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Reforming American Legal Education and Legal Practice: Rethinking Licensing Structures and the Role of Nonlawyers in Delivering and Financing Legal Services

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These are challenging times for the American bar. 'Crisis' is a term that comes readily to mind for many observers.[1] Yet if, as the cliché goes, crisis creates opportunities, it is by no means clear whether the profession is willing to take advantage of them.

One of the most prominent missed opportunities is the American Bar Association's Commission on Ethics 20/20. In 2009, the ABA's president created the Commission to recommend modifications in the ABA's Model Rules of Professional Conduct and related policies in light of technology and globalisation. In making its assessment, the Commission was to follow three principles: 'protecting the public; preserving the core values of the profession; and maintaining a strong, independent, and self-regulated profession'.[2] As was the case in prior regulatory initiatives, the Commission was constrained by its fundamentally conservative mission—preserve and maintain—and by a ratification process ill suited to innovation or reform.[3] Proposed modifications required approval by the ABA House of Delegates and then by state supreme courts after review by state bar associations. All of these groups are controlled by lawyers or former lawyers who, by training and disposition, tend to resist change.[4] That resistance is particularly intense when the profession's

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1 For legal education, see 'Legal Education Reform' *New York Times*, 25 November 2011; Karen Sloan, 'Educators Debate: Are Law Schools in Crisis?' *National Law Journal*, 7 November 2011; Brian Z Tamanaha, *Failing Law Schools* (University of Chicago Press, 2012). For lawyers, see Steven Harper, *The Lawyer Bubble* (Basic Books, 2013); James E Moliterno, 'Crisis Regulation' [2012] *Michigan State Law Review* 307; Larry E Ribstein, 'The Death of Big Law' [2010] *Wisconsin Law Review* 3.

2 ABA Commission on Ethics 20/20, Introduction and Overview, www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf.

3 See Moliterno (n 1) 344.

4 David Maister, 'The Trouble With Lawyers' *The American Lawyer*, April 2008, 33; Moliterno (n 1) 344. In one survey, fewer than a fifth of law firm leaders described their role as leading innovation and change. 'Law Firm Leadership, 2010: Research on Current Practices and Responsibilities' (2010) 10 *Law Office Management and Administration* 20.

own status and financial interests are at risk.[5] The result of the Ethics Commission's work was a series of relatively minor rule changes.[6] The only major proposal that it considered, nonlawyer investment in law firms, was abandoned. A third of the members of the House of Delegates attempted even to prevent debate on the issue. They supported a resolution that stated, without supporting facts or arguments, that any such nonlawyer involvement was inconsistent with the 'core values' of the legal profession.[7]

That process is emblematic of the obstacles confronting any fundamental reform efforts. From a regulatory standpoint, the bar is in some sense a victim of its own success. In no country has the legal profession been more influential and more effective in protecting its right to regulatory independence. Yet that success, and the structural forces that ensure it, has also shielded the profession from the accountability and innovation that would best serve public interests.

AN ALTERNATIVE APPROACH TO REGULATORY REFORM

What might an alternative approach have looked like? In 2003, the Lord Chancellor of Great Britain charged Sir David Clementi, an accountant and former deputy governor of the Bank of England, with the following task:

- To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector.
- To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified.[8]

That charge was a response to widely perceived problems in the bar's handling of disciplinary complaints and its insulation from competition.[9] Just prior to Clementi's appointment, the Office of Fair Trading had issued a White Paper that was highly critical of the bar's restrictive practices.[10] Clementi's report was just as critical. Its recommendations paved the way

5 Benjamin Barton, 'In Defense of the Status Quo: A Critique of the ABA's Role in the Regulation of the American Legal Profession' (2012) 45 *Suffolk University Law Review* 1009, 1021–2; Deborah L Rhode, *In the Interests of Justice: Reforming the American Legal Profession* (Oxford University Press, 2000) 16.

6 Jack A Guttenberg, 'Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give' [2012] *Michigan State Law Review* 415, 491; James E Moliterno, 'The Future of Legal Education Reform' (2013) 40 *Pepperdine Law Review* 423, 436; Moliterno (n 1) 341.

7 James Podgers, 'Clear Track: Ethics 20/20 Commission Can Now Address Issues of Fee Splitting with Nonlawyers' *ABA Journal*, 20 October 2012, 20; Stephen Gillers, 'How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession' (2013) 20 *Pepperdine Law Review* 365, 399–402.

8 David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report* (2004), 1.

9 John Flood, 'Will there be Fallout from Clementi? The Repercussions for the Legal Profession after the Legal Services Act 2007' [2012] *Michigan State Law Review* 537, 540–2.

10 Office of Fair Trading, *Competition in Professions: Progress Statement* (2002).

for fundamental reforms in the Legal Services Act of 2007. That Act permitted the creation of alternative business structures, in which nonlawyers could have ownership or managerial authority subject to certain constraints.[11]

What is most instructive for comparative purposes are the consumer-oriented goals that Clementi identified for his review, and those that underpinned the subsequent Legal Services Act. Clementi's report identified six objectives for the regulation of legal services:

- maintaining the rule of law;
- access to justice;
- protection and promotion of consumer interests;
- promotion of competition;
- encouragement of a confident, strong and effective legal profession;
- promoting public understanding of the citizen's legal rights.[12]

Consistent with those goals, the Act's provision of alternative business structures was justified on the grounds that consumers would benefit. Advantages included additional choice, greater price and quality competition, more nonlawyer expertise and resources, and increased access and convenience from one-stop shopping and economies of scale.[13] Where alternative business structures had a strong reputation in providing nonlegal services, they would have a strong incentive to maintain that reputation when offering legal assistance.[14]

