalism in Perspective*, *supra* note 1, at 708 & nn.26-27 (citing to various bar-related publications describing instances of nonlawyer incompetence).

10. *See generally* Cavanagh & Rhode, *supra* note 1.

11. *Id.* at 117-18.

12. *Id.* at 121-22.

13. *Id.* at 123-28.

without a lawyer's assistance.<sup>14</sup> Further, Rhode and Cavanagh found that the ancillary documents prepared by lawyers to cover issues such as property or child visitation rarely included extra details not already covered in the judicial decree.<sup>15</sup> Most fascinating, Rhode and Cavanagh asked plaintiffs and their attorneys how involved the attorneys were in client counseling and negotiations, and found striking differences in each group's assessment of attorney involvement.<sup>16</sup> For example, the attorneys reported that they had to negotiate property disputes in 60% of their cases whereas only 32% of the plaintiffs reported that their attorneys had spent time negotiating such a dispute.<sup>17</sup> Similarly, attorneys reported substantially more contact with their clients than their clients reported with the attorneys.<sup>18</sup> Based on their research, Rhode and Cavanagh concluded that, at least with regard to many divorces, lay people were as competent as lawyers and that lawyers overestimated the importance of their role in resolving the case.<sup>19</sup>

One can extrapolate from the Rhode/Cavanagh study that if many pro se plaintiffs were able to competently complete their divorce cases, then those cases involve skills that are not unique to lawyers. Thus, this is an area of law in which nonlawyers could competently practice. More importantly, as Rhode and Cavanagh also note, some of those interviewed about using the do-it-yourself divorce kit reported they did not go forward with the kit because they lacked typing skills or a typewriter or found the forms intimidating.<sup>20</sup> Had a nonlawyer assistant been available to help with the kits, then more people would have gone forward with them.

It is true that the Rhode/Cavanagh study provides empirical support regarding only one type of legal matter—relatively straightforward divorces. Nonetheless, one can identify other similar types of legal matters where a nonlawyer could provide assistance, such as advanced health care directives (particularly since many states have statutory forms),<sup>21</sup> or other areas involving form work. Further, the Rhode/Cavanagh study makes clear that a complete ban on nonlawyer assistance is not empirically supported.

More recently, in the late 1990s Herbert Kritzer studied lawyer and nonlawyer advocates in four administrative settings to determine

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14. *Id.* at 137-38.

15. *Id.* at 134-38.

16. *Id.* at 141-46.

17. *Id.* at 144.

18. *Id.* at 145-46.

19. Rhode and Cavanagh recognized that certain kinds of divorces clearly benefited from a lawyer's involvement, including highly disputed divorces. *Id.* at 151.

20. *Id.* at 162-63.

21. *See, e.g.*, Conn. Gen. Stat. Ann. § 19a-575a (West 2003).

whether one group performed better than the other.<sup>22</sup> Kritzer observed lawyers and nonlawyers who advocated in unemployment compensation appeals, state tax commission appeals, social security disability appeals, and labor grievance arbitrations, and he statistically analyzed the outcomes in the cases.<sup>23</sup> Kritzer hypothesized that the most accurate predictors of competence would be the advocates' levels of substantive knowledge of the area of law and procedural knowledge about the particular administrative forum.<sup>24</sup> In other words, the best advocates in each of the settings were likely to be those people who were well versed in substance and who were repeat players in the system. Kritzer's findings were in accord.<sup>25</sup>

For example, in the unemployment compensation appeals Kritzer observed, nonlawyer advocates included people such as union officials, staff of company personnel departments, or nonlawyers who work for businesses specializing in unemployment issues.<sup>26</sup> Lawyer advocates included independent counsel as well as in-house counsel of employer-parties.<sup>27</sup> Kritzer's analysis demonstrated that

some expertise (e.g., in adversarial advocacy) is probably better than none, but it is the combination of general advocacy skills, knowledge of specific hearing practices and players (e.g., how the administrative law judges run hearings), and substantive knowledge of... unemployment compensation that characterizes the most effective advocates. Formal training (in the law) is less crucial than is day-to-day experience in the UC [unemployment compensation] setting.<sup>28</sup>

Kritzer made similar findings in the other administrative areas.<sup>29</sup>

Kritzer did note that lawyers seemed to be better able than nonlawyers to "move across different settings"—that is, to use their general knowledge about preparing and presenting evidence and to work in multiple or unfamiliar forums.<sup>30</sup> Nonetheless, Kritzer also concluded that an experienced nonlawyer presenting in a forum similar to where he or she typically worked remained a better advocate than a lawyer experienced in trial work, but with little background in the substantive law of the new forum.<sup>31</sup> Kritzer's study expands on the findings of Rhode and Cavanagh and suggests that there may be many areas of substantive law and many kinds of

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22. Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* (1998).

23. *Id.* at 21-22.

24. *Id.* at 201.

25. *Id.* at 201-02.

26. *Id.* at 25.

27. *Id.*

28. *Id.* at 76.

29. *Id.* at 108 (tax appeals), 148 (social security disability appeals), 190 (labor grievance arbitrations).

30. *Id.* at 201.

