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Toward a Unified Theory of Professional Regulation

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TOWARD A UNIFIED THEORY
OF PROFESSIONAL REGULATION

*Andrew M. Perlman**

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I. INTRODUCTION

In recent years, the legal profession has addressed a number of controversial issues relating to its own structure. In 1999, the American Bar Association (ABA) considered and rejected a proposal that, if adopted by state bars, would have lifted restrictions on multidisciplinary practices (MDPs).¹ These MDPs would have enabled lawyers to partner and share fees with non-lawyers, such as accountants and consultants, and would have profoundly affected the nature of the legal profession.² Even more recently, the ABA adopted amendments to the model rules regarding multijurisdictional practice (MJP), which govern the extent to which lawyers may practice in states where they are not licensed.³ These changes also have the potential to shape in significant ways how attorneys practice law in an increasingly national and global legal marketplace. Rules regarding a lawyer's solicitation of clients, which have undergone numerous revisions in the last twenty-five years,⁴ offer yet another

1. See generally COMM'N ON MULTIDISCIPLINARY PRACTICE, A.B.A., REPORT TO THE HOUSE OF DELEGATES (1999) [hereinafter COMM'N ON MULTIDISCIPLINARY PRACTICE].

2. See *id.* at 1; see generally John B. Attanasio, *The Brave New World of Multidisciplinary Practice: Forward*, 50 J. LEGAL EDUC. 469, 471-72 (2000); *Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1083 (2000); Symposium, *Multidisciplinary Practice*, 36 WAKE FOREST L. REV. 1 (2001); *Multidisciplinary Practice Symposium*, 32 LOY. U. CHI. L.J. 543 (2001).

3. See REGULATION OF LAWYERS: STATUTES AND STANDARDS 327 (Stephen Gillers & Roy D. Simon eds., 2003); see also COMM'N ON MULTIJURISDICTIONAL PRACTICE, A.B.A., REPORT OF THE COMM'N ON MULTIJURISDICTIONAL PRACTICE 6 (2002) [hereinafter COMM'N ON MULTIJURISDICTIONAL PRACTICE] (recommending the later adopted amendments).

4. The United States Supreme Court has issued a series of opinions since 1977 that have transformed this area of law. See generally *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990); *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

example of regulations that impact how attorneys engage in the business of practicing law. In short, the bar has considered an increasing number of issues that have the potential to influence fundamental features of the legal profession.

This Article contends that, although ethics scholars have developed a rich set of theories to explain how lawyers should represent individual clients, these ethicists have not explained in sufficient detail how their theories should apply to regulations governing the profession's structure, including rules relating to MDPs, MJP, and lawyer advertising. Ethicists, in other words, have applied their theories to regulations—referred to here as representational rules—that govern how lawyers represent their clients, such as the duty of confidentiality or rules against the presentation of perjured testimony.⁵ But theorists have not described the implications of their theories for a second, and quite distinct, category of professional regulation: rules relating to the structure of the legal profession itself.

At first glance, the attention to representational rules appears understandable given the focus of standard ethics theories. These theories generally fall into two categories: the dominant view and its various critics. The dominant view posits (roughly) that attorneys should pursue all lawful strategies in order to achieve clients' objectives, even if those strategies produce immoral or unjust results in particular cases.⁶ In contrast, critics of the dominant view have offered several competing visions, arguing that lawyers should seek justice or morally acceptable outcomes rather than simply pursue clients' interests.⁷ There is a clear relationship between these ethics theories and representational rules, like the duty of confidentiality, and ethicists have explored that relationship in great detail.⁸

Despite the obvious applicability of ethics theories to representational rules, theorists have not extensively explored the possible implications of the theories for structural regulations. Consider a Florida rule that forbids plaintiffs' lawyers (but not defense lawyers) from contacting accident victims or their families in any way, including by mail, within thirty days of an accident.⁹ The United States Supreme Court recently upheld this rule

5. See, e.g., MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 79-125 (2d ed. 2002); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 177-205 (1988); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 54-62 (1998); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060-61 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

6. See, e.g., Fried, *supra* note 5, at 1060-61; Pepper, *supra* note 5, at 624-27.

7. See, e.g., LUBAN, *supra* note 5, at 202-05; SIMON, *supra* note 5, at 9.

8. See, e.g., LUBAN, *supra* note 5, at 148-54; Pepper, *supra* note 5, at 613-15.

9. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995).

against a First Amendment challenge on the grounds that the legal profession's image required the protection that the rule afforded.¹⁰ Many commentators have weighed in on the issue, but their arguments rarely draw on conventional ethics theories.¹¹ The absence of these theories is surprising because they have distinct and progressive implications for structural rules like Florida's letter solicitation provision. The dominant view, for example, suggests that the analysis should focus on whether letter solicitations within thirty days of an accident would enhance the representation that clients receive. From this perspective, the Florida rule is undesirable in that it might allow valuable, fresh evidence to go uncollected;¹² it also might permit defense lawyers to obtain defense-favorable settlement agreements before prospective plaintiffs hire an attorney.¹³ The dominant view, in other words, would shift the focus of the debate away from the profession's image and toward concerns that are more consistent with the profession's theories of representational rules. Critics of the dominant view, however, might focus on the extent to which the rule enhances the prospects for just or morally acceptable results. Such an analysis might also suggest that the rule is undesirable; specifically, it affects a lawyer's ability to protect a prospective client against defense-favorable tactics, thus creating the possibility of an unjust result.

One could identify a number of competing arguments using standard ethics theories as the analytical framework, but the point here is more basic: if we believe that lawyers should care about concepts like justice or client-centered representation when making decisions in the context of individual cases, we should not bracket those convictions when the debate turns to issues of broader structural concern. Bracketing, however, is too often what the profession has done. Of course, commentators have discussed structural issues in considerable detail, but they have done so without sufficient reference to the theories that lie at the heart of discussions about representational rules. This Article, in short, seeks to bridge the gap that has developed between ethics theories and structural rules.

Part II describes in more detail the dichotomy between structural and representational regulations. The suggestion is that, although lawyers tend to lump their self-regulatory efforts under the general rubric of professional responsibility, one can discern two distinct categories within

10. *Id.* at 624-35.

11. For one exception, see FREEDMAN & SMITH, *supra* note 5, at 329-32, which makes the argument that aggressive solicitation is consistent with the premises of the dominant view.

12. *See id.*; *cf. Went For It*, 515 U.S. at 636 (Kennedy, J., dissenting).

13. *See, e.g.*, Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went for It, Inc.*, 49 ARK. L. REV. 703, 721 (1997).

the rubric. On the one hand, the profession has promulgated representational rules, such as conflict of interest and confidentiality provisions, that govern attorney conduct in the context of law practice. On the other hand, attorneys have created rules more properly characterized as structural regulations. These provisions, such as the thirty day solicitation rule¹⁴ and limitations on non-lawyer practice,¹⁵ affect the contours of the legal profession itself and the ways in which lawyers conduct the business aspects of their practices.

Part III contends that the profession has not adopted a theory that successfully unifies our understanding of structural and representational rules. Instead, it has bifurcated its treatment of professional responsibility rules by referring to conventional models, like the dominant view and its critics, in the context of representational regulations and by adopting two relatively undeveloped objectives in the context of structural rules. First, the profession has sought to enhance the public's perception of lawyers in order to ensure confidence in the justice system as a whole.¹⁶ The profession's second objective, which lawyers have referred to much less explicitly but have relied upon equally, is that structural regulations should protect the bar's power and economic interests.¹⁷

Part IV contends that the bar's two structural objectives are unsatisfactory. The first goal is empirically flawed because it relies on the unproven and increasingly dubious premise that a positive image of the bar is necessary to achieve confidence in the justice system. The second goal is more obviously deficient; namely, protectionism does not serve as a compelling justification for regulations.¹⁸ Although numerous scholars have observed that the bar's regulations are self-interested and image-oriented,¹⁹ Part IV suggests that these biases emerge most frequently in the structural context, where we find the rules with greatest relevance to the legal profession's financial well-being. Finally, Part IV contends that, although the profession frequently relies on consumer protection as the justification for many structural rules, the more self-interested motivations

14. See *supra* note 9 and accompanying text.

15. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002).

16. See *infra* Part III.B. This emphasis is unsurprising given how seriously lawyers take the profession's public image. See DEBORAH RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 5 (2000) (observing that when lawyers are "asked to identify the most important problems facing the profession, [they] consistently have put public image . . . at the top of the list").

17. See *infra* Part III.B.

18. See, e.g., RHODE, *supra* note 16, at 6, 8 (noting the problematic role of self-interest in the bar's regulatory efforts).

19. See, e.g., *id.*; see also Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 706-07 (1977).

of image and protectionism appear to have had a greater impact on the content of structural regulations.

In light of these problems, Part V suggests that the profession should jettison its current approaches to structural regulations and instead unify representational and structural theory through the use of conventional models like the dominant view and its critics. Part V examines possible objections to this approach, including the idea that consumer protection should serve as the unifying theme, and concludes that traditional ethics models offer the most appealing theoretical vision for structural rules.

Part VI turns to the task of tracing the implications of contemporary theory for topics of structural concern. Through an analysis of key structural issues—client solicitation provisions, unauthorized practice laws, and multidisciplinary practice rules—it becomes apparent that conventional theories can make a significant contribution to debates about these often controversial subjects. Interestingly, this analysis also reveals that, although ethics models contain different prescriptions at the level of individual lawyer behavior (such as the scope of the duty of confidentiality), they are surprisingly unified in their analysis of structural regulations. In particular, the analysis confirms what many commentators have already concluded through alternative arguments: that the bar is frequently too slow in adopting important reforms. This Article, therefore, ultimately offers a unique justification for progressive reforms, arguing that the foot-dragging so frequently observed in the bar is actually inconsistent with the premises of prevailing ethics theories.

II. CATEGORIZING PROFESSIONAL REGULATIONS

Although commentators typically refer to professional rules generically,²⁰ it is possible to identify two distinct types of ethics regulations: representational rules and structural rules. The essence of the distinction is that representational rules govern how a lawyer must represent a client, such as prohibiting the presentation of perjured testimony or preventing conflicts of interest. In contrast, structural regulations, like limitations on advertising and rules against multidisciplinary practices, dictate how a lawyer conducts “the business of law.”

Representational regulations refer to the type of rules that most lawyers and scholars think of when they discuss professional responsibility.

20. For two exceptions to this general rule, see Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justification for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 432 (2001), which distinguishes between entry and conduct regulations, and Morgan, *supra* note 19, at 707, which identifies four distinct types of rules.

Specifically, representational provisions govern how lawyers act in the context of the lawyer-client relationship. For instance, regulations relating to the duty of confidentiality,²¹ conflicts of interest,²² client or witness perjury,²³ candor to the tribunal,²⁴ terminating the lawyer-client relationship,²⁵ and communications with witnesses²⁶ all set out limitations on what a lawyer may do when representing a particular client.

Structural regulations, in contrast, govern the very framework of the legal profession. Unlike representational regulations, these rules do not dictate how lawyers represent their clients; rather, they create the professional structure within which attorneys practice. Consider unauthorized practice laws. These provisions define the practice of law and thus set limits on the law-related services that non-attorneys can offer.²⁷ They also place constraints on the work that out-of-state attorneys can perform within a particular state (i.e., they place limits on multijurisdictional practice). As a result, these laws govern a key area of concern regarding the legal profession's framework. Rules regarding multidisciplinary practices (MDPs) also have structural implications in that they regulate the types of business arrangements that lawyers can forge with non-lawyers.²⁸ Advertising restrictions are yet another form of structural regulation; they dictate how lawyers obtain their clients rather than explaining how lawyers service their existing clients.²⁹ Even rules relating to bar admissions and graduation requirements qualify as structural because they define what members of the profession must learn in order to practice law.³⁰

21. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

22. *Id.* R. 1.7-1.10.

23. *Id.* R. 3.3(a)(4), 3.3(c).

24. *See, e.g., id.* R. 3.3(a)(1), (a)(3), 3.3(d).

25. *Id.* R. 1.16.

26. *Id.* R. 4.2-4.3.