For those in the United States concerned with issues of access to justice and cost-effective services, there is much to admire in the Legal Services Act reforms and the process that produced them. There is also much to like about the British use of qualified nonlawyer experts to provide routine advice and services. The discussion that follows focuses on two aspects of the American regulatory framework that get in the way of achieving similar advantages. The most fundamental is state courts' assertions of inherent authority to regulate the practice of law and their resistance to nonlawyer involvement in the financing and delivery of legal services as well as in the governance of the legal profession. A related problem involves the highly expensive 'one size fits all' model of legal education imposed by the bar's accreditation process. That has prevented the emergence of a range of legal services professionals who could provide cost-effective services. Instead, the United States suffers from an oversupply of law school graduates for the legal jobs available, at the same time that the public suffers from an undersupply of legal assistance.[15] Bar surveys have

11 Legal Services Act, 2007, c 29, ss 71–111 (UK).

12 Clementi (n 8) 15–17. The Legal Services Act lists 'protecting and promoting the public interest' as its first objective. Legal Services Act, 2007, c 29, s 1 (UK). For discussion, see Laurel S Terry, Steve Mark and Tahlia Gordon, 'Adopting Regulatory Objectives for Legal Profession' (2012) 80 *Fordham Law Review* 2685, 2699.

13 Department for Constitutional Affairs, *The Future of Legal Services: Putting Consumers First* (2005) 40.

14 *Ibid*.

15 Press Release, Association for Career Legal Professionals, 'Law School Grads Face Worst Job Market Yet—Less than Half Find Jobs in Private Practice' (7 June 2012), www.nalp.org/2011selectedfindingsrelease; see also William D Henderson and Rachel M Zahorsky, 'The Law School Bubble: How Long Will it Last if Law Grads Can't Pay Bills?' *ABA Journal*, January 2012, 32, 36; Martha Neil, 'In "Perfect Storm" of Hard-to-Find Jobs and Stagnant Pay, Law Grads Can't Escape Hefty Student Loans' *ABA Journal*, Daily News (6 February 2012).

consistently found that over four-fifths of the legal needs of low-income individuals, and a third of those of middle income individuals, remain unmet.[16] Many small businesses also face difficulty finding lawyers' assistance at prices they can afford.[17] Compared with other relatively affluent nations, the United States ranks poorly in securing access to civil justice.[18]

There are no simple fixes. In the absence of some increased willingness on the part of the bar to address fundamental flaws in its regulatory framework, the United States is likely to lag behind other nations in its capacity to provide cost-effective legal services.

STATE COURTS' INHERENT REGULATORY AUTHORITY

Around the turn of the twentieth century, state courts began asserting that they had inherent and exclusive power to regulate the admission and conduct of lawyers.[19] That authority, rooted in constitutional requirements of separation of powers among the judicial, executive and legislative branches, has foreclosed legislative intervention in key areas, including the scope of the professional monopoly.[20] The problem is compounded by the courts' inaccessibility to lobbying efforts by the public and by their willingness to let the organised bar call 'the major shots and most of the minor ones' on governance issues.[21] Although the inherent powers doctrine has served some salutary purposes in guaranteeing the independence of the profession from political influence, the cost has been substantial. The effect has been to protect the profession from competition and public accountability. As Charles Wolfram has put it, the doctrine 'stands as a powerful barrier shielding the legal profession from any of its critics … The legal profession has in that way both identified and "protected" the interest of clients and the public without permitting them to participate in any way in those processes.'[22] This lack of participation has shielded the bar from disinterested insight into problems in its own regulatory framework.[23] My focus here is on the particular difficulties that the inherent power doctrine poses for issues of nonlawyer competition in the delivery and financing of legal services.

16 See Deborah L Rhode, *Access to Justice* (Oxford University Press, 2004) 3; Deborah L Rhode, 'Access to Justice: An Agenda for Legal Education and Research' (2013) 62 *Journal of Legal Education* 531–2 (suggesting higher figures since the recession).

17 Guttenberg (n 6) 437–8.

18 World Justice Project, *Rule of Law Index* (2012–13) 27.

19 Laurel Rigertas, 'Stratification of the Legal Profession: A Debate in Need of a Public Forum' [2012] *Professional Lawyer* 79, 111. See generally Charles W Wolfram, 'Lawyer Turf and Lawyer Regulation: The Role of the Inherent Powers Doctrine' (1989) 12 *University of Arkansas Little Rock Law Journal* 1.

20 Rigertas (n 19) 112; Charles Wolfram, 'Barriers to Effective Public Participation in the Regulation of the Legal Profession' (1978) 62 *Minnesota Law Review* 619, 636–41.

21 For inaccessibility, see Benjamin Hoorn Barton, 'An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts Legislatures, or the Market?' (2003) 37 *Georgia Law Review* 1167, 1200. For the role of the bar, see Wolfram (n 19) 16.

22 Wolfram (n 19) 17.

23 Gillian K Hadfield, 'Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans' (2011) 37 *Fordham Urban Law Journal* 129, 154.