31. *Id.*

advocacy forums in which nonlawyers are equally competent as lawyers.

Given that many of the people without access to lawyers have low or modest incomes, it would be useful to consider research that focused on legal issues more common for those people. Researchers in the United Kingdom have conducted a relevant study.<sup>32</sup> First, consider some background on the provision of legal services in the United Kingdom. Since roughly 1994, nonlawyers have been able to provide the same kinds of legal aid services as solicitors.<sup>33</sup> Under the United Kingdom's system, some basic legal services are provided to all as part of the government's social services, with more extended services available to those with lower incomes.<sup>34</sup>

Researcher Richard Moorhead and his colleagues compared legal services provided by nonlawyers with similar services provided by solicitors on cases involving welfare benefits, debt collection, housing, and employment—all areas often involving clients with low or modest incomes.<sup>35</sup> They gathered data on the type of services provided and their legal outcomes, surveyed clients, had the legal files scrutinized by expert peer reviewers to assess the competency level of the services, and sent “dummy clients” to visit legal services providers to assess factors such as attitudes of the providers towards clients.<sup>36</sup> Their analysis provided some striking results.

First, clients reported that the nonlawyer providers were significantly better than solicitors in the following areas: knowing the right people with whom to speak about the client's problem, paying attention to the client's emotional concerns, listening to what the client had to say, treating the client as if she or he mattered, taking action that the client wished, having enough time for the client, giving the client information on what would happen in the case, and standing up for the client's rights.<sup>37</sup> While some of the above factors attempt to measure the quality of services (“knowing the right people with whom to speak”), many of the measures may disclose more about the style used by the advocate and the client's comfort level with that style.

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32. Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Non-Lawyers in England and Wales*, 37 *Law & Soc'y Rev.* 765 (2003) [hereinafter Moorhead et al., *Contesting Professionalism*]; see also Richard Moorhead, *The Rise of Nonlawyers: Experience from England and Wales (2001)*, available at <http://www.ilagnet.org/conference/ilag2001.htm> [hereinafter Moorhead, *The Rise of Nonlawyers*].

33. Moorhead, *The Rise of Nonlawyers*, *supra* note 32, at 1; see also Moorhead et al., *Contesting Professionalism*, *supra* note 32, at 773 (“Although, unlike in the United States, there was and is no general prohibition on nonlawyers providing legal advice; until the creation of the [Legal Aid] Board, funds for legal aid could only be provided through solicitors' firms and law centers employing solicitors or barristers.”).

34. Moorhead et al., *Contesting Professionalism*, *supra* note 32, at 772.

35. *Id.* at 777.

36. *Id.* at 777-82.

37. *Id.* at 785.



Thus, Moorhead and his colleagues also compared the outcomes received by clients served by nonlawyers and those served by solicitors.

The researchers found that in those cases where a concrete result was achieved (as compared to those solely involving legal advice), nonlawyers were significantly more likely to achieve a concrete result than were solicitors.<sup>38</sup> For example, “the likelihood of a solicitor getting a positive financial result in a welfare benefit case was about a quarter of the likelihood of a nonlawyer.”<sup>39</sup> The only area in which nonlawyers did not outperform solicitors was housing.<sup>40</sup> Furthermore, when expert peer reviewers assessed competency of services, more solicitors than nonlawyers had cases in which their service was ranked as poor.<sup>41</sup> Controlling for certain factors related to peer review scores, the researchers found “that where the case was handled by a solicitor’s firm, rather than an NFP [nonlawyer] agency, the likelihood of a case being assessed as below threshold competence increased markedly, and conversely, such cases were far less likely to be assessed at above threshold competence.”<sup>42</sup>

Finally, Moorhead and co-authors assessed whether nonlawyers and solicitors differed in the advocacy methods they chose. In other words, did nonlawyers focus on “lower-level” work and avoid advocacy methods involving litigation even if that would be best for the client?<sup>43</sup> This review was designed to assess whether solicitors, because of more advanced training, provided a wider range of services to their clients, thus offering more comprehensive services than nonlawyers. The researchers found no differences in advocacy methods in certain types of cases such as welfare benefits which, if there is litigation, are heard in front of administrative tribunals that permit appearances by nonlawyers.<sup>44</sup> In contrast, in housing cases, which proceed in court if there is litigation, a venue in which nonlawyers are barred, nonlawyers were less likely to take adversarial cases than solicitors.<sup>45</sup> Moorhead and his colleagues concluded that any differences in advocacy methods between nonlawyers and solicitors were as likely the result of structural barriers as of differing competency levels.<sup>46</sup>

In coming to a final analysis about their empirical work, Moorhead and his co-authors concluded (similar to Kritzer):

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38. *Id.* at 786-87.

39. *Id.* at 787.

40. *Id.*

41. *Id.* at 788.

42. *Id.*

43. *Id.* at 791.

44. *Id.* at 792.

45. *Id.* at 792-93.

46. *Id.* at 793 (citation omitted).