27. As discussed in greater depth in Part VI, *infra*, unauthorized practice laws prohibit two types of conduct: non-lawyers practicing law and attorneys practicing law in a state where they are not licensed to do so.

28. *See* articles cited *supra* note 2. Currently, the American Bar Association's Model Rules of Professional Conduct prohibit MDPs, MODEL RULES OF PROF'L CONDUCT R. 5.4 (2002), though an ABA Commission recently made an unsuccessful proposal to permit them. COMM'N ON MULTIDISCIPLINARY PRACTICE, *supra* note 1 (offering a proposal, ultimately rejected, that would have allowed MDPs); *see also* Molly McDonough, *D.C. Bar Votes Yes on MDP: Group Is Undaunted by Enron Issues*, A.B.A. J. E-REPORT, May 31, 2002, at 4 (reporting the District of Columbia Bar's Board of Governors' endorsement of MDPs). For the most recent information about the status of MDPs in specific jurisdictions, see CENTER FOR PROFESSIONAL RESPONSIBILITY, A.B.A., MDP INFORMATION, at http://www.abanet.org/cpr/mdp_state_summ.html (last visited Aug. 1, 2002).

29. MODEL RULES OF PROF'L CONDUCT R. 7.1-7.5 (2002).

30. *See* SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, A.B.A., STANDARDS FOR

Structural regulations not only differ substantively from representational rules, but they also differ with respect to the sources of their authority. In contrast to representational regulations, which are typically found in state rules of professional conduct, structural rules are more diverse in origin.³¹ State statutes often define what constitutes the unauthorized practice of law; state bar organizations dictate bar admission requirements; and the ABA sets out accreditation requirements for law schools.³² Of course, the rules of professional conduct do touch on matters of structural significance, such as MDPs and advertising,³³ but the rules are not the exclusive source of structural regulations.³⁴

Ultimately, structural rules help to define the profession itself, as in the case of unauthorized practice laws, graduation requirements, and rules against multidisciplinary practice, or explain how lawyers obtain their clients, as in the case of lawyer advertising and solicitation. Despite the wide range of subject matter, the rules share a common concern for regulating the ways in which the legal profession conducts the business of law. These types of rules, in other words, do not dictate how lawyers should represent their clients, but rather set the stage upon which lawyers perform for those clients.

The structural and representational categories are not without their ambiguities. Regulations relating to the attorney-disciplinary process, for example, have features resembling both types of rules. On the one hand, disciplinary processes and lawyers' knowledge of them can have a direct impact on the way that lawyers interact with their clients, and are thus similar to representational rules. On the other hand, the disciplinary system can be used to enforce structural regulations, such as unauthorized practice laws, so in that sense, the disciplinary rules have a structural character as

APPROVAL OF LAW SCHOOLS 301-07 (2002) [hereinafter SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR].

31. This diversity might explain why ethicists have tended to focus on representational rules. Those rules have a clearer source of legal authority and are thus more easily identifiable as sources of concern for courses and commentaries on legal ethics.

32. See SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, *supra* note 30.

33. Of late, even representational regulations have begun to appear outside of the Model Rules. For example, the Securities and Exchange Commission is in the process of narrowing the duty of confidentiality for lawyers practicing before the Commission in response to recent corporate scandals. *SEC Must Issue Attorney Conduct Rules Under New Federal Accounting Reform Law*, 71 U.S.L.W. 2079, 2079 (2002).

34. Interestingly, the profession seems to accept that non-lawyers should have a role in creating structural rules, such as legislative enactments regarding unauthorized practice, but lawyers do not have the same degree of acceptance when it comes to representational rules. The recent furor over the Sarbanes-Oxley Act and the SEC's related regulation of attorney confidentiality might have resulted, at least in part, from the profession's perception that representational rules should remain within the control of lawyers.

well. Despite these ambiguities, a great many professional regulations can be readily categorized as either representational or structural.

These groupings make sense, but one might wonder what purpose they serve. As an initial matter, the representational/structural dichotomy is a useful device for conceptualizing professional regulations. That is, the dichotomy helps us understand the different types of professional rules and how they relate to the work that attorneys perform.³⁵ Second, and more importantly, the categories shed light on a gap in the premises that underlie representational and structural rules. As Part III makes clear, the premises underlying many structural rules have remained largely unexamined and do not reflect the rich theoretical development that representational rules have received.

III. THE BIFURCATION OF ETHICS THEORY

Despite the existence of two distinct types of professional rules, most theories of legal ethics have tended to focus on representational regulations. Part III.A. identifies this focus through an explanation of existing ethics theories. Part III.B. then examines the underlying premises of structural regulations and concludes that, instead of relying on conventional models for theoretical insights, two unappealing objectives have evolved: the enhancement of the profession's image and the protection of the profession's economic interests. Of course, numerous commentators have noted that the profession relies on self-interested objectives rather than on the often-stated intention to protect consumers.³⁶ Part III.B., however, makes the case that the profession's self-interested behavior manifests itself most clearly at the structural level.

A. Theories of Representational Rules

To appreciate legal ethics theories' traditional focus on representational rules, consider the classic case of *Spaulding v. Zimmerman*.³⁷ The lawsuit

35. It is also worth elucidating this distinction in professional responsibility classes, especially since most courses tend to focus on representational regulations.

36. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 16 (1989); RHODE, *supra* note 16, at 16; Morgan, *supra* note 19, at 704.

37. 116 N.W.2d 704 (Minn. 1962). A number of law review articles have examined this case. See, e.g., Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1606 (1995). Many legal ethics casebooks discuss it as well. See, e.g., GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 5-13 (3d ed. 1999); THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 474-75 (7th ed. 1999); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 220-26 (3d ed. 2001). Even a

involved a minor, David Spaulding, who sustained injuries in a car accident.³⁸ During the litigation, defense counsel's medical expert discovered that David suffered more severe injuries than his own lawyers suspected: David had a life-threatening aneurysm that required immediate medical attention.³⁹ David's doctors had missed the diagnosis, so even David did not know the severity of his own condition.⁴⁰ Based on what the defense lawyers knew at the time,⁴¹ they faced the troubling dilemma of pursuing their client's interests—not disclosing the condition and settling the case for a nominal amount—or saving David's life.⁴²

Conventional theories have crafted a wide range of approaches to morally vexing cases like *Spaulding*. For instance, the dominant view of legal ethics,⁴³ which favors unwavering commitment to clients even if that commitment produces immoral or unjust results,⁴⁴ suggests that Zimmerman's lawyers, who did not disclose the condition, acted ethically.⁴⁵ Theories critical of the dominant view, which posit that lawyers should consider non-client interests like justice or morality when making

popular television show created an episode modeled on *Spaulding*. *The Practice: Honor Code* (ABC television broadcast, Nov. 18, 2001).

38. *Spaulding*, 116 N.W.2d at 706.

39. *Id.* at 707.

40. *Id.* at 707-08.

41. It turns out that, although the lawyers did not disclose the injury, David fortuitously discovered the problem himself when he had a checkup a short time after the case settled. *Id.* at 708. The checkup "was required by the army reserve, of which [David] was a member." *Id.*

42. Interestingly, the opinion does not reveal whether defense counsel consulted with the defendant, Zimmerman (a friend of the Spauldings and the driver of the car in which David was a passenger) to see if Zimmerman would have agreed to the disclosure. *Id.* at 706-07. Recent scholarship suggests that the conversation never occurred and that Zimmerman's insurance company also may not have known about the issue. Cramton & Knowles, *supra* note 37, at 69. Thus, the defense lawyers apparently decided not to disclose the information on their own, raising a host of ethics issues beyond the scope of this article. *Id.*; Pepper, *supra* note 37, at 1606.

43. Professor Simon uses this term, but other monikers include "the full advocacy model, the standard conception, the traditional conception, and (less charitably) the hired gun." Rob Atkinson, *Lawyering in Law's Republic*, 85 VA. L. REV. 1505, 1507 n.7 (1999) (reviewing SIMON, *supra* note 5); see also RHODE & LUBAN, *supra* note 37, at 137-49 (calling the position the neutral partisanship model); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 8 (1999) (referring to the dominant view as the regulatory model).

44. See, e.g., Fried, *supra* note 5, at 1080-87; Pepper, *supra* note 5, at 614.

45. Until recently, the ABA's Model Rules of Professional Conduct actually prohibited disclosure in this type of case. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (pre-2002 version) (prohibiting disclosure unless the client consents or the client is about to commit a criminal or fraudulent act that would cause injury). Thus, absent client consent, the defense lawyers not only acted ethically under one recent version of the duty of confidentiality; it was the only action that the rules permitted. Professor Pepper has added one important proviso: the lawyers should have consulted with their client and tried to convince the client to consent to disclosure. Pepper, *supra* note 37, at 1606.

professional judgments,⁴⁶ suggest that Zimmerman's lawyers should have disclosed David's condition even if Zimmerman had not wanted his lawyers to do so.⁴⁷ In short, conventional ethics theories have obvious applications to questions of individual lawyer behavior, and the literature has explored these applications in rich detail. The following discussion offers an overview of these ethics theories and notes their focus on representational rules.

1. The Dominant View

The dominant view consists essentially of two concepts: the principles of nonaccountability and partisanship.⁴⁸ The nonaccountability principle simply states that the public should not hold lawyers morally accountable for their choices of clients and tactics.⁴⁹ The partisanship principle posits a related idea, asserting that lawyers should undertake all lawful actions that best serve their clients' interests, even if those actions are contrary to the interests of justice or morality in specific cases.⁵⁰ These principles further many objectives, perhaps the most important of which is client autonomy;⁵¹ namely, by following the wishes of a client and not sacrificing those wishes on the altar of morality or some conception of justice, dominant view adherents believe that we honor an individual's freedom of choice.⁵²

As one might suspect, the dominant view has clear implications for representational rules. For example, adherents of the dominant view (and its concomitant partisanship principle) conclude that a lawyer does not act unethically by failing to disclose information that could adversely affect a third party. From this perspective, the defense lawyers in *Spaulding* did not act unethically by failing to disclose the boy's medical condition even

46. See, e.g., LUBAN, *supra* note 5, at 154-58; SIMON, *supra* note 5, at 8-9.

47. See, e.g., LUBAN, *supra* note 5, at 149-54.

48. LUBAN, *supra* note 5, at 11; Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 150 (David Luban ed., 1983).

49. SIMON, *supra* note 5, at 8; Fried, *supra* note 5, at 1078; Pepper, *supra* note 5, at 617.

50. See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 282 (1991); Fried, *supra* note 5, at 1066; Pepper, *supra* note 5, at 614.

51. For prominent examples of this emphasis, see FREEDMAN & SMITH, *supra* note 5, at 56-58; Fried, *supra* note 5, at 1073, and Pepper, *supra* note 5, at 616-17. See also William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 165 n.1 (Deborah L. Rhode ed., 2000) (citing numerous scholars who have identified client autonomy as a key issue in lawyering); Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U.L. REV. 199, 199 (2001) (observing that "[l]egal ethics proceeds from the assumption that client autonomy is a good thing and paternalism towards clients is bad").

52. See Fried, *supra* note 5, at 1073.

though that decision could have resulted in the boy's death. Because the attorneys had a duty only to their client and the client did not seek any unlawful ends or illegal means, the lawyers did not act improperly. In a similar fashion, proponents of the dominant view have explored other topics covered by representational rules, such as conflicts of interest and client perjury.⁵³ The dominant view, therefore, has clear consequences for representational rules, and commentators have written extensively about that relationship.

What dominant view proponents have done less well is to explore in depth the implications of their position for structural regulations. Professor Monroe Freedman is perhaps the most prominent advocate of the partisanship principle,⁵⁴ and he has set out a "systematic position on lawyers' ethics" in one of his books.⁵⁵ Freedman explores the significance of his position for a number of professional regulations, including the making of frivolous arguments,⁵⁶ conflicts of interest,⁵⁷ the duty of confidentiality,⁵⁸ and perjury,⁵⁹ among others. But Freedman spends significant time on only one structural issue (client solicitation rules)⁶⁰ and does little to address other structural regulations. Professor Freedman's work is typical in this regard; one finds little discussion of the dominant view's applicability to structural rules in the literature.