NONLAWYER PRACTICE

Unlike many other countries, the United States generally bans legal assistance by nonlawyers, regardless of their expertise. In most jurisdictions, such unauthorised practice of law is a misdemeanour, and violators are also subject to civil sanctions.[24] Although these prohibitions are frequently violated and only intermittently and inconsistently enforced, the ban on personalised assistance stands as a powerful barrier to low-cost providers. So, for example, form-processing services may provide clerical help, but may not answer questions about where and when papers must be filed or even correct obvious errors.[25] A few courts have even held that online document assistance constitutes the unauthorised practice of law because the services go beyond clerical support.[26] Only a few states have considered or implemented licensing systems that enable nonlawyers to provide limited assistance in specified fields. However, some of these systems explicitly exclude legal advice.[27]

Legislative efforts to expand the contexts in which nonlawyers may act have generally proven unsuccessful, except with respect to administrative agency proceedings. There, some, but not all, courts have allowed nonlawyer representation on the theory either that the individuals were not giving advice and therefore not practising law, or that the legislative authorisation conformed to the judiciary's own assessment that public policy justified nonlawyer practice.[28] For example, the Colorado Supreme Court upheld a system enabling nonlawyers to represent claimants in unemployment proceedings on the ground that lay representation had been accepted by the public for 50 years and 'poses no threat to the People of the State of Colorado. Nor is it interfering with the proper administration of justice. No evidence was presented to the contrary.'[29] On similar reasoning, federal agencies have permitted nonlawyers to appear in representative capacities in many administrative proceedings, and the United States Code explicitly grants agencies that authority.[30] Efforts

24 American Bar Association, State Definitions of the Practice of Law, www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf; Quintin Johnstone, 'Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and their Resolution' (2003) 39 *Willamette Law Review* 795, 806–7.

25 *Fifteenth Judicial District Unified Bar Association v Glasgow*, 1999 WL 1128847 (Tennessee Appellate 1999); *Florida Bar v Brumbaugh*, 355 So 2d 1186 (Fla 1978).

26 *In re Reynoso*, 477 F 3d 1117 (9th Cir 2007); *Committee v Parsons Technology*, 179 F 3d 956 (5th Cir 1999); *Janson v LegalZoom.com*, No 2: 10-Cv-04128 at 20–21 (District Missouri 2011). The Texas ruling was overturned by a legislative exemption and the Missouri case was subsequently settled without banning the services altogether. For other discussion, see Tom McNichol, 'Is LegalZoom's Gain Your Loss?' *California Lawyer*, September 2010, 20.

27 For a description of the California, Arizona and Washington systems which prevent advice, see Laurel A Rigertas, 'Stratification of the Legal Profession: A Debate in Need of a Public Forum' [2012] *Journal of the Professional Lawyer* 79, 114–15, 117–18. For expansion of the Washington system that will allow limited license legal technicians and for proposals in California and New York, see Don J DeBenedictis, 'State Bar to Weigh Licensing Nonlawyers' *San Francisco Daily Journal*, 11 April 2013.

28 For a decision finding no practice of law, see *Perto v Board of Review*, 654 NE 2d 232 (Illinois Court of Appeals 1995). For decisions carving out a public policy exception, see *Unauthorised Practice of Law Committee of Supreme Court of Colorado v Employers Unity, Inc*, 716 P 2d 460, 463 (Colorado 1986); *Hunt v Maricopa County Employees Merit System Commission*, 619 P 2d 1036, 1038–9 (Arizona 1980).

29 *Supreme Court of Colorado v Employers Unity* (n 28) 463.

30 5 USC 555(b). See Rigertas (n 19) 121.

to challenge that federal authority have failed, but some courts have resisted state legislative efforts to authorise nonlawyer involvement in state administrative proceedings.[31]

Yet the demand for nonlawyer practice has considerably outstripped the bar's capacity to prevent it. As the chair of Tennessee's unauthorised practice committee put it,

> In recent years, it seems every Tom, Dick, and Harriet have gotten into … businesses that either constitute the practice of law or the law business or that are so close, the border is invisible. Tax consultants, document production 'mills' such as 'We the People,' and numerous title insurance and closing companies have sprung up offering services or advice that cannot be differentiated from the services offered by licensed lawyers.[32]

Within organisations, nonlawyers play an increasingly important role in areas such as contracts and compliance, often with no real supervision by lawyers.[33]

Despite unauthorised practice complaints, document preparation services continue to thrive. For example, LegalZoom provides legal forms and simple instructions for a variety of legal needs, including business formation, employment agreements, tax forms, trademark registration, copyright registration, and real estate leases.[34] In 2012, the company filed a registration with the US Securities and Exchange Commission in anticipation of going public.[35] According to that statement, the company has served more than two million customers since its founding in 2002, and nine out of ten surveyed customers reported that they would recommend LegalZoom to their friends and family.[36]

Although bar leaders repeatedly insist that broad prohibitions on unauthorised practice serve the public's interest, support for that claim is notable for its absence.[37] Outside the context of immigration, it is rare for customers to assert injury or for suits to be filed by consumer protection agencies.[38] The vast majority of UPL lawsuits filed against cyber lawyer products are brought by lawyers or unauthorised practice committees and generally settle without examples of harm.[39] In other nations that permit nonlawyers to provide legal advice and assist with routine documents, the evidence available does not suggest that their performance has been inadequate.[40] In a study comparing outcomes for low income clients in the United Kingdom on a variety of matters such as welfare benefits, housing

31 For resistance, see *Turner v Kentucky Br Association*, 980 SW 560, 563 (Kentucky 1998).

32 William C Bevender, 'Treating the UPL Epidemic' [2006] *Tennessee Bar Journal* (October) 26.

33 Thomas Morgan, 'Calling Law a Profession Only Confuses Thinking about the Challenges Lawyers Face' (2011) 9 *University of Saint Thomas Law Journal* 542, 564; Susan Hackett, 'Inside Out: An Examination of Demographic Trends in the In-House Profession' (2002) 44 *Arizona Law Review* 609, 616.

34 Our Products and Services, LegalZoom, www.legalzoom.com/products-and-services.html.

35 LegalZoom.com, Inc Registration Statement (Form S-1) 10 May 2012.

36 *Ibid*.

37 For bar claims, see Nicholas J Wallwork, 'UPL Harms Public, Lawyers and Consumer Confidence' *Arizona Attorney,* February 2002.