The professional model of service does not always provide higher levels of service than the paraprofessional in the sphere of operations examined in this study. The control on entry into legal practice, years of legal education, and regulation of conduct and competence have done little or nothing to distinguish the lawyers from their nonlawyer competitors. Other empirical evaluations in different contexts tend also to question the supposed supremacy of lawyers; it is specialization, not professional status, which appears to be the best predictor of quality.<sup>47</sup>

There are three particularly compelling features of the Moorhead research: first, the breadth of services that were examined; second, that the areas of service often included people with low and modest incomes; and third, that multiple methods were used to measure competency. If the legal profession has grudgingly accepted nonlawyer assistance, it has generally been along the lines of "if we must have nonlawyers, then they can only work in this very limited capacity."<sup>48</sup> However, Moorhead and his co-authors' research establishes that nonlawyers are competent to provide services in a range of both substantive areas and advocacy methods. Nonlawyers competently worked in all of the substantive areas in which legal aid was provided, and competently provided services that ranged from legal advice and counseling to litigation. Further, nonlawyers outperformed solicitors in achieving a concrete outcome for a client and in making the client feel comfortable and informed about the legal matter.

Importantly, the clients in the study often had problems similar to those faced by low-income clients in the United States such as maintaining welfare benefits and housing. While the particular eligibility requirements or legal criteria are certainly different between the two countries, the Moorhead study confirms that nonlawyer advocates are comfortable with, and skilled at working with, those who may be less sophisticated about the law. Similarly, those clients report a high level of satisfaction with nonlawyer advocates, especially in terms of non-legal needs such as emotional support and good levels of communication.

Further, while the Moorhead study was conducted on a professional system that is different than that in the United States, the systemic differences are modest enough that the study's results remain relevant to discussions about nonlawyer practice in the United States. For

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47. *Id.* at 795.

48. For example, some states permit nonlawyers to assist in preparing forms related to real estate purchases. *See, e.g.*, *State Bar v. Guardian Abstract Title Co.*, 575 P.2d 943 (N.M. 1978); *Cultum v. Heritage House Realtors, Inc.*, 694 P.2d 630 (Wash. 1985) (en banc). Some states have also expanded nonlawyer assistance work in areas in which parties regularly appear pro se. For examples, see Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *Fordham L. Rev.* 2241, 2241-42 (1999).

example, students in the UK may study law as an undergraduate degree. However, to qualify as a solicitor a student must complete a post-graduate year in a legal practice course and then two further years in training at a solicitor's office.<sup>49</sup> Thus, solicitors have a similar kind of advanced training as do American lawyers (in fact, those wanting to be solicitors have more job-specific training than do American law students). It is clear from the Moorhead study that such advanced training in itself does not make lawyers better practitioners than nonlawyers.

*B. Is a License to Practice Law the Most Relevant Piece of Information to Consumers When Choosing a Legal Advisor?*

As noted above, one component of the justification for UPL restrictions is that the law is a specialized and complicated body of knowledge that the average consumer will not readily understand. Thus, the consumer will not be able to determine in advance what specific kinds of legal services are needed, and when picking a legal advisor will have to rely instead on an easily understood marker about the advisor's qualifications. According to the argument, a license to practice law is the best marker of good qualifications and it would be too hazardous for consumers to have to sift through varying alternative kinds of information about qualifications.

However, as others have noted, that rationale is both inaccurate and simplistic.<sup>50</sup> Many consumers are sophisticated and highly knowledgeable about their legal needs. For example, a financial planner likely understands the basic contours of estate law and the conditions under which tax-planned legal documents like a trust are appropriate. That consumer will be able both to assess the need for a lawyer's involvement and look to the particular qualifications of a lawyer when deciding who to retain. The consumer will consider whether she has substantial enough assets that her estate would owe an estate tax. If yes, the consumer will consider whether the lawyer has experience drafting trusts that deal with such issues as the unified estate and gift tax credit and generation-skipping taxes. For the expert consumer, the least relevant information is that the lawyer is licensed.

For those consumers who are less knowledgeable, they are in no different position searching for legal services than they are when searching for other services or goods such as a reliable home improvement contractor or the best internet service provider. In those situations, consumers look for more information about the provider than whether the provider is licensed. The consumer

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49. See Roger Burrige, *Legal Education in the United Kingdom*, at <http://www.aals.org/2000international/english/uk.htm> (last visited Oct. 23, 2004).

50. See Pearce, *supra* note 3, at 1267.

considering a home contractor generally looks for references and other evidence that the contractor has timely finished other projects. Similarly, the consumer looking for a lawyer would like some information about the kind of legal practice primarily handled by the lawyer, and may also want some references. It is not enough for the consumer to know that the lawyer is licensed. Consumers are able to look for and understand markers of competency beyond the simple fact of licensing.