53. See, e.g., FREEDMAN & SMITH, *supra* note 5, at 257-58 (describing the dominant view perspective on conflicts); Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939 (1988) (moderating his earlier views on client perjury); Monroe H. Freedman, *Professional Responsibility of Criminal Defense Lawyers: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (sketching out a radical view of client perjury). Interestingly, Professor Freedman believes that there should be an exception to the duty of confidentiality in cases where someone's life is at stake. FREEDMAN & SMITH, *supra* note 5, at 146-47. Professor Abbe Smith, another proponent of the dominant view, is arguably more consistent on this point and rejects the idea that the rules should permit a lawyer's disclosure of confidential information under these circumstances. *Id.* at 147.

54. Professor Freedman, though an advocate of the partisanship principle, is less fond of the nonaccountability principle. *Id.* at 82 (asserting that "[t]he lawyer's decision to accept or reject a client is a moral decision for which the lawyer can properly be held morally accountable").

55. *Id.* at vii.

56. *Id.* at 93 (arguing that "[o]ne of the most serious threats to zealous advocacy is the imposition of sanctions against lawyers who file pleadings or make arguments that are deemed to be 'frivolous'").

57. *Id.* at 255-56 (describing how conflicts can adversely affect a lawyer's zealotry).

58. *Id.* at 127-28 (contending that the duty of confidentiality is a critical component of effective assistance of counsel).

59. *Id.* at 153-90.

60. *Id.* at 329-61.

2. Critics of the Dominant View

Theorists have offered a number of different critiques of the dominant view,⁶¹ but the critics generally share the goal of developing a competing vision of ethics infused with some form of judgment that considers non-client interests. Specifically, critics typically refer to two methods for giving substance to professional judgments: morality and social values.⁶² Professor David Luban presents one of the most commonly cited versions of a morality-based theory of ethics.⁶³ According to Luban, lawyers should seek morally worthy ends using morally justifiable means (at least outside the criminal defense context).⁶⁴ From this perspective, the lawyers in *Spaulding* acted unethically because they failed to place sufficient weight on the moral consequences of their failure to disclose the plaintiff's injuries.

In contrast to morality-based theories of ethics, some models identify faults with the dominant view yet find it troubling to allow lawyers to make professional decisions using common morality.⁶⁵ Professor William Simon has constructed one of the most compelling and thorough of such models, which posits that "[l]awyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice."⁶⁶ By justice, Simon does not refer to common morality but to "legal judgments grounded in the methods and sources of authority of the professional culture."⁶⁷ Lawyers, according to this view, should not pursue their own unique conception of justice or morality, but should be guided by an understanding of justice that is consistent with the legal culture's understanding of the concept. Like Luban, Simon would also find that the lawyers in *Spaulding* should have disclosed the plaintiff's injuries, but Simon would justify that conclusion on the grounds that the result would have been consistent with the prevailing legal notions of justice.

61. Pepper, *supra* note 5, at 614-15 n.7 (citing critiques of the neutral partisanship model based on moral philosophy, religion, socioeconomic analysis, legal analysis, and jurisprudence).

62. See Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75, 89-90 (2000). Unfortunately, the discussion here does not do justice to the wonderfully rich and powerful set of dominant view critiques. The debate between these two positions is beyond the scope of this Article.

63. See, e.g., LUBAN, *supra* note 5.

64. *Id.* at xxii; see also THOMAS L. SHAFFER & R.F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994); THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981).

65. See Crystal, *supra* note 62, at 90-91 (citing Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990)); Wendel, *supra* note 43, at 7.

66. SIMON, *supra* note 5, at 138.

67. *Id.*

As is the case with dominant view advocates, prominent dominant view critics also fail to fully explore the structural aspects of their theories. Professor Simon, for example, develops a rich and powerful critique of the dominant view but ultimately emphasizes issues relating to representational rules. He writes: “The kind of moral decisions that implicate the profession’s most fundamental commitments to legality and justice are those that arise from conflicts between client interests on the one hand and third-party and public interests on the other.”⁶⁸ Simon, in other words, believes that the most important issues for legal ethicists relate to how lawyers represent specific clients. This focus is apparent in the examples that Simon develops early in his book and returns to throughout the work.⁶⁹ All of the hypotheticals place a lawyer in a situation of having to choose between the client’s objectives and the interests of justice. What Simon does not explore are issues—like unauthorized practice, advertising, multidisciplinary practice, or even legal education—that have important implications for how lawyers behave in the context of his hypotheticals. As a result, he does not consider the structural dimensions of the issues he seeks to address. In fairness, Simon does discuss structural concerns, but of a somewhat different variety; namely, Simon examines how the regulatory and disciplinary structure of the profession should operate.⁷⁰ Though interesting and compelling, the discussion does not examine the crucial structural controversies—like MJP, non-lawyer practice, and MDP—that the profession currently faces, and so Simon’s discussion is unnecessarily limited in its breadth.

As with Simon’s work, Professor Luban’s seminal book, *Lawyers and Justice: An Ethical Study*,⁷¹ develops a powerful critique of the dominant view and then explains how the critique plays out in the context of specific representation rules, such as the duty of confidentiality, conflicts of interest, and the prohibition against presenting false testimony. Unlike Simon, Luban does address some issues of structural concern, such as access to justice and its relationship to the unauthorized practice of law.⁷² Luban’s conclusions, however, do not draw on his critiques of the dominant view. Rather, Luban starts with the assumption that the government’s legitimacy depends on the concept of equality.⁷³ He then reasons that equality requires access to the legal system and that access, in

68. *Id.* at 4.

69. *Id.* at 4-6, 29, 41-42.

70. *Id.* at 195-215.

71. LUBAN, *supra* note 5.

72. *Id.* at 237-39.

73. *Id.* at 244.

turn, often requires the availability of legal advice.⁷⁴ Luban concludes that we should therefore liberalize unauthorized practice laws and expand resources for traditional legal aid.⁷⁵

Largely absent from Luban's analysis is an application of his theory of lawyer behavior to the question of access. Luban overlooks the moral dimension of the issue because he too quickly assumes that the question of unauthorized practice has no moral component; namely, he concludes that a lay person has no moral right to receive legal services.⁷⁶ In reaching this conclusion, Luban appears to look at the morality of the issue from the wrong end of the lawyer-client relationship. Rather than asking whether lay people have a moral right to a lawyer in civil cases, Luban should have examined—as he does earlier in his book—the moral obligation of the legal profession. That is, he should have asked whether lawyers have a moral right to the monopoly they maintain over legal services. As will be explained in greater detail in Part VI, the latter question is more consistent with the theory he develops because it focuses on the legal profession's moral obligations rather than the client's moral rights. It also ensures a more uniform treatment of the issues he discusses in his book, bringing them back to a single theory of the legal profession.⁷⁷ In short, Luban does consider access to justice issues such as the unauthorized practice of law, but the analysis does not draw on his underlying critique of the dominant view.

Professor Deborah Rhode, another leading legal ethics scholar, recently published a compelling book that touches on both ethics theory and many structural themes,⁷⁸ but her discussions of the two topics, like Luban's, appear relatively disconnected. For example, Professor Rhode identifies several guiding principles for professional reform.⁷⁹ The first principle relates to ethics theory, and the second principle relates to structural questions.⁸⁰ Despite recognizing these two distinct areas of professional

74. *Id.* Luban correctly argues that the appropriate source of the legal advice (i.e., lawyer versus non-lawyer) should differ depending on the content of the legal matter. *Id.* at 269-70.

75. *Id.*; see also David Luban, *Mandatory Pro Bono: A Workable (and Moral) Plan*, 64 MICH. B.J. 280 (1985).

76. LUBAN, *supra* note 5, at 248-49.

77. Luban's analysis, despite addressing access issues, contains only a brief mention (or no mention at all) of other key structural questions, such as lawyer advertising, MJP, and MDP. Granted, MJP and MDP have become more controversial in recent years (after Luban wrote his book), but Luban has not applied his analysis to these issues in much of his subsequent work. *But see* David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839 (1999) (discussing the effect of MDPs on Luban's ideal conception of the lawyers' role).

78. See RHODE, *supra* note 16.

79. *Id.* at 17-19.

80. *Id.*

interest, Professor Rhode does not examine how (or if) her two principles are related. This approach is reflected throughout her book; the discussion of ethics theory appears early in the book,⁸¹ separate from structural issues like advertising and unauthorized practice, which appear later.⁸² So, even though her analyses of the latter issues are wonderfully trenchant because of her deft use of empirical evidence and policy arguments, Professor Rhode's discussion of structural issues does not ultimately draw on the ethics theories she earlier describes.

Finally, Professor Richard Abel has discussed many important features of the legal profession in his book, *American Lawyers*.⁸³ His focus, however, was primarily on how lawyers created a profession rather than on the specific rules that govern the business of law.⁸⁴ Moreover, when Professor Abel does discuss structural rules, such as advertising and MJP, he does not tie that discussion to the prevailing theories of legal ethics.⁸⁵ Rather, the book filters the discussion of structural concerns through the lens of three distinct theoretical traditions in sociology: "Weberian, Marxist, and a structural-functional approach associated with Parsons but rooted in Durkheim."⁸⁶ This approach to understanding the genesis of lawyer regulations and the profession more generally is obviously essential, but it does not offer (and does not appear intended to offer) a method for understanding the ideal content of the structural rules with which this Article is most concerned.

In all, the conventional debate between the dominant view and its critics, as well as the discussions about theories of professionalism, are profoundly important. This literature, however, has given insufficient attention to the implications of ethics theories for the structural rules that constitute the other half of professional regulation.

B. *P.R.: Professional Responsibility as Public Relations and
Protectionist Rules (The Structural Objectives)*

Unlike the complex theoretical discussions that have emerged in the context of representational rules and professional sociology, ethicists have not developed a theory to explain the appropriate content of structural rules. Rather, at least two objectives have emerged, one more explicit than the other. The first and more explicit goal is the fostering of confidence in

81. *Id.* at 49-80.

82. *Id.* at 143-84.

83. ABEL, *supra* note 36.

84. *Id.* at 14.

85. *See, e.g., id.* at 119-22.

86. *Id.* at 15.

lawyers in order to preserve trust in the justice system as a whole. Structural regulations, according to this view, should enhance the profession's image because a positive image is necessary to a sound judicial system. The second and more implicit objective underlying many structural rules is less altruistic and considerably more self-interested: the protection of the bar's economic well-being. Of course, not all regulations have these objectives and other regulations share these objectives only in part. This section nonetheless contends, as many other commentators have argued,⁸⁷ that the profession has pursued these goals more consistently than other identifiable agendas, including consumer protection. The following discussion adds to the already-existing literature by suggesting that these concerns arise most often and clearly in the structural context. This emphasis becomes apparent through an examination of the history of bar associations, ethics rules, and legal education.

1. Professional Associations

Lawyers' attention to image and economic self-interest has its roots in the history of the American bar.⁸⁸ The profession experienced extensive hostility for much of its infancy, so when the profession finally organized itself after the Civil War into a structure that largely survives today, lawyers took great pains to guard their image and protect their economic well-being. Not only does this focus continue despite a much less pressing need for it, but it has manifested itself in many of the profession's structural rules.

As far back as colonial times, the bar experienced adversity in the form of antagonistic legislation,⁸⁹ with some early colonies going so far as to outlaw the practice of law.⁹⁰ One leading legal historian has noted quite

87. See, e.g., sources cited *supra* note 36.

88. I am mindful here not to represent this section as a piece of historical scholarship. As Judge Posner has noted: "[T]he term 'law office history' is properly derisory and the derision embraces the efforts of judges and law professors . . . to play historian." *Velasquez v. Frapwell*, 160 F.3d 389, 393 (7th Cir. 1998), *vacated, in part*, 165 F.3d 593 (7th Cir. 1999). Nonetheless, some historical references are helpful in documenting the bar's attention to image and self-protection.

89. See, e.g., Francis Aumann, *The Changing American Legal System, Some Selected Phases* 19-26 (1940), *reprinted in* READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION 31-33 (Dennis Nolan ed., 1980); 1 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 331 (1965); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 81 (1973); ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES, WITH PARTICULAR REFERENCE TO THE DEVELOPMENT OF BAR ASSOCIATIONS IN THE UNITED STATES* 136 (1953); Jonathon Rose, *Medieval Attitudes Toward the Legal Profession: The Past As Prologue*, 28 STETSON L. REV. 345, 365 (1998). In fact, even this long history of public disregard is understated; the public's distaste for lawyers extends as far back as medieval times. *Id.* at 346.