38 Rigertas (n 19) 124; Evidence of harm from internet legal provision of assistance is sparse. Mathew Rotenberg, 'Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources' (2012) 97 *Minnesota Law Review* 709, 725.

39 Rotenberg, *ibid*, 722.

40 Rhode, *Access to Justice* (n 16) 89; Guttenberg (n 6) 464; Julian Lonbay, 'Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union' (2010) 33 *Fordham International Law Journal* 1629, 1636 (discussing Swedish legal advice providers).

and employment, nonlawyers generally outperformed lawyers in terms of concrete results and client satisfaction.[41] After reviewing their own and other empirical studies, the authors concluded that 'it is specialization, not professional status, which appears to be the best predictor of quality'.[42] In Ontario, which allows licensed paralegals to represent individuals in minor court cases and administrative tribunal proceedings, a five-year review reported 'solid levels of [public] satisfaction with the services received'.[43] In the United States, studies of lay specialists who provide legal representation in bankruptcy and administrative agency hearings find that they generally perform as well or better than attorneys. Extensive formal training is less critical than daily experience for effective advocacy.[44]

Almost all of the scholarly experts and commissions that have studied the issue have recommended increased opportunities for such assistance. Until recently, almost all judges and bar associations had ignored those recommendations.[45] There are, however, some signs of change. The ready access to online documents has fed desires for self-representation and for low-cost assistance in routine matters. New York and California are considering licensing structures, and Washington has implemented one for certain specialities.[46] To the extent that the goal is to protect clients from incompetence, rather than lawyers from competition, regulation, not prohibition, of lay specialists makes sense.

The need for such a regulatory system is particularly apparent in the area of immigration, a field characterised by both pervasive fraud and pervasive unmet needs.[47] Individuals holding themselves out as notaries and immigration consultants have preyed on the ignorance of undocumented consumers who cannot afford attorneys. Many of these consultants capitalise on the status of *notarios publicos* in some Latin American countries, where these legal professionals enjoy formal legal training and authority to provide legal assistance.[48] Undocumented residents who are victims of 'notario fraud' are often unwilling to approach the authorities to complain. The situation would benefit from a licensing structure similar to those in Australia, Canada and the United Kingdom, which allow for licensed nonlawyer experts to provide immigration-related assistance.[49] Although the United States allows

41 Richard Moorhead, Alan Paterson and Avrom Sherr, 'Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales' (2003) 37 *Law and Society Review* 765, 785–7. For discussion, see Deborah J Cantrell, 'The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers' (2004) 73 *Fordham Law Review* 883, 888–90.

42 Richard Moorhead, Alan Paterson and Avrom Sherr, 'Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales' (2003) 37(4) *Law & Society Review* 765, 795.

43 David B Morris, *Report to the Attorney General of Ontario* (November 2012), 12.

44 Herbert Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* (University of Michigan Press, 1998) 76, 108, 148, 190, 201.

45 Deborah L Rhode, 'Whatever Happened to Access to Justice?' (2009) 42 *Loyola Law Review* 869, 885–6.

46 See DeBenedictis (n 27) 1.

47 For fraud, see Careen Shannon, 'Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud' (2009) 78 *Fordham Law Review* 577, 589; Jessica Wesberg and Bridget O'Shea, 'Fake Lawyers and Notaries Prey on Immigrants' *New York Times*, 23 October 2011, A25. For unmet need, see Erin B Corcoran, 'Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants' (2012) 115 *West Virginia Law Review* 643, 654–5.

48 Ann E Langford, 'What's In a Name? Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population' (2004) 7 *Harvard Latino Law Review* 115, 119–20.

49 For the role of registered migration agents in Australia, see Information for Consumers, Australian Government Office of the Migration Agents Registration Authority, www.maralgov.au/using-an-agent/using-a-registered-

accredited nonlawyers to represent individuals in immigration appeals, it permits only representatives who work for nonprofit organisations and who accept only nominal fees for their efforts.[50] An expanded accreditation and oversight system to allow qualified lay experts to charge reasonable fees for assistance would go a long way towards expanding access to justice for a population in great need of assistance.[51]

Similar regulatory systems could be developed in other contexts to allow personalised assistance on routine matters. Various consumer protections could be required concerning qualifications, disclaimers, malpractice liability and insurance, and so forth.[52] Consistent with their inherent powers, courts could oversee the development of such systems or could approve them as consistent with the public interest. A number of courts have already taken such approaches in evaluating unauthorised practice claims. So, for example, after considering factors such as cost, availability of services and consumer convenience, the Washington State Supreme Court held that it was in the public interest for licensed real estate brokers to fill in standard form agreements.[53] Such a consumer-oriented approach would make for a more socially defensible regulatory structure than the conventional ban on nonlawyer practice irrespective of its quality and cost-effectiveness.

NONLAWYER INVESTMENT

A second area where the involvement of nonlawyers makes increasing sense is the financing of legal services. Nonlawyer ownership of law firms is permitted in some form in Australia, England, Wales, Scotland, Germany, the Netherlands, New Zealand and parts of Canada.[54] However, as noted earlier, the Ethics 20/20 Commission tabled a modest proposal for similar nonlawyer investment in the United States. The proposal would have required that firms engage only in legal practice, that nonlawyer investment be capped at 25 per cent, that nonlawyers be actively engaged in the enterprise, and that they pass a fit-to-own test similar to the character and fitness test required for entrance to the bar.[55]

migration-agent. For the role of authorised immigration consultants in Canada, see 'Use an authorised immigration representative', Citizenship and Immigration Canada, www.cic.gc.ca/english/information/representative/rep-who.asp. For the role of regulated immigration advisors in the United Kingdom, see *Code of Standards: The Commissioner's Rules*, Office of the Immigration Services Commissioner, http://oisc.homeoffice.gov.uk/servefile.aspx?docid=6.