### C. *Are UPL Prosecutions Used to Protect Consumers?*

The final component of the consumer justification for UPL restrictions is that UPL prosecutions are, in fact, used to protect consumers and the corollary argument that UPL prosecutions are, in fact, good at protecting consumers. That issue, like the question of lawyer-nonlawyer competency, is an empirical one. Again, Deborah Rhode has conducted important research in this area.<sup>51</sup>

Rhode conducted a tripartite inquiry, including a review of all reported UPL cases concerning nonlawyers between 1970 and 1980, a survey of state administrative agencies to assess whether any permitted nonlawyer representation, and a survey of every state authority charged with policing UPL to assess what actual prosecutorial work occurred.<sup>52</sup> Rhode found that only 2% of the complaints reviewed in her survey were initiated by injured consumers.<sup>53</sup> That was true even though most of the UPL complaints concerned "form preparation and related advice"<sup>54</sup>—an area which courts and professional associations have said was ripe for abuse of consumers by nonlawyers.<sup>55</sup> Furthermore, only 11% of the complaints reviewed involved allegations of specific harm by nonlawyers.<sup>56</sup>

Rhode's findings that most UPL complaints deal with alleged misbehavior of lawyers and that very few complaints are filed by aggrieved consumers, suggests that UPL complaints are not used by consumers as a protective measure. Further, most complaints are not about nonlawyer misconduct. Thus, UPL restrictions are certainly not primarily used to protect consumers from nonlawyer activities.

Nonetheless, Rhode did find that most complaints related to form preparation. If form preparation is considered a straightforward legal service akin to a basic consumer service, then UPL prosecutions targeting attorneys who incompetently assisted their clients in filling

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51. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1 (1981) [hereinafter Rhode, *Policing the Profession*].

52. *Id.* at 11-15.

53. *Id.* at 43.

54. *Id.* at 30.

55. See *supra* Part I.A.

56. Rhode, *Policing the Profession*, *supra* note 51, at 43.

out forms might be justified as a means of consumer protection. Interestingly, Rhode's interviews of state personnel charged with policing UPL revealed that almost 50% of them perceived the general public as skeptical about whether UPL restrictions were used to protect consumers rather than as a tool to protect attorneys.<sup>57</sup> Thus, enforcement personnel recognized that consumers did not agree that lawyers policed themselves in order to protect consumers.

Turning to the corollary of whether UPL prosecutions are a good tool for consumer protection, it might be helpful to think of an exemplary case such as that of the "notario." Several commentators have detailed stories about unscrupulous nonlawyers who offer poor-quality legal services to immigrants.<sup>58</sup> The nonlawyers often work under the name "notario" because in many Latin American countries "notario" means lawyer.<sup>59</sup> Thus, Spanish-speaking immigrant consumers mistakenly believe they are receiving services from a lawyer. Since every state's UPL regime prohibits nonlawyers from giving independent legal advice, UPL prosecutions would seem to be a good method to use to protect those immigrant consumers.<sup>60</sup>

However, a review of some of the cases against notarios reveals that states (generally through attorney general offices) have often prosecuted those cases using other more potent tools such as criminal law or statutes barring the use of the phrase "notario."<sup>61</sup> Similarly, instead of relying on UPL restrictions, disgruntled consumers have challenged nonlawyer misconduct using civil claims such as trademark infringement, false advertising, and state consumer protection statutes.<sup>62</sup>

Consumers and their advocates have used methods other than UPL prosecutions because remedies in UPL cases are often weaker than those available under general criminal or civil law. For example, in most states the harshest sanction for UPL is a misdemeanor conviction.<sup>63</sup> UPL restrictions do not provide consumers with minimum damages or attorneys' fees as do many states' consumer protection statutes.<sup>64</sup> Further, by using a civil action rather than a UPL prosecution, consumers retain control over the litigation rather

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57. *Id.* at 39-40.

58. See, e.g., Anne E. Langford, *What's in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 Harv. Latino L. Rev. 115 (2004).

59. Rhode, *Policing the Profession*, *supra* note 51 at 31-32.

60. For a discussion of states' UPL restrictions and definitions, see Denckla, *supra* note 7, at 2581, 2585-92.

61. Langford, *supra* note 58, at 128-31.

62. See Complaint, Legal Aid Found. of L.A. v. Cal. Law Clinic (Cal. Super. Ct. 2003) (No. BC307009) (copy of complaint on file with author); see also Donna S. Harkness, *Packaged and Sold: Subjecting Elder Law Practice to Consumer Protection Laws*, 11 J.L. & Pol'y 525, 538-53 (2003).

63. Rhode, *Policing the Profession*, *supra* note 51, at 11.

64. Harkness, *supra* note 62, at 536-37.

than ceding control to the state personnel charged with prosecuting UPL. In sum, UPL restrictions are not the most effective tool for consumer protection.

Having considered the various facets of the consumer protection justification for UPL restrictions, the empirical data supports several conclusions: (1) nonlawyers can competently provide similar kinds of services as lawyers, (2) a license to practice law is not the most relevant indicator of competency, and (3) UPL restrictions constitute a blunt instrument, at best, for protecting consumers. Thus, it is inappropriate for the legal profession to justify UPL restrictions on the grounds of consumer protection. If nonlawyers can competently provide legal services, the issue becomes whether UPL restrictions should be entirely eliminated or whether they should be replaced with some sort of nonlawyer licensing scheme.