90. FRIEDMAN, *supra* note 89, at 81-82; POUND, *supra* note 89, at 132. In some parts of the colonies, lawyers at times barely resembled a profession at all. See, e.g., Alan F. Day, *Lawyers in*

simply that “the lawyer was unloved in the 17th century.”⁹¹ The extreme hostility for lawyers began to dissipate to some degree at the beginning of the eighteenth century,⁹² as the needs of a growing society made lawyers more necessary.⁹³ Lawyers nonetheless continued to face animosity despite the profession’s growth and society’s needs.⁹⁴

Hostility continued even after the American Revolution.⁹⁵ One problem was that many attorneys who had finally become established near the end of the colonial era were loyalists and left the country after the Revolution.⁹⁶ Many of the remaining lawyers had little formal legal training, and the freshness of the war with Britain left the public distrustful of English law and of those who had knowledge of it.⁹⁷ In fact, even though lawyers made up about half of the signers of the Declaration of Independence and at least half of the delegates at the Constitutional Convention in Philadelphia in 1787, the public was suspicious of lawyers.⁹⁸ Indeed, many people who opposed the Constitution prior to its

Colonial Maryland, 1660-1715, 17 AM. J. LEGAL HIST. 145 (1973), reprinted in READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION, *supra* note 89, at 40. The reasons for this hostility are controversial, but the existence of the dislike is less so. See, e.g., FRIEDMAN, *supra* note 89, at 82.

91. FRIEDMAN, *supra* note 89, at 82.

92. See, e.g., Milton M. Klein, *The Rise of the New York Bar: The Legal Career of William Livingston*, 15 WM. & MARY L. REV. 334, 334 (1958), reprinted in READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION, *supra* note 89, at 52 (observing that “[o]n the eve of the American Revolution, the legal profession in New York possessed both social prestige and political power”); Charles McKirdy, *Before the Storm: The Working Lawyer in Pre-Revolutionary Massachusetts*, 11 SUFFOLK U. L. REV. 46, 46 (1976), reprinted in READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION, *supra* note 89, at 47 (noting the extent to which the profession had become socially accepted by the middle of the eighteenth century).

93. FRIEDMAN, *supra* note 89, at 83-84.

94. *Id.* at 82-84.

95. POUND, *supra* note 89, at 177-78; CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 212 (1911); Rose, *supra* note 89, at 365. *But see* Dennis R. Nolan, *The Effect of the Revolution on the Bar—The Maryland Experience*, 62 VA. L. REV. 969, 971 (1976) (finding that the oft-cited thesis of Warren and Pound about the post-Revolution bar did not apply in Maryland). Even if the validity of the Pound/Warren thesis is doubtful, as Professor Nolan suggests, there is little question that the profession at least suffered growing pains during the nation’s early years and that some of the former colonies expressed hostility toward lawyers.

96. 2 CHROUST, *supra* note 89, at 281; FRIEDMAN, *supra* note 89, at 88, 265; WARREN, *supra* note 95, at 212-13. *But see* Erwin Surrency, *The Lawyer and the Revolution*, 8 AM. J. LEGAL HIST. 125 (1964), reprinted in READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION, *supra* note 89, at 78 (concluding that, although “more than 130 lawyers left the colonies during the Revolution or by the end of the war, a sufficient body of able lawyers remained to re-establish the profession”).

97. POUND, *supra* note 89, at 177; WARREN, *supra* note 95, at 214.

98. Milton M. Klein, *New York Lawyers and the Coming of the American Revolution*, 55 N.Y. HIST. 383 (1974), reprinted in READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION, *supra* note 89, at 85. Given the important role that lawyers played during and after

ratification did so on the grounds that it ““was the work of lawyers.””⁹⁹ A widespread depression after the Revolution also fostered resentment, as many attorneys took on the unpopular role of debt collectors.¹⁰⁰ Even the Supreme Court did not receive considerable public support; in 1800, when President John Adams asked John Jay to resume his former position as Chief Justice, Jay refused. Jay reasoned that the Court did not have “the public confidence and respect which, as the last resort of justice of the nation, it should.”¹⁰¹

A number of lawyer associations developed in the early 1800s, and by the time Alexis de Tocqueville made his famous visit to America in the early part of the century, de Tocqueville believed that lawyers “form[ed] the only enlightened class whom the people do not mistrust.”¹⁰² Lawyer associations, however, quickly dissolved during a time that Roscoe Pound has called “The Era of Decadence.”¹⁰³ During this period, from the 1830s until around 1870, the profession experienced a particularly deep breakdown in organization, education, and professional training.¹⁰⁴

the Revolution, the distrust at that time is surprising. In fact, it is so surprising as to prompt one commentator to mark it as one of the “more curious” developments in American legal history. WARREN, *supra* note 95, at 212. Perhaps the answer lies in the depth of the distaste for lawyers. That is, the hostility toward the legal profession may be akin to distasteful vegetables; people may not like them, but the public realizes that they have many redeeming qualities. This seeming contradiction between having political power and being the subject of public hostility exists today as well. Although a significant percentage of political leaders today have had legal training, the public continues to express distrust of lawyers.

99. WARREN, *supra* note 95, at 218.

100. FRIEDMAN, *supra* note 89, at 265; POUND, *supra* note 89, at 179; WARREN, *supra* note 95, at 214.

101. William H. Rehnquist, *The Supreme Court: The First Hundred Years Were the Hardest*, 42 U. MIAMI L. REV. 475, 477 (1988).

102. LAWYERS’ ETHICS 8 (Allan Gerson ed., 1980) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835)). *But see* RHODE & LUBAN, LEGAL ETHICS, *supra* note 37, at 23-24 (suggesting that there is some evidence that de Tocqueville overstated the respect that lawyers received during this period).

103. POUND, *supra* note 89, at 232-49. Interestingly, Dean Pound’s book itself, which documented a survey of the bar in the early 1950s, manifested a concern for public confidence. He wrote:

The legal profession is a public profession. Lawyers are public servants. They are the stewards of all the legal rights and obligations of all the citizens. It is incumbent on stewards, if they are to be faithful to their trust, to render an accounting from time to time. This Survey is an honest effort to make a complete audit and report for submission to the American people.

Id. at vii.

104. *See, e.g.*, 2 CHROUST, *supra* note 89, at 165-66, 171; POUND, *supra* note 89, at 232-33. Some recent scholarship pegs the end date around 1850. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 10 (1983). *But see id.* at 8-9 (offering a

Given the profession's checkered history, lawyers sought ways to change their image and enhance their professional stature. With these objectives in mind and with the Civil War behind them, lawyers founded both the Bar Association for the City of New York in 1870 and the American Bar Association in 1878.¹⁰⁵ In the case of the Bar Association for the City of New York, lawyers noted their commitment to "sustain[ing] the profession in its proper position in the community."¹⁰⁶ The Bar's constitution consequently set out, among other goals, the intention "to maintain the honor and dignity of the profession."¹⁰⁷ William Maxwell Everts, one of the leaders of the American Bar at the time and a pivotal figure in the establishment of the New York City Association, commented that the group would attempt to "restore the honor, integrity, and fame of the profession."¹⁰⁸

Although these comments reflected to some degree the confidence-sapping scandals of the Tweed administration in New York,¹⁰⁹ the usage of strikingly similar wording by bar founders around the country implied a broader concern for image and self-protection. The American Bar Association, for example, which was founded just nine years later, included a provision in its constitution that it would, *inter alia*, "uphold the honor of the profession of law."¹¹⁰ One author who has examined the ABA's history has noted that one objective of the ABA was to remove the "latent hostility toward the . . . profession."¹¹¹ Lawyers also organized dozens of bar associations around the country, frequently declaring their commitment to "maintaining the honor and dignity of the profession."¹¹² In short, lawyers had encountered widespread distrust during their early

more optimistic view of the legal profession's status in the early 19th century); Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306, 308 (1968), *reprinted in* THE LEGAL PROFESSION: MAJOR HISTORICAL INTERPRETATIONS 91 (Kermit L. Hall ed., 1987) (casting doubt on the conventional view of the profession in the 19th century).

105. POUND, *supra* note 89, at 249.

106. *Id.* at 255 (emphasis omitted).

107. *Id.* at 256.

108. *Id.* at 258-59; *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 34 (1986) (noting that "[t]he purpose of the ABA was, and for most of its life has remained, that of raising the economic and social status of lawyers and particularly of its members").

109. FRIEDMAN, *supra* note 89, at 561-62.

110. 1 REPORTS OF THE AMERICAN BAR ASSOCIATION 30 (1878).

111. GERALD CARSON, A GOOD DAY AT SARATOGA 12 (1978). The ABA has more recently set out a list of goals, and although the list does not contain an explicit reference to the profession's image, many of the goals, such as "increas[ing] public understanding of and respect for . . . the role of the legal profession," certainly share the concerns of previous bar leaders. A.B.A. POLICY AND PROCEDURES HANDBOOK 2 (2002).

112. *See, e.g.*, POUND, *supra* note 89, at 263, 264, 267-68, 285, 286, 291, 297-99.

years, so the attorneys who founded modern bar associations set out—at least in part—to avoid the profession’s turbulent past by creating a positive public image¹¹³ and by protecting the profession’s economic interests.¹¹⁴

The bar’s focus on impressions and self-protection in the late nineteenth century appears understandable given the historical context, but one finds that these emphases continue within today’s bar associations and related entities. With respect to image, one commentator has noted the continued wide-spread belief that “bar associations should . . . be urgently concerned about what clients and the general public think of lawyers.”¹¹⁵ Indeed, one recent president of the ABA dedicated his term to improving the profession’s negative image, going so far as to launch a one million dollar public relations campaign.¹¹⁶ Even more recently, the National Conference of Bar Presidents, an organization of former and present bar leaders that educates bar associations, began its Professional Reform Initiative (PRI). PRI’s goal is to “reestablish[] public trust and confidence in the justice system.”¹¹⁷ PRI has assumed that, to achieve this goal, it must focus on improving lawyer “truthfulness and honesty,” which the group identifies as “the profession’s core values.”¹¹⁸ Its premise is that the profession must focus on the public’s perception of lawyers in order to ensure that the “system [does not] descend into a spiral of mistrust and inefficiency.”¹¹⁹ Similarly, the ABA Commission on Advertising recently stated a similar assumption, positing that “[p]ublic confidence in the

113. One could attribute the focus on image to a number of causes, only one of which was the profession’s difficult history. The point, however, is not to identify the specific causes of the emphasis on perceptions but to demonstrate how the bar has been and continues to be concerned about public impressions.

114. See, e.g., Kermit L. Hall, *Introduction to THE LEGAL PROFESSION: MAJOR HISTORICAL INTERPRETATIONS*, *supra* note 104, at xiii (noting the role that self-interest played in the professionalization of the bar in the latter half of the 19th century).

115. SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 140 (1994); see also RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE* 34 (2002) (“Bar associations often believe that one of their primary missions is to improve the popular perception of lawyers.”).

116. Randall Samborn, *ABA Meeting Features Trial Publicity Debate*, NAT’L L.J., Aug. 8, 1994, at A6 (describing the outgoing ABA president’s focus on “efforts to improve the public’s poor image of lawyers”); Sandra Torry, *A Million-Dollar Campaign to Love the Lawyers*, WASH. POST, May 24, 1993, at F7 (explaining the ABA’s efforts to enhance the profession’s public image).

117. W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 S.C. L. REV. 527, 534 (2002). Mr. Hodes is the Reporter for PRI. *Id.* at 527 n.*.

118. *Id.* at 534.

119. *Id.* at 533-34. PRI is part of the larger “professionalism movement.” See *id.* at 532 n.17. This movement, which has taken many forms and about which much has been written, has sought to improve (among other things) lawyers’ behavior. As with PRI, one of the reasons often cited for this attention to lawyer behavior is systemic confidence.

profession is essential in order to sustain our justice system.”¹²⁰ The ABA Commission and PRI are informative not only because of their focus on professional image, but because they tie that image to confidence in the system of justice.