50 See 8 Code of Federal Regulation, s 1292.1 (2012); Shannon (n 47) 602–3.

51 See Emily A Unger, 'Solving Immigration Consultant Fraud through Expanded Federal Accreditation' (2011) 29 *Law and Inequality Law Review* 425; Careen Shannon, 'To License or not to License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers' (2001) 33 *Cardozo Law Review* 437.

52 Steven Gillers, 'How to Make Rules for Lawyers' (2013) 40 *Pepperdine Law Review* 365, 417.

53 *Culum v Heritage House Realtors*, 694 P 2d 630 (Washington 1985).

54 ABA Commission on Ethics 20/0, *For Comment, Issues Paper Concerning Alternative Business Structures* (5 April 2011), 7–17.

55 *Ibid*, 7–19.

Opposition to such investment rests on three concerns. The first is that shareholder preoccupation with profits would pose a threat to professional independence.[56] The American Bar Association's Model Rule 5.4, which prohibits sharing fees with nonlawyers, justifies the prohibition as necessary 'to protect the lawyer's professional independence of judgment'.[57] According to the reporter for the Ethics 20/20 Commission, nonlawyers who are not subject to the bar's code of ethics might push lawyers 'to chase the dollar rather than abid[e] by the rules of professional conduct'.[58] Symbolic and status concerns are also at stake. According to some commentators, nonlawyer investment would mean 'diluting the essence of what it means to be a lawyer'.[59] If Wal-Mart could own law firms, Lawrence Fox predicts that 'it will be the end of the profession … We will become just another set of service providers.'[60]

Other objections involve confidentiality and conflicts of interest. United States corporations are generally required to report income, major clients and details of work to equity investors.[61] Yet sharing such information would constitute a violation of lawyers' duties of confidentiality and a waiver of the attorney-client privilege. A further concern is the conflicts of interest that could arise from strategic equity purchases. A large investor could choose to purchase shares in multiple firms in order to claim a conflict of interest when a competitor or adversary attempted to hire that firm.[62]

Missing from these arguments is any evidence of such problems in the jurisdictions that permit nonlawyer ownership. The ABA's Ethics 20/20 Commission reviewed the experience of the District of Columbia, which has permitted nonlawyer ownership interests in law firms for over two decades, and found no record of disciplinary concerns.[63] Nor did it report any ethical difficulties in Australia or England, which have more recently permitted nonlawyer investment. Both countries require appointment of a legal director or head of practice to ensure compliance with ethical obligations.[64] Both countries also subject alternative business structures to the same ethical rules as those governing legal professionals, including confidentiality, and nonlawyer owners are obligated not to cause a lawyer to breach any

56 Katherine H Reardon, 'It's Not Your Business! A Critique of the UK Legal Services Act of 2007 and Why Nonlawyers Should Not Own or Manage Law Firms in the United States' (2012) 40 *Syracuse Journal of International Law and Commerce* 155; New York State Bar Association, *Report of the Task Force on Nonlawyer Ownership* (17 November 2012), 73–74.

57 ABA Model Rules of Professional Conduct, Rule 5.4, Comment.

58 John Eligon, 'Selling Pieces of Law Firms' *New York Times*, 29 October 2011, B1 (quoting Andrew Perlman, reporter for Ethics 20/20 Commission).

59 Jennifer Smith, 'Law Firms Split over Nonlawyer Investors' *Wall Street Journal*, 2 April 2012, B1 (quoting David J Carr). For an overview of these objections, see Ted Schneyer, 'Professionalism as Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities' (2012) 40 *Fordham Urban Law Journal* 75, 130–7.

60 'Trio of Federal Suits Challenge Ethics Rule that Stops Private Equity Investment in Firms' (2011) 27 *ABA/BNA Lawyers' Manual on Professional Conduct* 382 (quoting Lawrence Fox).

61 Joanne Stagg-Taylor, 'Lawyers' Business: Conflicts of Duties Arising from Lawyers' Business Models' (2011) 14 *Legal Ethics* 173, 183.

62 *Ibid*, 185; Reardon (n 56) 179.

63 ABA Commission on Ethics 20/20, *Discussion Paper on Alternative Practice Structures* (2 December 2011), 4.

64 ABA Commission on Ethics 20/20, *Issues Paper concerning Alternative Business Structures* (5 April 2011), 15.

professional duties.[65] Slater and Gordon, the Australian law firm that was the first in the world to become a publicly traded company, made clear in its prospectus that obligations to courts and clients take precedence over the interests of shareholders.[66] According to its executive director, going public has not only preserved professional independence, it has given lawyers more distance from business pressures than in traditional partnerships.[67] As other commentators have pointed out, there are already many American contexts in which nonlawyers are involved in a managerial capacity where strategies have emerged to preserve professional independence and confidentiality: government agencies, insurance defence, group legal service plans, and in-house corporate legal departments.[68]

Also missing from opponents' arguments is adequate consideration of the benefits that might follow from the infusion of capital and talent. Equity financing holds a number of advantages over traditional financing approaches, which rely on the capital contributions of partners or outside borrowing. As law professor Milton Regan notes, a 'partnership's capital base is limited to the wealth of its partners, and its assets are mobile'.[69] In an era of increasing lateral movement, partners who are uncertain about their own or their colleagues' future plans may be reluctant to invest in firms' long-term needs. These partners may be equally wary of assuming loan obligations that will leave them liable for firm debt if others depart. Excessive reliance on loans is one of the precipitating causes of law firm dissolution.[70] At the same time, the demand for alternative sources of capital is growing in light of globalisation, nationalisation, and technological advances. The need to service clients in multiple locations has fuelled expansion that depends on additional resources. Developing information technology to assist in diagnosing legal issues, providing basic assistance and generating documents is also highly capital intensive.[71]

Such initiatives would benefit from collaboration with professionals in marketing, finance systems, engineering, project management, and similar occupations.[72] Research on innovation finds that it most often comes through interactions with those in related fields.[73] As Richard Susskind notes, just as librarians did not create Google, lawyers may not create tomorrow's breakthroughs in the delivery of legal services.[74] The desire to attract and retain outside investors may also 'tend to impose financial … discipline on law firms whose members have not experienced serious pressure to exercise it'.[75]

65 *Ibid*, 9, 115.