Russell Pearce has convincingly argued that UPL restrictions should be abandoned.<sup>65</sup> Instead, “[l]awyers and nonlawyers would be able to provide legal services, but only those admitted to the bar would be able to call themselves ‘lawyers.’”<sup>66</sup> All who provide legal services would owe basic duties to their clients such as duties of confidentiality and competence, and the government would prescribe a set of ethical regulations covering all legal services providers.<sup>67</sup> Pearce’s system essentially is a notification system where consumers could ask for information about a provider’s training and experience in determining whether to hire the provider. Consumers could rely on existing legal remedies provided in tort and in consumer protection statutes should their legal service provider inadequately handle the legal matter.

Pearce’s system substantially reduces costs for legal service providers to enter the market, thereby increasing the kinds and numbers of providers available to consumers at varying cost levels. The one empirical question left open is whether the market would provide sufficient levels of low-cost providers so that those consumers currently priced out of the market would then be able to afford services. Until UPL restrictions are abandoned, it will remain uncertain how well the market will fill the current void in low-cost legal services. However, that uncertainty should not be the reason that justifies retaining the current system, which unquestionably fails to provide a sufficient level of low-cost services.

Given that the legal profession, courts, and legislatures (often lawyer-dominated) have been slow to deconstruct UPL restrictions, what can be done to speed the course, and who should lead such an effort?

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65. Pearce, *supra* note 3, at 1269-70.

66. *Id.* at 1269.

67. *Id.* at 1270.

## II. THE CALL FOR LEGAL AID LAWYERS TO LEAD EFFORTS TO REFORM UPL

Despite repeated calls by scholars to modify or eliminate UPL restrictions,<sup>68</sup> similar advocacy efforts by consumer groups,<sup>69</sup> ABA commissions charged with studying UPL,<sup>70</sup> and conference recommendations supporting nonlawyer practice,<sup>71</sup> there has been only modest approval of work by nonlawyers.<sup>72</sup> At the same time, there has been research showing a great amount of unmet legal needs among those who cannot easily afford legal services—upwards of four-fifths of the needs of the poor and two-thirds of the needs of middle income individuals are unmet.<sup>73</sup> There is also research confirming an increase in the number of people (especially the poor) being pressed to go forward pro se.<sup>74</sup> Nonetheless, funding for civil poverty lawyers has declined.<sup>75</sup>

No one understands the alchemy of the above better than legal aid lawyers and their clients—too many people are left without any help solving their legal problems. Legal aid lawyers have creatively responded by developing innovative methods of delivering legal services and crafting pro se assistance programs.<sup>76</sup> But, legal aid attorneys as a community have never made a substantive and focused commitment to eliminating UPL restrictions as a possible solution to their clients' unmet legal needs. For example, the National Legal Aid and Defender Association, the overarching association for legal aid lawyers, has never taken a formal position on UPL—either in support or in opposition.<sup>77</sup> If UPL restrictions are to be eliminated, it will

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68. See *Bibliography*, *supra* note 1, at 2737-42.

69. See, e.g., HALT, *supra* note 4.

70. See, e.g., Comm'n on Nonlawyer Practice, ABA, Nonlawyer Activity in Law-Related Situations: A Report with Recommendations (August 1995), available at <http://www.abanet.org/cpr/nonlawyer.html>.

71. See *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 Fordham L. Rev. 1751 (1999).

72. Some examples of nonlawyer practice include legal document assistants and immigration consultants authorized by California statutes, see Cal. Bus. & Prof. Code §§ 6400, 22441 (West 2004), and bankruptcy preparers authorized by the federal bankruptcy code. 11 U.S.C. § 110 (2000).

73. Rhode, *Access to Justice*, *supra* note 1, at 3, 103.

74. Deborah J. Cantrell, *Justice for the Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 Fordham L. Rev. 1573, 1582 (2002); see also Rhode, *Access to Justice*, *supra* note 1, at 82.

75. Cantrell, *supra* note 74, at 1575-76; see also Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 Loy. J. of Pub. Int. L. 11, 27-31 (2003) (giving an historical account of federal funding for civil legal services) [hereinafter Cantrell, *A Short History*].

76. Cantrell, *supra* note 74, at 1581. But see Gary Blasi, *How Much Access? How Much Justice?*, 73 Fordham L. Rev. 865, 867-69 (2004) (detailing his evaluation of a self-help center for pro se tenants and his findings that tenants were still unlikely to win).

77. Telephone Interview with Don Saunders, Director, Civil Legal Services of NLADA (July 8, 2004). In contrast, when the ABA Taskforce on the Model

happen only with the concerted, coordinated effort of a segment of the bar such as legal aid lawyers. The fact that legal aid lawyers have not challenged UPL restrictions is, one hopes, an unfortunate oversight. One worries, however, that it is an indication that legal aid lawyers are as protective (even if benevolently) as their private bar counterparts. There is evidence supporting both conclusions.

#### A. *The Evidence of Unfortunate Oversight*

As noted above, legal aid lawyers, especially those working in community-based offices,<sup>78</sup> turn away clients every day. Those clients need legal assistance in a multitude of substantive areas: housing, government benefits, Medicaid, consumer fraud, divorce, and domestic violence, among others.<sup>79</sup> The clients understand their problems in terms of negative legal consequences that will result if a lawyer does not help them or take their case. In return, the lawyers, well trained in their ethical duty of loyalty to a client, understand their responsibilities in terms of reaching positive solutions for particular clients. If Mrs. S. is about to be evicted, and her landlord has not followed proper procedures, then the obvious course of conduct for the lawyer is to focus on those procedural irregularities and gain more time for Mrs. S. to either cure her rent default or find new housing. Thus, in the press of everyday business in which problems are always presented as individualized substantive legal matters, the impetus for a legal aid lawyer is to focus on the substantive legal issues rather than step back and analyze whether there is a more fundamental structural problem.