The bar also has continued to support measures that promote the profession’s economic interests. As explained in more detail below, many structural regulations have protectionism as an underlying premise. Indeed, numerous commentators have noted that efforts to prevent MDPs,¹²¹ continued support for strict unauthorized practice laws,¹²² and the rejection of a more permissive approach to multijurisdictional practice¹²³ all arguably reflect to varying degrees the profession’s use of structural regulations to protect the interests of the bar. Many of these commentators have noted that the recent professionalism movement,¹²⁴ with its focus on improving lawyer behavior (e.g., lawyer conduct codes) and on redirecting lawyer attention to professional conduct instead of mere financial reward, also arguably has a self-interested quality.¹²⁵ Of course, bar associations always have addressed problems unrelated to their public image or economic interests, and the present discussion should imply nothing to the contrary. The critical point, though, is that image and economic well-being are two dominant, recurring, and widely-acknowledged objects of professional concern.

120. COMM’N ON ADVERTISING, A.B.A., *LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATION 3* (1995) [hereinafter COMM’N ON ADVERTISING]; see also COMM’N ON ADVERTISING, A.B.A., *REPORT ON THE SURVEY ON THE IMAGE OF LAWYERS IN ADVERTISING* app. C (1988) (contending that “undignified advertising can detract from the public’s . . . respect for the justice system”).

121. See, e.g., John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83 (2000); Daniel R. Fischel, *Multidisciplinary Practice*, 55 *BUS. LAW.* 951, 974 (2000) (arguing that “[a]lthough defenders of the ban on fee sharing have attempted to cloak their arguments in the rhetoric of ‘professionalism,’ ‘lawyer’s independence,’ and the ‘public interest,’ their goals are no different from any other trade union or interest group pursuing economic protectionism”).

122. See, e.g., Deborah L. Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 *GEO. J. LEGAL ETHICS* 209 (1990) (criticizing the self-interested nature of unauthorized practice laws).

123. Morgan, *supra* note 19, at 725 (identifying the self-serving nature of multijurisdictional practice rules).

124. COMM’N ON PROFESSIONALISM, A.B.A., “. . . IN THE SPIRIT OF PUBLIC SERVICE” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986) [hereinafter COMM’N ON PROFESSIONALISM].

125. See ABEL, *supra* note 36, at 240-45; FREEDMAN & SMITH, *supra* note 5, at 337 (identifying “professionalism” as “a euphemism for public image”); ROBERT L. NELSON ET AL., *LAWYERS’ IDEALS/LAWYERS’ PRACTICES* 17-18 (1992) (citing MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* (1977) for the proposition that professionalism serves the economic interests of professional elites).

2. Ethics Regulations

Although the ethics literature recognizes the self-interested nature of professional regulations, scholars have not often recognized that this protectionism has tended to manifest itself most clearly in the context of structural regulations. The following discussion makes clear that the ABA's structural rules—the rules that have the most to do with the business aspects of the profession—have emphasized self-protection and public image at the expense of more appropriate emphases. It is not necessarily the case that the bar has consciously sought these two objectives, but there is ample evidence that ethics codes have, in fact, advanced these goals more clearly than other identifiable objectives.¹²⁶

a. The Canons of Professional Ethics

Many scholars believe there is a “link between the making of professional ethics codes and the making and maintenance of professional associations,”¹²⁷ so it should come as little surprise that the ABA began crafting ethics codes not long after its creation. Given the bar's history, it should also be unsurprising that the ABA's first ethics code—the ABA Canons of Professional Ethics—reflected a concern for image and economic protection. In fact, the very work upon which the Canons were based—George Sharswood's *An Essay on Professional Ethics*¹²⁸—expressly identified image as an important consideration.¹²⁹ Sharswood also made the link, as the recent PRI and ABA Commission on

126. See, e.g., ABEL, *supra* note 36, at 142 (noting that the legal profession has used self-regulation as a method for gaining competitive advantages); Morgan, *supra* note 19, at 739-40 (making a similar observation in the context of the Model Code). Of course, ethics rules serve many purposes. See, e.g., Ted Schneyer, *Professionalism as Bar Politics: the Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 724-32 (1989) (describing the many motivations of the Model Rules' drafters). That said, two of the most frequently relied upon objectives are the maintenance of public trust and economic protectionism.

127. Schneyer, *supra* note 126, at 691. Schneyer goes on to say that “the ABA's primacy in formulating the rules of legal ethics remains an important factor in maintaining its authority, if not its membership.” *Id.* at 692.

128. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (F.B. Rothman 1993) (1854). It has become *de rigueur*—and not without good reason—to begin a discussion of American legal ethics codes with George Sharswood. It served as the model for Alabama's ethics code, which in turn served as the model for the ABA's 1908 Canons of Legal Ethics. Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 243-47 (1992).

129. David Hoffman's RESOLUTIONS IN REGARD TO PROFESSIONAL DEPARTMENT, *in A COURSE OF LEGAL STUDY* (Baltimore, Joseph Neal 1836) is another frequently cited progenitor of modern ethics rules. See, e.g., Geoffrey C. Hazard, Jr., *The Legal Profession: the Impact of Law and Legal Theory: Forward*, 67 FORDHAM L. REV. 239, 244 (1999).

Advertising still do, between respect for the profession and trust in the justice system more generally. Sharswood wrote:

Counsel should ever remember how necessary it is for the dignified and honorable administration of justice, upon which the dignity and honor of their profession entirely depend, that the courts and the members of the courts, should be regarded with respect by the suitors and people; that on all occasions of difficulty or danger to that department of government, they should have the good opinion and confidence of the public on their side.¹³⁰

Sharswood's emphasis on a polished professional image and its relationship to systemic confidence emerged quite clearly in the ABA's Canons. The preamble for the Canons posited that "[t]he future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men."¹³¹ Even judges subsequently recognized the role that the Canons served; one court observed that "[t]he canons of professional ethics must be enforced by the Courts and must be respected by members of the Bar if we are to maintain public confidence in the integrity and impartiality of the administration of justice."¹³² The Canons thus served as a mechanism to confer credibility on the newly formed bar associations, functioned as an important public relations tool for lawyers, and purported to prevent systemic distrust.

In addition to their concern for image, the Canons also served elite bar members' economic interests.¹³³ Jerold Auerbach, a prominent legal historian, has found that the "Canons . . . served as a club against lawyers whose clients were excluded from [upper-class urban] culture: especially the urban poor, new immigrants, and blue-collar workers. . . . The Canons reflected and reinforced an increasingly stratified profession."¹³⁴ In a similar vein, Professor Charles Wolfram has observed that "[t]he Canons were not originally adopted in order to serve as a regulatory blueprint for enforcement through disbarment and suspension actions. Instead, they seem to have been a statement of professional solidarity—an assertion by elite lawyers in the ABA of the legitimacy of their claim to professional stature."¹³⁵ Another commentator has noted that "[t]he rapid growth of the

130. SHARSWOOD, *supra* note 128, at 62-63.

131. CANONS OF PROF'L ETHICS pmbl. (1908).

132. *In re Meeker*, 414 P.2d 862, 864 (N.M. 1966).

133. *See, e.g.*, FREEDMAN & SMITH, *supra* note 5, at 3-4, 332-35.

134. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 42, 51 (1976).

135. WOLFRAM, *supra* note 108, at 54.

[ethics] Code movement appears to have coincided with a sense of siege upon the part of the leadership of the profession which was concerned [in part] about the increasing volley of attacks from outside [the profession].”¹³⁶ In short, the bar used the Canons to reinforce the power and prestige of its elite members.

The emphasis on image and self-protection is apparent in specific structural provisions of the Canons, most notably the rules relating to lawyer advertising.¹³⁷ As for image, the ABA Canons set the tone for what would be a persistent theme regarding advertising, stating that it was:

unprofessional to solicit professional employment by circulars, advertisements, . . . or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged . . . and all other like self-laudation, *offend the traditions and lower the tone of our profession* and are reprehensible¹³⁸

The Canons tossed lawyers the tiniest of self-promotion bones, allowing them only “professional cards” and “[p]ublication[s] in reputable law lists.”¹³⁹ Less explicit in the advertising provisions but no less present were the bar’s attempts to protect its own interests, particularly from new members of the profession who might encroach on business or cause a reduction in fees.¹⁴⁰ Indeed, the people most hurt by restrictions on advertising were not the established practitioners who drafted the Canons.¹⁴¹ Rather, advertising restrictions hurt newcomers, an increasingly large number of immigrants who were entering the American job market, including the legal profession.¹⁴² Without advertising, such entrants had difficulty competing with the more socially-connected members of the bar.¹⁴³

Of course, the ABA had numerous reasons for creating the Canons, and the present discussion is not intended to suggest anything to the contrary.

136. MICHAEL J. KELLY, *LEGAL ETHICS AND LEGAL EDUCATION* 7 (1980).

137. There are other examples as well, such as the debate about contingency fees. AUERBACH, *supra* note 134, at 44-47.

138. CANONS OF PROF’L ETHICS Canon 27 (1947) (emphasis added). Courts from this period took a similar approach. *See, e.g.,* Barton v. State Bar of Cal., 289 P. 818, 820 (Cal. 1930) (expressing concern for public sentiment if lawyers were to advertise freely).

139. CANONS OF PROF’L ETHICS Canon 27 (1947).

140. AUERBACH, *supra* note 134, at 42-43.

141. *Id.*

142. *See id.* at 95-96.

143. *Id.* at 42-43.

Rather, the point—made by many commentators¹⁴⁴—is that protectionism and self-aggrandizement were two of the more significant catalysts for the Canons, including the key structural concern of lawyer advertising.

b. The Model Code of Professional Responsibility

The Canons' replacement, the 1969 Model Code of Professional Responsibility, also manifested a concern for professional image and protectionism. The Model Code, like the Canons, made explicit its concern for image and tied that concern to the objective of creating systemic confidence. The Code's preamble observed that:

Lawyers, as guardians of the law, play a vital role in the preservation of society [I]n the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.¹⁴⁵

Given the preamble, the very first Canon in the Model Code should come as little surprise. It commanded that “A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.”¹⁴⁶ And the very last canon urged lawyers to “Avoid Even the Appearance of Professional Impropriety.”¹⁴⁷ It specified that “[w]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.”¹⁴⁸ Noting that the “rules of law require that the people have faith that justice can be obtained through our legal system,” the Canon stated that lawyers “should promote public confidence in our system and in the legal profession.”¹⁴⁹ The Canon, like the preamble, also tied the profession's image to the fate of the legal system more generally, stating that: “Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer.”¹⁵⁰

144. *See supra* notes 135-37 and accompanying text.

145. MODEL CODE OF PROF'L RESPONSIBILITY pmb1. (1980).

146. *Id.* Canon 1.

147. *Id.* Canon 9.

148. *Id.* EC-9-2.

149. *Id.* EC-9-1.

150. *Id.* EC 9-2; *see also id.* EC 8-6 (assuming that a lawyer's “intemperate statements tend to lessen public confidence in our legal system”). Scholars have reiterated this supposed connection between the public's trust in lawyers and confidence in the legal system more generally. *See, e.g.,* John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, “Lawyer Honesty” and Public Trust in the Legal System*, 20 PACE L. REV. 93, 93 (1999) (assuming that, “[i]f the public cannot trust the lawyers who are entrusted with the legal system, there is a

The persistent theme of image-preservation emerged throughout the Code but, as was also the case with the Canons, most clearly in the numerous structural provisions relating to advertising and lawyer self-promotion. Although more permissive than the Canons, the Model Code still placed substantial limits on lawyer self-promotion and relied heavily on public trust for those limitations. For example, the original version of Model Code EC 2-9 said: “Public confidence in our legal system would be impaired by . . . advertisements of legal services” because “it would inevitably produce unrealistic expectations in particular cases and *bring about distrust of the law and lawyers.*”¹⁵¹

In addition to emphasizing image, the Model Code reflected a concern for lawyers’ economic well-being.¹⁵² Not only did the Code’s advertising rules reflect anticompetitive instincts,¹⁵³ but so did the Code’s restriction on fee sharing between lawyers and non-lawyers (i.e., its prohibition against multidisciplinary practice arrangements).¹⁵⁴ Such restrictions, which still exist in substantially similar form under the presently-

problem that casts a shadow on the integrity of the very concept of rule of law”) (emphasis omitted).