66 Andrew Grech and Kirsten Morrison, 'Slater & Gordon: The Listing Experience' (2009) 22 *Georgetown Journal of Legal Ethics* 535, 555.

67 Eligon (n 58) B1 (quoting Ken Fowlie).

68 Guttenberg (n 6) 473–4; Schneyer (n 59).

69 Milton C Regan, Jr, 'Lawyers, Symbols and Money: Outside Investment in Law Firms' (2008) 27 *Pennsylvania State International Law Review* 407, 422.

70 See Tyler Cobb, 'Have your Cake and Eat it Too: Appropriately Harnessing the Advantages of Nonlawyer Ownership' (2012) 54 *Arizona Law Review* 765, 777; Deborah L Rhode, *Lawyers as Leaders* (Oxford University Press, 2013) 167–72.

71 Rotenberg (n 38) 729, 738–41.

72 William D Henderson and Rachel M Zahorsky, 'Paradigm Shift' [2011] *ABA Journal* 40, 45–47.

73 Steven Johnson, *Where Good Ideas Come From: The Natural History of Innovation* (Riverhead Books, 2010) 41, 58, 166, 246.

74 Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, 2008) 254.

75 Thomas D Morgan, *The Vanishing American Lawyer* (Oxford University Press, 2010) 170.

The need for outside capital and expertise is particularly acute in the marketing of routine assistance. The prospect of legal services at Wal-Mart prices, however distasteful to lawyers, is likely to be appealing to many consumers. The chain already offers variety of professional services, including medical, dental and eye care, and law would be a logical next step. A similar evolution has already begun in England. WH Smith, a London-based chain, offers legal advice on divorce, wills, real estate transactions, and basic contracts through legal kiosks run in partnership with QualitySolicitors.[76] Co-operative Legal Services (CLS), an offshoot of a supermarket, offers legal assistance often packaged with other related services.[77] As Renee Knake puts it, outside investment may 'democratise' the delivery of legal services in ways that dramatically expand access to justice for underserved consumers.[78] That is the claim underlying a recent lawsuit challenging the ban on outside investment. Jacoby & Meyers needs external capital to finance its efforts to realise economies of scale in delivering affordable routine assistance.[79]

In many ways, the debate over nonlawyer investment parallels the debate over multidisciplinary partnerships, an innovation that the American bar has also resisted. In 2000, the ABA defeated a modest proposal that would have permitted lawyer-controlled multidisciplinary practices (MDPs), citing many of the same concerns about professional independence, confidentiality and conflicts of interest that underpin opposition to nonlawyer financing. In both cases, the arguments proceeded without tangible evidence of harms, and without adequate consideration of the benefits of innovation, competition, efficiency and convenience that would accompany new practice forms.[80] As commentators note, the United States is already experiencing a form of de facto MDPs, in which lawyers work alongside other professionals such as accountants, medical professionals and financial consultants in the integrated delivery of services.[81] And a growing number of other countries permit the bar to recognise in form what is true in fact: that many clients see advantages in 'one-stop shopping', and that it is possible to regulate ethical conduct without foreclosing consumer choice. The current controversy over nonlawyer finance offers an occasion to revisit the bar's historic opposition to multidisciplinary practice in light of actual experience.

LEGAL EDUCATION AND LICENSING STRUCTURES

Debates about the relationship between lawyers and nonlawyers raise broader issues about the structure of legal practice. Are there alternative ways of licensing and educating legal service providers that might better serve the public interest? This is an opportune time to consider these questions, given the difficult climate in which law schools are operating.

76 Renee Newman Knake, 'Democratizing the Delivery of Legal Services' (2012) 73 *Ohio State Law Journal* 1, 7.

77 Flood (n 9) 557.

78 Knake (n 76).

79 *Jacoby & Meyers, LLP v Presiding Justices*, 488 F App'x 526 (2d Cir 2012) (No 12-1377).

80 See Rhode (n 5) 138–9. For an overview of the debate see Laurel Terry, 'A Primer on MDPs: Should the "No" Rule Become a New Rule?' (1999) 72 *Temple Law Review* 869.

81 Rees M Hawkins, 'Not "If" but "When" and "How": A Look at Existing De Facto Multidisciplinary Practices and What they Can Teach Us about the Ongoing Debate' (2005) 83 *North Carolina Law Review* 481, 506; Guttenberg (n 6) 478.