This is not surprising. As law students, and then as practicing lawyers, advocates generally think about the law along substantive lines. Most classes at law school are taught along substantive lines: torts, contracts, property, business organizations, and the like.

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Definition of the Practice of Law solicited comments on its proposed definition, the chair of the ABA's Standing Committee on the Delivery of Legal Services responded that the only viable definition was one that barred nonlawyers from holding themselves out to the public as lawyers because nonlawyers should be permitted to provide legal services as a way of meeting the unmet needs of poor legal consumers. Memorandum from Mary K. Ryan, Chair, Standing Committee on the Delivery of Legal Services, to Lish Whitson, Chair, Taskforce on the Model Definition of the Practice of Law (Dec. 19, 2002), available at <http://www.abanet.org/cpr/model-def/scdls.pdf>.

78. I use the phrase "community-based offices" to refer to those legal aid offices that focus on providing direct legal services to poor clients, as contrasted with legal aid offices that focus on systemic reform efforts. Many, but not all, community-based offices receive federal funding from the Legal Services Corporation, while no office focused on systemic reform does. See Cantrell, *A Short History*, *supra* note 75, at 27-31; see also Rhode, Access to Justice, *supra* note 1, at 62-64.

79. See New Haven Legal Assistance Ass'n, Home Page, at <http://www.nhlegal.org/> (last visited Oct. 21, 2004) (providing an example of the kinds of legal assistance provided by a community-based office).



Further, when lawyers go into practice, they often focus on a particular substantive area, and that is true for legal aid lawyers as well. Most legal aid offices are divided into substantive teams: the benefits group, the health care group, the family law group, and the housing group.<sup>80</sup> There is no unit designed exclusively to reflect on larger systemic and structural barriers of the legal system and there is no time set aside at most programs to bring attorneys together across substantive areas to consider systemic and structural barriers.

Further, for those programs receiving federal funding, the “strong Congressional message [since 1996 is that] federally funded legal services should focus on individual case representation,”<sup>81</sup> creating an incentive for community-based legal aid offices to see as many individual clients as possible. Additionally, federally-funded programs are charged with setting their work priorities by assessing the needs of the community’s clients. Many programs send written surveys to their clients asking about those clients’ legal needs. As one would expect, clients often focus on their own individual substantive problems and not structural problems.<sup>82</sup> Thus, legal aid programs are encouraged by their constituencies to focus on substantive legal issues, not structural ones.

One also sees a focus on substantive law rather than structural change in those legal aid offices which handle systemic reform matters. For example, if one surveys a list of “support centers” (the generic name given to legal aid offices that do not receive federal funding and that focus on systemic litigation and legislative advocacy), one sees that almost all of those organizations have a substantive law focus. Some examples include the National Health Law Program, the National Center for Youth Law, the National Immigration Law Center, and the National Senior Citizens Law Center.<sup>83</sup> To the extent the support centers consider systemic reform, it is generally along substantive lines, such as a class action lawsuit against the governor of California to force the state to award a cost-of-living adjustment to the state’s welfare recipients.<sup>84</sup> Support centers show the same bias toward substantive legal work as do community-based programs.

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80. An example of this kind of structure can be seen at the Legal Aid Foundation of Los Angeles. It has ten substantive units and each has a directing attorney. LAFLA, Key Staff, at <http://www.lafla.org/about/staff/index.asp> (last visited Oct. 22, 2004) (listing the ten substantive units and their directing attorneys).

81. Rhode, Access to Justice, *supra* note 1, at 108 (quoting John McKay, then-president of Legal Services Corporation).

82. *Id.* at 107-08.

83. Many of the support centers are located in California. See Pub. Interest Clearinghouse, Directory of California and Nevada Legal Services Programs, at <http://www.pic.org/resx/direclsp.htm#N> (last visited Oct. 22, 2004).

84. See First Amended Petition for Writ of Mandate, *Guillen v. Schwarzenegger* (Cal. App. Dep’t Super. Ct. 2004) (No. CPF-03-503797), available at <http://www.wclp.org/files/First%20amended%20petition%20.pdf>. Plaintiffs’ counsel is Western Center on Law & Poverty, the largest state support center in California.