151. MODEL CODE OF PROF’L RESPONSIBILITY EC 2-9 (1977) (emphasis added). This presumed relationship between advertising and public confidence in lawyers has been undermined by numerous studies. *See, e.g.*, William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 326 (1996); Rotunda, *supra* note 13, at 729-32. One study of the issue is particularly compelling. Concerned for the profession’s image, Chief Justice Warren Burger set up a Commission to study the effects of lawyer advertising on public opinion. ROTUNDA, *supra* note 115, at 34. Despite Burger’s concerns, the Commission found that “it is principally lawyers—not clients—who are concerned about the style and message of certain legal advertising.” COMM’N ON PROFESSIONALISM, *supra* note 124, at 276. Since then, yet another ABA study reached a similar conclusion. COMM’N ON ADVERTISING, *supra* note 120, at 3. In particular, the Commission, which described its work as “the most comprehensive ever undertaken on this subject” of lawyer advertising, *id.* at i, found that the relationship between advertising and public image is “questionable.” *Id.* at 3. Indeed, “[w]hile the legal profession strongly believes that advertising contributes to the decline of the profession’s image, the public rarely mentions advertising as a factor.” *Id.*; *see also* RHODE, *supra* note 16, at 148 (arguing that “many restrictions on lawyers’ commercial speech seem designed less to protect the public than to protect the profession’s public image”).

152. *See* Morgan, *supra* note 19, at 704 (asserting that the Model Code was “consistently self-serving”). Professor Morgan makes the trenchant observation that lawyer self-interest is not an unworthy pursuit; a legal education, after all, is costly to obtain, and we need to ensure that people have an incentive to pursue a career in law. *Id.* at 706. Morgan goes on to conclude, however, that the Model Code simply places too much emphasis on lawyer self-interest at the expense of other more important concerns, such as client interests and the pursuit of justice. *Id.*; *see infra* Part IV.B.

153. Morgan, *supra* note 19, at 712 (reaching the same conclusion about the Code’s advertising provisions).

154. MODEL CODE OF PROF’L RESPONSIBILITY DR 3-102, -103 (1982). Similar prohibitions appeared as late additions to the Canons, *see* CANONS OF PROF’L ETHICS Canons 33-34 (1908), but the prohibitions became more developed under the Model Code.

governing Model Rules of Professional Conduct,¹⁵⁵ benefited attorneys by ensuring that non-lawyers did not obtain controlling interests in law practices. The fear was that large companies, such as accounting firms, would gobble up existing law firms, put them under non-lawyer control, and offer attorneys reduced incomes and less autonomy over their practices.¹⁵⁶ Even worse, retail stores might open legal services departments and compete with small firms and solo practitioners.¹⁵⁷ Many attorneys quite simply feared that MDPs would threaten their businesses, and the Model Code's MDP-prohibition reflected this concern. Of course, not all lawyers opposed MDPs and many members of the profession voiced concerns about MDPs not described here; the position—shared by many ethicists—is that the restriction on MDPs (a structural rule) resulted at least in part from the protectionism and image-consciousness that has persistently pervaded the legal profession.¹⁵⁸

Another manifestation of protectionism appeared in the Code's rules regarding the unauthorized practice of law.¹⁵⁹ In spite of the enormous range of ethical issues that arise in practice, the Code dedicated an entire Canon (out of only nine in the entire Code) to the dangers and problems with non-lawyers performing legal work.¹⁶⁰ Although this issue is discussed in greater depth in Part VI, it is worth noting that scholars have offered considerable evidence that the bar's analysis of non-lawyer practice dramatically overestimates the harm and underestimates the benefits of allowing non-lawyers to perform routine legal tasks.¹⁶¹ For

155. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2002).

156. See, e.g., COMM'N ON MULTIDISCIPLINARY PRACTICE, A.B.A., REPORT TO THE HOUSE OF DELEGATES 2 (July 2000) (identifying and responding to this concern).

157. In fact, this is one of the very concerns that caused the drafters of the Model Rules (i.e., the Kutak Commission) to reject a version of Rule 5.4 that would have permitted MDPs. Charles W. Wolfram, *Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken*, 52 CASE W. RES. L. REV. 961, 970 (2002) (discussing the Kutak Commission's rejection of MDPs after it was noted that Sears might become a competitor for lawyers).

158. See, e.g., Fischel, *supra* note 121, at 974.

159. See Morgan, *supra* note 19, at 712 (concluding that "the prohibition of unauthorized practice is primarily for the benefit of lawyers"). The profession has a long history of excluding non-lawyers in an attempt to protect the profession's economic interests. See, e.g., Gerard Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840*, 14 AM. J. LEGAL HIST. 283, 304-05 (1970) (describing how Massachusetts lawyers in the 18th and early 19th centuries required extensive training to practice law).

160. MODEL CODE OF PROF'L RESPONSIBILITY Canon 3 (1980).

161. Morgan, *supra* note 19, at 707-12. The bar recently conducted a study that favored loosening unauthorized practice laws. COMM'N ON NONLAWYER PRACTICE, A.B.A., NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS (1995). Tellingly, however, the ABA's House of Delegates has largely ignored the most ambitious proposals contained in the report. Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 765 (2001). In fact, the ABA recently approved a resolution calling for *strengthened* unauthorized practice laws. Deborah Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1553 (2002); see also Deborah Rhode, *Professionalism in Perspective:*

instance, Professor Rhode has observed that as much as eighty percent of the legal needs of the poor currently go unmet,¹⁶² and that non-lawyers could help this under-served segment of the population obtain legal services they would not otherwise receive.¹⁶³ Despite the benefits of loosening unauthorized practice laws and the lack of evidence regarding the harms that non-lawyers would allegedly cause in the context of routine matters,¹⁶⁴ the Model Code urged states to adopt rigorous restrictions on non-lawyer practice.¹⁶⁵ One could certainly identify many rationales for these restrictions, including consumer protection, but a prominent concern was, quite simply, featherbedding.¹⁶⁶ As one noted scholar has concluded, laws against the unauthorized practice of law represent “[p]erhaps the clearest example of a Code standard which operates primarily for the benefit of lawyers.”¹⁶⁷

c. The Model Rules of Professional Conduct

Even the now-governing Model Rules of Professional Conduct retain an emphasis on professional image and protectionism.¹⁶⁸ With respect to image, the chairman for the committee that generated the new rules made the concern about perception explicit. Upon adoption of the Model Rules in 1983, the chairman declared that “[t]he legal profession has taken a step which should improve its image.”¹⁶⁹ Professor Ted Schneyer examined the political context in which the ABA created the Model Rules and found that the ABA drafted them, at least in part, to “shor[e] up among

Alternative Approaches to Nonlawyer Practice, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 702 (1996). So even though the report evidences some willingness to support measures that are inconsistent with the bar’s economic interests, those efforts have failed.

162. See, e.g., RHODE, *supra* note 16, at 7.

163. See *id.*

164. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000) (noting “that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services”).

165. MODEL CODE OF PROF’L RESPONSIBILITY Canon 3. The restrictions on unauthorized practice of law also appeared as a late addition to the Canons. CANONS OF PROF’L ETHICS Canon 47 (1908).

166. It is worth noting that the courts under the Model Code tended to apply an “appearance of impropriety” standard to conflicts of interest cases. Interestingly, the Model Rules dropped the appearance of impropriety standard, and the courts now infrequently refer to appearances in conflicts cases. This development, especially combined with the courts’ continued use of image in the advertising context confirms one of this Article’s central observations: that the profession has adopted image-related justifications for structural rules but has become less inclined to do so with respect to representation regulations.

167. Morgan, *supra* note 19, at 707.

168. Schneyer, *supra* note 126, at 725-26 (identifying self-protection as a major theme that “animates American lawyers today” and a theme that affected the Kutak Commission during its drafting of the Model Rules).

169. FREEDMAN & SMITH, *supra* note 5, at 6.

lawyers and regulators the ABA's image as lawgiver for the practice of law."¹⁷⁰ Schneyer also noted that the Rules were a response to "a felt need to shore up the profession's public image in the wake of the Watergate scandal, in which many lawyers were implicated."¹⁷¹

The reliance on public perception and self-interest is apparent in a number of structural areas. For the reasons explained in the context of the Code, the Model Rules' continuing restrictions on MDPs, including the rejection of a recent initiative that would have permitted them,¹⁷² reflects the profession's economic interests.¹⁷³ Moreover, the Model Rules (until quite recently)¹⁷⁴ did not discourage states from adopting strict regulations against interstate practice. As a result, many states have erected elaborate procedures to prevent incursions from out-of-state lawyers.¹⁷⁵ State bars have identified a number of reasons for strict rules against multijurisdictional practice, though the most important is likely protectionism.¹⁷⁶ As Professor Thomas Morgan noted more than twenty-five years ago, "[r]ules setting geographical limits on areas in which lawyers may practice are . . . used to protect lawyers . . . against competition from their legally trained brethren."¹⁷⁷ It is not simply happenstance that many of the states with the strictest rules, such as Rhode Island and New Jersey, also happen to border states that have large numbers of potential competitors (Massachusetts and New York, respectively).¹⁷⁸ Although the ABA recently adopted a proposal to

170. Schneyer, *supra* note 126, at 688 (asserting that the ABA drafted the Rules in order to enhance its own image and the image of the profession).

171. *Id.*

172. COMM'N ON MULTIDISCIPLINARY PRACTICE, *supra* note 1.

173. *See, e.g.*, Fischel, *supra* note 121, at 974.

174. *See infra* Part VI.B.2.

175. *See, e.g.*, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5-6 (Cal. 1998); *In re Ferrey*, 774 A.2d 62, 64 (R.I. 2001) (denying fees to a Massachusetts lawyer who represented a client before a Rhode Island administrative body even though the body granted the lawyer a pro hac vice admission; the Rhode Island Supreme Court reasoned that only it could grant such admissions and that the administrative body's action to the contrary was invalid).

176. Morgan, *supra* note 19, at 725-26.

177. *Id.* at 725; *see also* Gerard J. Clark, *Two Faces of Multijurisdictional Practice*, 29 N. KY. L. REV. 251, 254 (2002) (reviewing the recent MJP case law and concluding that "protection of the innocent and unsuspecting . . . public seems very distant to the courts' deliberations"); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice By Transactional Lawyers*, 36 S. TEX. L. REV. 665, 679 (1995) (arguing that the "real motivation [for many MJP regulations] . . . has to do with cutting down on the economic threat posed for in-state lawyers . . . by competition with out-of-state lawyers").

178. *See, e.g.*, *In re Ferrey*, 774 A.2d 62 (R.I. 2001) (exemplifying Rhode Island's strict approach to MJP); COMM. ON MULTIJURISDICTIONAL PRACTICE, N.J. STATE BAR ASSOC., PRELIMINARY REPORT AND RECOMMENDATIONS, *available at* http://www.abanet.org/cpr/mjp-comm_njsba.html (setting out the New Jersey bar's opposition to proposed MJP revisions and offering more conservative alternatives than the ABA's MJP Commission); *see also* Wolfram, *supra* note 177, at 681 (making a similar observation about New Jersey). *But see New Jersey Supreme Court*

liberalize multijurisdictional practice (MJP) rules,¹⁷⁹ the proposal is without force unless adopted by individual states. Moreover, the ABA's MJP Commission earlier rejected an even more liberal proposal that would have created a kind of national drivers' license model for attorney admissions.¹⁸⁰ Even though at least one member of the MJP Commission thought the more liberal version (dubbed the "Common Sense Proposal") was "a wonderful idea," the Commission rejected the proposal at least in part because it could not be "sold" to the ABA's House of Delegates.¹⁸¹

The Model Rules do evidence a more liberal approach to advertising and soliciting than the Code, but recent developments suggest that a return to more restrictive regulations may be under way. Around the time the Kutak Commission drafted the Model Rules, the profession began moving toward more permissive advertising rules as a result of an increasing public concern for consumer protection, government attention to anticompetitive behavior by lawyers,¹⁸² a greater awareness of the unequal distribution of legal services,¹⁸³ and the United States Supreme Court's strengthening of First Amendment speech rights for attorneys in the seminal case of *Bates v. State Bar of Arizona*.¹⁸⁴ In the last several years, however, the profession has once again promulgated more restrictive limitations on lawyer advertising and solicitation by relying on the well-worn justification of lawyer image. This return to more restrictive regulations based on a concern for public perception is on vivid display in the Supreme Court's recent decision in *Florida Bar v. Went For It, Inc.*¹⁸⁵ In *Went For It*, the Court examined the constitutionality of a Florida statute enacted in 1990 that prohibited lawyers from contacting accident victims or their families (even by mail) within thirty days of an

Proposes to Allow Limited Multijurisdictional Practice, 71 U.S.L.W. 2436, 2436 (2003) (noting a recent proposal to liberalize MJP in New Jersey, though the proposal does not go quite as far as the recent ABA amendments).