Rising costs, declining applications, reduced job placements and disaffected students have attracted widespread attention.[82] The American Bar Association has established a Task Force on the Future of Legal Education, and as one of its members noted, 'There is almost universal agreement that the current system is broken'.[83]

One cluster of problems involves expense. The Council of the American Bar Association Section of Legal Education and Admission to the Bar prescribes a vast range of costly requirements as a condition of accrediting law schools, including three years of postgraduate study; job security for faculty; an extensive library and physical plant; and limits on the number of courses that can be taught online or by adjuncts.[84] A further influence on costs is the annual ranking of schools by *US News and World Reports*. One of the easiest ways for schools to boost their scores is to spend more in areas rewarded by the *US News* formula. Two examples are expenditures per student and faculty student ratios, which have risen dramatically in the decades since the rankings came into effect.[85] Schools also can rank higher if they spend more on faculty research support and on glitzy events and publications that enhance the school's reputation. Reputational surveys, which count for 40 per cent of each school's position, are a particularly inadequate proxy for educational quality.[86] Few of those surveyed have enough systematic knowledge about a sufficient number of institutions to make accurate comparative judgments. Most participants rely on word-of-mouth reputation and prior rankings, which makes the process self-perpetuating. Moreover, the ranking system excludes many factors that materially affect a student's educational experience, such as access to practical courses, *pro bono* opportunities, and a diverse faculty and student body. This is not to suggest that rankings are entirely without value. Some characteristics can be objectively assessed, and schools should be accountable for their relative performance. But the current system distorts spending priorities. *US News* assigns arbitrary weights to incomplete measures, uses flawed reputational surveys as proxies for quality, and forces schools to compete in an academic arms race that inflates expenses.

The combination of rigid accreditation requirements and perverse ranking incentives has driven costs sharply upward. Over the last three decades, the price of a legal education has increased approximately three times faster than household income.[87] Law school

82 Applications are headed for a 30-year low: see Ethan Bronner, 'Law Schools' Applications Fall as Costs Rise and Jobs are Cut' *New York Times*, 31 January 2013, A1; Tamanaha (n 1) 126–8, 160–6 (declining applications). For jobs, see text at note 89. For student disaffection, see text following note 89. This discussion of legal education draws on Deborah L Rhode, 'Legal Education: Rethinking the Problem, Reimagining the Reforms' (2013) 40 *Pepperdine Law Review* 347.

83 Ethan Bronner, 'A Call for Drastic Changes in Educating New Lawyers' *New York Times*, 11 February 2013, A11 (quoting Thomas Lyons).

84 ABA Standards and Rules of Procedure for Approval of Law Schools, www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf.

85 Debra Cassens Weiss, 'Study Partly Blames Higher Law School Tuition on 40 Percent Leap in Faculty Size' *ABA Journal*, 10 March 2010, www.abajournal.com/news/article/study_blames_higher_law_school_tuition_on_40_leap_in_faculty_size.

86 For the rankings methodology, see Robert Morse and Sam Flanagan, 'Law School Rankings Methodology', 14 March 2011, www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/03/11/methodology-best-law-schools-rankings.

87 Bill Henderson, 'Law School 4.0: Are Law Schools Relevant to the Future of Law?' *Empirical Legal Studies*, 2 July 2009, www.elsblog.org/the_empirical_legal_studi/2009/07/are-law-schools-part-of-problem-or-the-solution.html.

graduates have an average debt above $100,000.[88] Nationally, only 55 per cent of recent graduates had full-time long-term jobs for which a law degree was preferred, and their salaries were often inadequate to pay off loan obligations.[89] The sense of betrayal among those with crushing debt burdens is apparent in blogs running under titles such as 'Shilling Me Softly', 'Jobless Juris Doctor', and 'Exposing the Law School Scam'.

A related problem is that, unlike systems of accreditation for higher education generally, law school standards do not seek to enhance cost-effectiveness, or to permit diversity in light of schools' particular mission. Rather, they impose a 'one size fits all' structure that stifles innovation and leaves many students both underprepared and overprepared.[90] Graduates are often overqualified to offer many forms of routine assistance at affordable cost, and underqualified in practical and interdisciplinary skills. Accreditation structures have failed to recognise in form what is true in fact. Legal practice is increasingly specialised, and it makes little sense to require the same training for a Wall Street securities lawyer and a small town family practitioner. Three years in law school and passage of a bar exam are neither necessary nor sufficient to guarantee proficiency in many areas where routine needs are greatest, such as uncontested divorces, landlord-tenant matters, immigration and bankruptcy. The diversity in America's legal demands argues for greater diversity in educational structures.

A related problem is insufficient attention to practical skills. Although most law schools have responded to this longstanding criticism with expanded clinical offerings and related initiatives, these remain at the margins of the curriculum.[91] Only three per cent of schools require clinical training, and a majority of students graduate without it.[92] These students often lack other opportunities to develop an understanding of how law functions, or fails to function, for the have-nots.[93] Schools are similarly weak in non-clinical courses that integrate experiential approaches and address practice-oriented topics, such as problem solving, marketing, practice and project management, interpersonal dynamics, organisational behaviour, and information technology.[94] In one survey, close to two-thirds of students and 90 per cent of lawyers felt that law school did not teach the practical skills necessary to succeed in today's economy.[95]

88 Brian Z Tamanaha, 'How to Make Law School Affordable' *New York Times*, 31 May 2012, A23.

89 Joe Palazzolo, 'Law Grads Face Brutal Job Market' *Wall Street Journal*, 26 June 2012, A1, A (citing figures for the class of 2011). The median salary for a 2011 graduate was $60,000. Rick Schmitt, 'Price and Perils of JD: Is Law School Worth It?' (March 2013) *Washington Lawyer* 22, 26.

90 Nancy B Rapoport, 'Eating our Cake and Having it Too: Why Real Change is So Difficult in Law Schools' (2006) 81 *Indiana Law Journal* 359, 366.

91 For new initiatives, see Patrick G Lee, 'Law Schools Get Practical' *Wall Street Journal*, 11 July 2011, B5. For their marginalisation, see David Segal, 'What they Don't Teach Law Students: Lawyering' *New York Times*, 20 November 2011, A1; Karen Sloan, 'Stuck in the Past' *National Law Journal*, 16 January 2012, A1 (quoting Susan Hackett's dismissal of initiatives as 'tweaking around the edges').