Given that there are an enormous number of substantive legal issues with which poor people need legal assistance, it is hard to fault legal aid lawyers for focusing on those issues. It is certainly a good result if a lawyer is able to help a family get its children back on Medicaid or if a lawyer is able to change state legislation so that more children are eligible for Medicaid. Nonetheless, it would be an even better result if seven families were able to get their children back on Medicaid because they went to their community center and met with a nonlawyer advocate who provided the same services as the legal aid lawyer. Legal aid lawyers need to more forcefully press for regulatory and statutory changes to support that nonlawyer advocate.<sup>85</sup>

### B. *The Evidence for Protectionism*

One response of legal aid lawyers to suggestions that their clients should receive services by methods other than direct lawyer assistance is to assert that their clients are not second-class citizens and are entitled to the same kinds of services as more wealthy people. Few would dispute that an ideal world would mean that anyone who wanted a lawyer could have a lawyer, just as anyone who wanted a doctor could have a doctor. But, it is unhelpful to propose an ideal world as the only acceptable solution when the political, financial, and structural realities make clear that an ideal world is not achievable.

As Lucie White has argued, “endorsing the principle of *equal* (i.e., elite) legal services for all people” may not be the best means for promoting social equality.<sup>86</sup> White contends that advocates should look at the social needs of the poor and other disenfranchised groups “*sui generis*, in ways that reflect *their own* experiences of need, their embedded historical and cultural realities, the societal power landscapes from their perspectives, their capacities, and their normative aspirations . . . .”<sup>87</sup> White’s call goes well beyond legal aid lawyers embracing nonlawyer advocates, but it underscores the need for legal aid lawyers to challenge existing structural assumptions, including the assumption that a lawyer knows best.

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See Western Ctr. on Law and Poverty, Mission History, at <http://wclp.org/aboutwclp/missionhistory.php> (last visited Oct. 22, 2004).

85. Again, some community-based legal aid programs have actively brought paraprofessionals onto their staffs and utilize those advocates as much as they can. One example is the Health Consumer Center of Los Angeles County Neighborhood Legal Services. The Center runs a multilingual hotline staffed by paraprofessionals who are overseen by an attorney. See Neighborhood Legal Servs., Special Projects, at <http://www.nls-la.org/specialprojects.html> (last visited Oct. 22, 2004); see also Rhode, Access to Justice, *supra* note 1, at 110-12 (discussing other reasons why legal aid lawyers have been reluctant to expand services).

86. Lucie White, *Specially Tailored Legal Services for Low-Income Persons in the Age of Wealth Inequality: Pragmatism or Capitulation*, 67 Fordham L. Rev. 2573, 2578 (1999).

87. *Id.*

Legal aid lawyers also argue that they, rather than nonlawyers, should see clients because lawyers are better trained to detect less obvious, but equally serious, ancillary legal problems. As described by one of the lawyers interviewed by Herbert Kritzer: “People don’t show up with a nice, simple legal problem in a small, neat box. They usually show up with a legal problem with one or two cans tied on its tail.”<sup>88</sup> According to the argument, only lawyers, with their special training and experience, are able to detect and deflect those troublesome cans. Kritzer’s research provided no support for that argument. He did not find that most of the cases were more complicated than they initially appeared, and he suggested that nonlawyer specialists could “be more cognizant of the multiplicity of attached ‘cans’ than would be a specialist lawyer brought in on a one-shot or intermittent basis.”<sup>89</sup>

Certainly it is true that there are easy, straightforward cases where no specialized knowledge or skills are needed in order to accurately assess the legal problem. Considering only those more complicated cases, the question becomes whether legal aid lawyers have demonstrated that they are more competent than others in identifying the complications. There is evidence that they are not. For example, legal aid attorneys have been criticized for not understanding or identifying the collateral civil consequences of a guilty plea or conviction.<sup>90</sup> Similarly, civil legal aid lawyers have been criticized for not understanding or seeking help to assess the social services needs of a client.<sup>91</sup> What becomes clear is that lawyers can have the same level of difficulty spotting ancillary issues as can nonlawyers, and that the best antidote is an integrated model of services where several kinds of experts are asked to assess the client’s needs.

Why is it that legal aid lawyers, who presumably choose public interest law because of some sense of community service, still hold tightly to the belief that lawyers are better at providing legal services? One can see some interesting antecedents, both historically and academically. Historically, one may look to the Office of Economic Opportunity (“OEO”), the federal office established in 1964 to coordinate federal funding for legal aid.<sup>92</sup>

In considering the means by which it was going to establish and improve legal aid, the OEO determined that one important factor was

88. Kritzer, *supra* note 22, at 196.

89. *Id.*

90. McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 *Clearinghouse Rev.* 56 (2003); see also Tom Perrotta, *Legal Aid Tests New Style of Advocacy in Harlem*, 37 *Clearinghouse Rev.* 519 (2004) (noting the hostility of some legal aid lawyers to the idea of civil-defender collaboration).

91. Ellen Hemley, *Representing the Whole Client*, 36 *Clearinghouse Rev.* 483 (2003).

92. See Cantrell, *A Short History*, *supra* note 75, at 17.

upgrading the qualifications of legal aid lawyers.<sup>93</sup> The OEO wanted to recruit bright, highly-qualified graduates from the elite law schools, and created a fellowship program to support that effort.<sup>94</sup> Under the program, called the Reginald Heber Smith Community Lawyer Fellowship Program, the fellows quickly became known as “Reggies” and were placed throughout the country to help legal aid offices become part of the new national network of poverty advocates.<sup>95</sup> While there are no longer “Reggie” fellows, the “Reggies” continue to be revered among legal aid lawyers and are held as exemplars of what it means to advocate for the poor.<sup>96</sup>

The use of Reggies helped create a sense of legal aid lawyers as specially suited for advocacy on behalf of the poor. Those lawyers were motivated by ideas such as equality or social justice and saw their careers as having a purpose grander than that of making partner in a law firm.<sup>97</sup> They saw their legal skills as the means by which to bring about greater societal change. That sense of the grand power of the law and the desire for great social change also likely fostered a sense that only lawyers had the skills to carry out the resulting strategies. Thus, in an effort to improve the quality of legal aid attorneys, the OEO also fostered the idea that those lawyers are specially qualified as advocates for the poor.