179. See COMM'N ON MULTIJURISDICTIONAL PRACTICE, *supra* note 3.

180. See *Interim Recommendations Need Changes, Speakers Urge at MJP Commission Hearing*, 70 U.S.L.W. 2499, 2499 (2002).

181. *Id.*

182. COMM'N ON ADVERTISING, *supra* note 120, at 33 (observing that "[r]esearchers and commentators have postulated . . . that the ban on advertising was one of a number of methods used by the organized bar early in the 20th Century to limit entry into the profession and restrict trade").

183. *Id.* at 35-37.

184. 433 U.S. 350, 385 (1977); see also *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622 (1995) (noting that "[c]onstitutional protection for attorney advertising . . . is of recent vintage").

185. 515 U.S. 618 (1995). It is worth noting that the Court's retrenchment may reflect a change in personnel as much as a change in philosophy. Both Justices Thomas and Breyer, who had not been on the Court at the time of the related predecessor case, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), joined the dissenters from the *Shapero* case to create the majority in *Went For It*. Rotunda, *supra* note 13, at 720 n.67.

accident.¹⁸⁶ Although strikingly similar to the regulation struck down in the Court's 1988 decision in *Shapero v. Kentucky Bar Ass'n*¹⁸⁷ (the only significant difference being the thirty-day waiting period as opposed to an outright ban), the Court upheld the Florida statute.¹⁸⁸ The Court concluded that, with regard to such forms of solicitation, the "Bar has [a] substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in *preventing the erosion of confidence in the profession that such repeated invasions have engendered.*"¹⁸⁹ In support of its conclusion, the Court relied heavily on evidence submitted by The Florida Bar that purported to show that advertising adversely affects the public's impression of lawyers.¹⁹⁰ The Court's reliance on this evidence is difficult to justify in light of the Court's previous skepticism about public image serving as a basis for regulating lawyer advertising¹⁹¹ and the lack of scientific evidence demonstrating a correlation between advertising and public opinion.¹⁹²

Ultimately, an examination of the history of structural regulations reveals that the bar has often used these rules to promote lawyers' image and economic interests. Of course, while not all structural rules further these goals,¹⁹³ a wide range of the profession's structural regulations have, in fact, advanced those objectives.

3. Legal Education

Although not part of the Model Rules, legal education requirements are also structural in that they define who can practice law and what people need to know in order to do so. They also reflect the twin goals of image-enhancement and protectionism. Robert Stevens, in his classic account of the history of American legal education, wrote that "the concept of providing part of legal training through an institution known as the law school had become associated with the parallel aspect of institutionalization—the urge to raise standards and to make the bar more competent and more exclusive."¹⁹⁴ Jerold Auerbach has explained that

186. *Went For It*, 515 U.S. at 620.

187. 486 U.S. 466, 470-71 (1988) (holding that the Model Rules' prohibition on targeted mailings was unconstitutional).

188. *Went For It*, 515 U.S. at 635.

189. *Id.* (emphasis added).

190. *Id.* at 626-29.

191. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 368-72, 379 (1977) (expressing skepticism that the State's desire to maintain attorneys' dignity is an interest substantial enough to justify the abridgment of their First Amendment rights).

192. *See supra* note 151 and accompanying text.

193. RONALD D. ROTUNDA, *LEGAL ETHICS, THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* 22 (2002-2003 ed.) (arguing that although "some of the rules may be self-serving, others are not").

194. STEVENS, *supra* note 104, at 24.

enhanced educational requirements also furthered protectionist impulses; that is, they helped to keep immigrants and minorities out of the legal profession.¹⁹⁵ In 1922, for example, Yale Law School's Board of Admissions expressed concern about "the Jewish problem."¹⁹⁶ The school's Dean even "suggested to the state bar in 1923 that students with foreign parents should be required to remain longer in college than native-born Americans before being admitted to law school."¹⁹⁷ That same Dean also urged the Yale faculty not to use "grades as the basis of limiting enrollment to the law school, because such a development would admit students of 'foreign' rather than 'old American' parentage, and Yale would become a school with an 'inferior student body ethically and socially.'"¹⁹⁸ Similar expressions of discriminatory intent litter the materials from this period.¹⁹⁹

Although the discriminatory motives have largely disappeared, self-protection and image-polishing still play a role in legal education, especially in the context of professional responsibility. In fact, the recently enhanced commitment to teaching legal ethics appears to have arisen, at least in part, out of a concern for the bar's image.²⁰⁰ In particular, many law schools began requiring for-credit legal ethics instruction in the mid-1970s in what appeared to be a response to the disastrous public relations effects of Watergate, a scandal in which many lawyers were implicated.²⁰¹ More recently, nearly all states have required students to pass the Multistate Professional Responsibility Examination (MPRE)²⁰² as a prerequisite to becoming members of the bar.²⁰³ This development also has some of its origins in the face-saving efforts that followed Watergate.²⁰⁴

195. AUERBACH, *supra* note 134, at 107-08; *see also* ABEL, *supra* note 36, at 41-73.

196. STEVENS, *supra* note 104, at 101.

197. *Id.*; *see also* AUERBACH, *supra* note 134, at 107-08.

198. STEVENS, *supra* note 104, at 101.

199. *Id.*

200. *See, e.g.*, Deborah Rhode, *Legal Education: Professional Interests and Public Values*, 34 *IND. L. REV.* 23, 38-39 (2000).

201. *See, e.g.*, Kathleen Clark, *Legacy of Watergate for Legal Ethics Instruction*, 51 *HASTINGS L.J.* 673, 673 (2000); Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 *FORDHAM L. REV.* 1299, 1332-33 (2003). The rise in for-credit, mandatory ethics courses was also related to the ABA's 1973 rule that required all law schools to offer some sort of legal ethics instruction. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, *supra* note 30, Standard 302. That rule, however, did not require for-credit courses, so the rise in such courses appears strongly related to Watergate, even if the new rule itself was not related to that event. Hayden, *supra* at 1332-33.

202. *See* NAT'L CONFERENCE OF BAR EXAMINERS, THE MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION, *available at* <http://www.ncbex.org/tests.htm>. (last visited Aug. 8, 2002).

203. Hayden, *supra* note 201, at 1299 (noting that passage of the MPRE is now required in all but three states).

204. *Id.* at 1301 (arguing that Watergate's role in the creation of the MPRE "cannot be

The profession's concern for public image, therefore, has affected legal ethics instruction as well as other structural features of professional regulation.

In the end, one finds structural rules in a variety of contexts and covering different substantive issues, but two themes appear consistently: an attempt to ensure confidence in the legal profession and to protect the bar's economic well-being. The next question is whether these premises for structural regulations deserve the privileged place that they have received. The answer, as suggested below and as noted by many commentators, is no.

IV. THE INADEQUACIES OF EXISTING STRUCTURAL OBJECTIVES

This Part contends that the bar's two most commonly sought structural objectives—the advancement of lawyers' public image and the promotion of their economic interests—ultimately prove quite unattractive as justifications for professional rulemaking and are consequently in need of revision. Certainly, quite a few commentators have recognized the undesirability of these objectives, so this Part necessarily draws heavily on the work of previous scholars.²⁰⁵ That said, this Part makes explicit two important points. First, it addresses the presumed link between image and systemic confidence and suggests that the link is not as strong as the profession has assumed. Second, it suggests that the focus on image and self-protection has not affected all professional regulations equally; rather, the focus has occurred primarily in the context of systemic issues.

A. *Image as a Justification*

The improvement of the profession's image might appear, at first glance, to be a compelling objective given the abundance of surveys documenting the public's distaste for lawyers. Many studies, including one finding that a minuscule five percent of parents would choose law as the best profession for their children,²⁰⁶ have found that the public holds

dismissed as irrelevant," but also arguing that the MPRE's emergence had other causes).

205. See, e.g., ABEL, *supra* note 36; RHODE, *supra* note 16; Morgan, *supra* note 19, at 707.

206. Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1 (reviewing the results of a National Law Journal/West Publishing Company poll). *But see* Walter S. Morsberg, *A Special News Report on People and Their Jobs in Offices, Fields and Factories*, WALL ST. J., Feb. 15, 1977, at A1 (citing a poll that found parents viewing law as one of the top three careers that they would want their children to pursue). At least one explanation for this contrasting finding is that the latter poll was conducted more than twenty-five years ago, at a time when many commentators believe the public had a better impression of attorneys. However, coming shortly after Watergate and the well-publicized role of lawyers in that scandal, this explanation is dubious. The differences quite likely reflect distinctions in methodology rather than an evolution of sentiment.

lawyers in particularly low esteem.²⁰⁷ Many scholars and practitioners believe that the legitimacy of the American justice system relies in no small part on the public's image of lawyers and conclude that the profession's rule-makers must therefore take these surveys into account.²⁰⁸ This Part, however, draws on a substantial body of literature to demonstrate that there may be little correlation between lawyers' image and public confidence in the justice system and that the profession should consequently place less emphasis on public opinion when crafting rules of structural significance.²⁰⁹

1. The Empirical Problem: The Unproven Link Between Lawyer Image and Institutional Confidence

The public's impression of lawyers does not affect society's confidence in legal institutions to the extent that the profession has assumed. Recent studies demonstrate that the public's interaction with, and respect for, lawyers has some effect on the level of trust for the justice system as a whole but that this relationship is relatively weak in comparison with other

207. See, e.g., WOLFRAM, *supra* note 108, at 3-4 (citing numerous studies that document the low regard in which the American public holds the legal profession); Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J. Sept. 1993, at 60, 62 (summarizing the findings of a nationwide telephone survey commissioned by the ABA which found that only forty percent of the public had a favorable view of lawyers); Chris Klein, *Poll: Lawyers Not Liked*, NAT'L L.J., Aug. 25, 1997, at A6; Randall Samborn, *Poll: Image of Lawyers Around Country Grows Worse*, N.Y. L.J., Aug. 2, 1993, at 1; Humphrey Taylor, *Lawyers and Law Firms Plumb the Depths of Public Opinion*, THE HARRIS POLL, Aug. 11, 1997 (finding that only nineteen percent of respondents believe that the legal profession enjoys "very great prestige"); see also Hornsby & Schimmel, *supra* note 151, at 325 n.2 (citing numerous public opinion polls involving lawyers).

208. See, e.g., N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 923 (1996) (adopting former ABA President N. Lee Cooper's belief that "confidence in the American justice system begins with the public perception of lawyers"); Steven A. Delchin & Sean P. Costello, *Show Me Your Wares: The Use of Sexually Provocative Ads to Attract Clients*, 30 SETON HALL L. REV. 64, 108 & n.229 (1999) (citing numerous articles in support of the same claim); R. William Ide III, *What the ABA Plans to Do*, A.B.A. J., Sept. 1993, at 65, 65 (claiming that "[w]ithout public confidence in lawyers and the profession, the entire justice system is compromised"); Gregory Zimmer, Note, *Suing a Current Client: Responsibility and Respectability in the Conduct of the Legal Profession*, 11 GEO. J. LEGAL ETHICS 371, 388 (1998) (positing that "indifference to public perception of the legal profession [causes] a considerable diminution of the respect afforded to . . . the justice system in general"). See also *supra* notes 118-20 and accompanying text.