92 Segal (n 91) A1.

93 For the marginalisation of concerns about access to justice, see Deborah L Rhode, 'Access to Justice: An Agenda for Legal Education and Research' (2013) 62 *Journal of Legal Education* 531.

94 Jane Porter, 'Lawyers Often Lack the Skills Needed to Draw, Keep Clients' *Wall Street Journal*, 20 May 2009, B5; William Hornsby, 'Challenging the Academy to a Dual (Perspective): The Need to Embrace Lawyering for Personal Legal Services' (2011) 70 *Maryland Law Review* 420, 437.

95 Lexis-Nexis, *State of the Legal Industry Survey* 7 (2009).

While this is not the occasion for a detailed blueprint of professional reform, its general direction should be clear. Cutting costs would become far easier if the influence of the *US News and World Report* ranking system were challenged and accreditation requirements were significantly curtailed. Law schools could work together with other bar organisations to create an evaluation structure that did not use expenditures as a proxy for quality, and that valued other matters affecting the educational experience, such as the availability of skills training. Instead of imposing the same requirements on all schools, accreditation authorities could take account of different institutional missions and priorities. Uniform standards for matters such as facilities, adjunct teaching, distance learning and faculty research support could be eliminated.[96] Schools could one, two and three-year degree programs, and states could license graduates of one-year programs to offer routine legal services. Some schools could become more affordable by substituting a third year of apprenticeship or admitting talented students after three years of college.[97] Institutions could vary in the specialities they offered, in their reliance on adjuncts and online courses, and in the relative importance they attached to practical skills and legal scholarship.

Given the increased innovation and competition available under such a system, there is no empirical basis for believing that these changes would significantly impair the competence of graduates.[98] Opening the legal academy to greater rivalry among different models is likely to produce a better educational experience. Law schools would face greater pressure to demonstrate, not simply assert, their cost-effectiveness. Some schools might fail, which would help bring the number of graduates into closer alignment with the number of jobs available for entry-level candidates. So too, the availability of shorter, less expensive training with a practical focus could increase the number of providers for low and middle-income consumers now priced out of the market for legal assistance.

THE POLITICS OF REFORM

Achieving change along any of the dimensions this article has identified poses no small challenge. Because 50 separate state supreme courts have final authority over the regulation of legal practice, and have traditionally deferred to the organised bar in exercising that authority, the process of reform is much more cumbersome than in other nations. There is, moreover, no organised group of consumers that can come close to matching the influence of state and national bar associations. Unlike doctors, whose monopoly on routine services eroded in the face of pressure from insurance companies and governmental agencies that subsidised medical assistance, lawyers have faced no comparable pressures for cost effectiveness.

96 For a similar proposal, see Tamanaha (n 1) 173.

97 Tamanaha (n 1) 173; Richard A Matasar, 'The Viability of the Law Degree: Cost, Value, and Intrinsic Worth' (2011) 96 *Iowa Law Review* 1579, 1618.

98 For challenges to the necessity of three years of law school, see Richard Posner, 'Let Employers Insist if Three Years of Law School is Necessary' *San Francisco Daily Journal*, 15 December 1999, A4; Mitu Gulati, Richard Sander and Robert Sockloskie, 'The Happy Charade: An Empirical Examination of the Third Year of Law School' (2001) 51 *Journal of Legal Education* 235.

Yet at no time in recent history have the circumstances been better for pushing for fundamental change. The perceived crisis in legal education, the overwhelming level of unmet legal needs, and the successful examples from other nations all argue for rethinking American systems for delivering legal services. It is a hopeful sign that the ABA's Task Force on the Future of Legal Education has placed all options on the table, including consideration of shorter programs and licensing structures for nonlawyer providers. [99]Another promising sign is the willingness of some state courts to take the initiative regarding such licensing structures. Washington has authorised legal technicians in specified practice areas and New York's Task Force to Expand Access to Civil Legal Services has recommended a pilot project to allow trained nonlawyer advocates in certain practice contexts.[100] An alternative reform strategy is for state legislatures to establish licensing systems with the expectation that state courts will find that such systems serve the public interest. Litigation challenging the bar's monopoly over routine advice and financing of legal services is a further option.[101] It may even be possible to convince some bar committees on professional responsibility to follow the lead of the committee for the New York City Bar Association. It recommended authorisation of nonlawyers as courtroom aides and legal technicians as a way of reducing the justice gap between litigants who can afford attorneys and those who cannot.[102]

The premise underlying the courts' assertion of inherent authority to regulate the practice of law and the profession's authority over the accreditation of law schools is that both serve societal interests. To make good on that premise, the profession needs to rethink the role of nonlawyers in the financing and delivery of legal services. It is a shameful irony that the nation with one of the world's highest concentrations of lawyers has done such a poor job of making civil legal assistance broadly available. Greater involvement of nonlawyers is a crucial step in enhancing access to justice and the legitimacy of the bar's claim to regulate itself in the public rather than the profession's interest.

99 ABA Task Force on the Future of Legal Education, Draft Report 23 (2013).

100 Washington Supreme Court Admission to Practice Rule 28, www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf; Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York (November 2010), www.nycourts.gov/ip/access-civil-legal-services.

101 Deborah L Rhode, 'Policing the Profession Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions' (1981) 34 *Stanford Law Review* 1, 62–96; *Jacoby and Meyers LLP v Presiding Justices* (n 79).

102 New York City Bar Association, Committee on Professional Responsibility, *Narrowing the 'Justice Gap': Roles for Nonlawyer Practitioners* (June 2013).