The legal academy has fostered a similar sense of specialness. Regardless of where a student goes to law school, that student becomes a member of an elite group upon entering.<sup>98</sup> Law is not an

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93. See Earl Johnson Jr., *Justice and Reform: The Formative Years of the American Legal Services Program 178-79* (1978).

94. *Id.* at 178-79, 189.

95. *Id.* at 179, 183, 189.

96. See, e.g., Notes from the November 1998 Reunion of Reggies, at <http://nejl.wcl.american.edu/regreunion.html> (last visited Oct. 22, 2004) [hereinafter Notes]. There are also contemporary legal services fellowship programs that are designed to provide opportunities for highly-qualified law graduates to work in the public interest. See, e.g., Equal Justice Works, Equal Justice Works Fellowship, at <http://www.napil.org/> (last visited Oct. 22, 2004); Skadden, Arps, Slate, Meagher & Flom LLP, Skadden Fellowship, at <http://www.skadden.com/Index.cfm?contentID=23> (last visited Oct. 22, 2004); Yale Law Sch., Arthur Liman Public Interest Fellowship, at <http://islandia.law.yale.edu/liman/default.htm> (last visited Oct. 22, 2004).

97. Notes, *supra* note 96. As one Reggie stated,

[a]s Reggies we have a special duty to hold on to the vision and the courage that made us want to be advocates for equal justice, because it is that vision, that strength and that courage that this society must have if we are ever to become a just society.

*Id.*

98. For example, Yale Law School has admitted only about 7% of those who applied over the past three years. See Yale Law Sch., Summary of Yale Law School Applicants for 2001, 2002, 2003, at <http://www.law.yale.edu/outside/html/Admissions/admis-jdoverview.htm>. At the University of Connecticut School of Law, roughly 6% of applicants were enrolled for the 2004-2005 academic year. See Univ. of Conn. School of Law, Class of 2007 Profile, at <http://www.law.uconn.edu/admissions/admsfin/profile.html> (last visited Oct. 27, 2004).

open profession and it screens people out beginning with admission to law school and continuing with passage of a bar examination. The message sent to law students is clear—"not everyone gets to do this, and you are special because you do." Law students regularly accumulate substantial debt for the privilege and must justify that debt by believing that the law will give them special skills by which they might help society, or by giving them special skills by which to make money (with those beliefs not necessarily mutually exclusive). Either way, the law student concludes that there is unique value in going to law school and unique skills gained during the three years.

Law students generally are not required to take, and may not be offered, any courses that compare lawyering skills to other paraprofessional skills. Thus, students receive no information that challenges their sense that the practice of law requires special skills. Further, assuming students are required to take some kind of professional responsibility course, it is highly unlikely that the course will focus much on unauthorized practice of law. Only one of the ABA's fifty-eight model rules mentions UPL.<sup>99</sup> Students conclude their professional responsibility course committed to the ideal of lawyers as holding a special relationship with, and owing special duties to, their clients. As the preamble to the ABA's Model Rules states: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen *having a special responsibility for the quality of justice.*"<sup>100</sup> Even the most public-interest minded law student is likely to finish law school believing she can provide special services to the community—services that a nonlawyer would not also be able to provide.

The legal aid community has periodically challenged itself to reconsider the role of the lawyer in advocating for social change. For example, there have been calls for lawyers to more effectively include their clients and client communities in decision making, or for lawyers to take a more holistic approach to serving their clients.<sup>101</sup> However, the challenges generally consider the ways that lawyers might alter their behaviors rather than urging lawyers to change the structural barriers that increase the kinds of legal advocates available to clients. For example, lawyers should be "rebellious" or they should incorporate into their skills the methods of community organizers.<sup>102</sup>

It is now time for legal aid lawyers to do more than change their own methods of advocacy. It is time for legal aid lawyers to affirmatively and assertively take on UPL restrictions as a substantive

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99. See Model Rules of Prof'l Conduct R. 5.5 (2004).

100. *Id.* at pmbl. 1 (emphasis added).

101. See Cantrell, *A Short History*, *supra* note 75, at 31-35 (summarizing some of the more prominent calls for reform).

102. *Id.*; see also Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. Rev. 443 (2001).

area of law important to their clients. It will take the concerted effort of a notable section of the bar to convince state legislatures that nonlawyers should be permitted to provide legal services. No other group of lawyers has demonstrated any interest in pursuing such an agenda. If legal aid lawyers do not take on this challenge, it is likely to remain solely a topic for academic discourse.