209. See, e.g., PETER W. MORGAN & GLENN H. REYNOLDS, THE APPEARANCE OF IMPROPRIETY: HOW THE ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS, AND SOCIETY 5 (1997); Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1459-60 (1999). Specifically, commentators have criticized lawyers' concern for self-image, arguing that the profession needs to increase its attention to substance rather than to perception. These critics of so-called "appearance ethics" have contended that a positive professional image does little to instill confidence in the legal system and that perceptions should therefore not serve as a proper basis for reform.

factors. A representative survey—a 1999 study by the American Bar Association—supports this conclusion.²¹⁰

Before delving into the ABA survey's findings, it is worth noting the lack of nuance that typically accompanies discussions of public trust in the legal profession. One problem is that the literature has failed to differentiate between the public's trust in the profession in general and a particular individual's trust in her own lawyer to perform necessary legal services. The problem is that one can have trust in one's own lawyer but believe that the profession as a whole is undeserving of confidence, or vice versa. Unfortunately, surveys rarely make this distinction, but it is critical to the presumed objective of strengthening confidence in the legal system generally. In particular, the remedies for curing a lack of confidence in one's own lawyer could be quite different from the reforms necessary to change the public's perceptions of the profession. For example, rules regarding advertising may affect lay attitudes about the bar, but they will probably not impact an individual's trust in her own attorney. Conversely, a change in conflicts rules is unlikely to alter lay attitudes about the bar, but it could affect an individual's relationship with her lawyer. In the end, studies assessing public attitudes have not done a particularly good job of identifying what forms of public trust they are measuring.²¹¹ They also do not explain the relative importance of each form of trust: that is, should we have greater concern for what clients think of their own lawyers or for what the public thinks about the profession as a whole?

Even if we assume that discussions of public trust relate to perceptions of the legal profession more generally, a second problem with many discussions is that they tend to assume that lawyer popularity is an appropriate measure of confidence. In reality, one could identify at least two forms of public opinion: lawyer popularity and trust in attorneys. The first concern relates to how popular lawyers are; the second relates to whether the public trusts attorneys to carry out their responsibilities to the courts and to the justice system. People may trust lawyers to carry out their public responsibilities but at the same time not like them. Conversely, the public may like lawyers but believe they do not fulfill their obligations to the courts and to the justice system. Accordingly, even if there were some correlation between public confidence in the profession and trust in the system, surveys do not reveal much information about which type of public opinion lawyers should address. The studies that exist, however, do not offer much support for the idea that trust in the legal profession (generically defined) has a significant impact on trust in the justice system.

210. See M/A/R/C RESEARCH, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 50, 56, 73 (1999).

211. See RHODE, *supra* note 16, at 4 (arguing that “what the public dislikes about the legal profession is hard to disentangle from what it dislikes about the law, the legal system, and the lawyer’s role within that system”).

One telling and representative study is the ABA's 1999 survey, *Public Understanding and Perceptions of the U.S. Justice System*.²¹² The survey polled a representative sample of 1,000 Americans and assessed their attitudes about the United States system of justice and the various institutions within it.²¹³ A key objective of the study was to identify the factors that influence people's attitudes about legal institutions and to determine which of those factors affect public confidence in the justice system as a whole.²¹⁴

At the outset, one important finding is worth highlighting: public confidence in the justice system does not require trust in the legal profession. Consider that eighty percent of respondents thought the American justice system is "the best in the world"²¹⁵ and that thirty percent were extremely or very confident in the U.S. justice system in general.²¹⁶ In contrast, only fourteen percent expressed strong confidence in the legal profession.²¹⁷ There are many possible explanations for these results, but one conclusion is unavoidable: people can have trust in the justice system as a whole without having significant confidence in lawyers. Of course, this conclusion does not preclude a correlation between impressions of the legal profession and systemic trust. It may very well be the case that if the public had even lower trust in lawyers, the additional lack of trust would have resulted in lower confidence in the justice system. Conversely, the public might have had even more confidence in the justice system if people had a better impression of lawyers. Nonetheless, strong confidence in the justice system does not *require* strong confidence in attorneys.

This conclusion is also supported by an examination of peoples' attitudes sorted by their knowledge of legal institutions. The survey asked respondents numerous questions about the justice system to gauge their knowledge and found that people who were well-informed about the legal system had the most confidence in the justice system, with thirty-nine percent having a great deal of trust.²¹⁸ At the same time, these respondents also had the least trust in the legal profession, with only twelve percent having strong confidence in the bar.²¹⁹ Conversely, respondents with the lowest levels of knowledge had *more* trust in lawyers and *lower*

212. M/A/R/C RESEARCH, *supra* note 210, at 1.

213. *Id.* at 1, 3.

214. *Id.* at 1.

215. *Id.* at 58.

216. *Id.* at 50; *see also* LEO J. SHAPIRO & ASSOC., PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 6 (2002) (finding that thirty-nine percent of the public is extremely or very confident in the American justice system but only nineteen percent are extremely or very confident in the legal profession).

217. M/A/R/C RESEARCH, *supra* note 210, at 7.

218. *Id.* at 54.

219. *Id.*

confidence in the justice system as a whole.²²⁰ In other words, many people with less confidence in the profession have greater confidence in the system and vice versa, offering particularly telling evidence of the limited correlation between the two forms of trust.²²¹

Table 1:²²²

	Respondents Extremely or Very Confident in the U.S. Justice System	Respondents Extremely or Very Confident in the Legal Profession
Most Knowledgeable Respondents (Top 25% of Sample)	39%	12%
Least Knowledgeable Respondents (Bottom 25% of Sample)	28%	19%

The next question, therefore, is whether there actually is any correlation between people's trust in lawyers and their confidence in the justice system. Unfortunately, the ABA study only hints at the answer to this question. The hints suggest that there does exist some limited relationship, but it is not the kind of correlation that the profession seems to presume.²²³ The survey identified thirteen factors, including one entitled "Lawyer

220. *Id.*

221. *See id.* It is not hard to imagine why people with high confidence in lawyers might have less confidence in the system. One possible explanation is that people with the lowest levels of trust in social institutions nonetheless acknowledge that lawyers often have battled to change those institutions. *See* ROTUNDA, *supra* note 115, at 37 (noting that blacks tend to "view lawyers more favorably than do whites" because "lawyers have been instrumental in securing civil liberties for racial minorities"). *But see* Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 436-37 (1977) (citing studies that show that the poor have lower opinions of lawyers than the rest of the population). In the same vein, political liberals tend to trust the judicial system less (and thus frequently oppose the death penalty), yet are less critical of the legal profession. Conversely, conservatives tend to have strong confidence in the system but distrust lawyers. Former Vice President Dan Quayle, for example, was a vocal critic of the legal profession, *see, e.g.*, Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 77 (1993), but trusted the legal system to make life and death decisions with regard to the death penalty.

222. M/A/R/C RESEARCH, *supra* note 210, at 54.

223. *See id.* at 82-83.

Issues” that summarized respondents’ attitudes about the legal system.²²⁴ A regression analysis then revealed which of the thirteen factors had the greatest influence on respondents’ beliefs about legal institutions in general.²²⁵ The survey found that the system’s treatment of minority groups, the system’s concern for technicalities, and courts’ responsiveness to victims and requests for information all had a greater role in affecting institutional perceptions than did issues relating to lawyers.²²⁶

The survey did find that respondents’ beliefs about lawyer issues correlated to some degree with systemic perceptions.²²⁷ That finding, however, does not support the conclusion that we should be concerned about the profession’s image. Rather, the public’s concern about lawyer issues turned on matters quite apart from lawyer popularity and focused on the profession’s structural inadequacies.²²⁸ For example, the public’s views on the reasonableness of the cost of lawyers’ services, the number of lawyers as a whole, and lawyers’ concern for their own self-interest all affected systemic trust to some small degree.²²⁹ That finding simply does not support a strong link between the public’s perception of lawyers and systemic trust, and other recent studies imply a similar conclusion.²³⁰

2. Alternative Justifications for the Focus on Public Confidence

One might argue that, even if there is little or no correlation between the public’s perception of lawyers and the public’s confidence in the justice system, there may be other reasons to care about the profession’s image. For example, it might be argued that we need to attract intelligent, competent people to the practice of law, and if the profession has a negative image, such people will not become lawyers. The problem with this argument is that the profession’s image has been low for most of the nation’s history and was, as explained earlier, even worse than it is today. The profession, though, has never had trouble attracting talented people to the field. In fact, even during more hostile times, intelligent

224. *Id.* at 77.

225. *Id.* at 80.

226. *Id.* at 82.

227. *See id.* at 94.

228. *See id.* at 77.

229. *See id.* at 77, 82.

230. In the same year as the ABA study, a number of organizations (including the ABA) sponsored a conference in an attempt to identify issues that contribute to confidence in the justice system. NAT’L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY (1999). After compiling a list of possible issues that could affect confidence, conference participants, who included both lawyers and non-lawyers, attempted to identify the key drivers of systemic trust. Interestingly, lawyers and non-lawyers roughly agreed on the key factors affecting the public’s confidence in the nation’s judicial system, and the behavior of lawyers was simply not a prominent concern. *Id.* at 12-13.

people—including many of the Constitution’s authors—were lawyers.²³¹ There is thus little evidence that a poor (or even poorer) public image would affect the quality of the bar in such a significant way as to raise concerns.

One might argue that one difference today is that there are more career options for intelligent people than there were centuries or even decades ago. The greater availability of alternative careers might make law relatively less attractive than it was in the past. While this possibility surely exists, the evidence is to the contrary. Law school applications have not dropped to any significant degree in recent years despite an apparent downturn in the public’s impression of the profession. Rather, applications appear tied more closely to changes in the economy than to changes in the public’s impression of the bar.²³²

Another possible reason to focus on image is that poor public perception might lead lay people to call for changes to the legal profession that would, in the long run, adversely affect the public itself.²³³ For example, if the public sufficiently dislikes lawyers, government might revoke the profession’s monopoly and adopt reforms that would hurt the public in the end.²³⁴ Again, there is scant evidence to support this concern. Democratic institutions regularly craft regulations that are considerably more complex and arcane than the professional responsibility of lawyers, so there is little reason to believe that such institutions would do a worse job protecting the public’s long term interests than lawyers do when regulating themselves.²³⁵ As this Article has attempted to make clear, self-regulation creates significant opportunities for problematic rules; it is difficult to believe that democratic institutions would do worse.²³⁶

That said, the profession’s rule-makers should not ignore public opinion; there are plenty of circumstances where the profession should pay attention to what the public thinks. For example, lawyers deserved

231. FRIEDMAN, *supra* note 89, at 84 (noting that a “competent, professional bar, dominated by brilliant and successful lawyers . . . existed in all major communities by 1750 despite opposition and adversity”).

232. See Terry Carter, *The Economics of Admissions: Law Schools Get a Boost in Admissions when the Economy Goes South*, A.B.A. J. E-REPORT, June 28, 2002, at 5.

233. See RHODE, *supra* note 16, at 16 (noting the profession’s belief that it needs independence from government control in order to serve the common good).

234. *Id.* at 145; cf. Tom Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 863 (1998) (identifying a similar argument in the context of the court system).

235. See Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773, 788 (arguing that lawyers “should immediately reject . . . the . . . dangerous (if only implied) suggestion that any incursions on the tradition of self-regulation are inevitably inimical to the public interest”).

236. One compelling middle ground position is to get the public more involved in the bar’s self-regulating functions. Rather than having lawyers create their own rules, lawyers could obtain meaningful participation in the rule-making process from lay people. RHODE, *supra* note 16, at 145-46.

criticism for their role in Watergate and in many scandals since then,²³⁷ including (perhaps) the Enron debacle.²³⁸ The profession should certainly consider these criticisms when crafting professional regulations.²³⁹ The public's opinion, however, should not be the touchstone that it has often been. As one scholar has found, "[t]here is considerable evidence to suggest that public dissatisfaction with the courts is based upon a variety of misconceptions held by the public about the operation of the courts and of the legal system."²⁴⁰ Although that conclusion relates to the public perception of the courts, there is no reason to think that the public has any better understanding of lawyers when it evaluates the profession. As Professor Ronald Rotunda has argued: "[L]awyers should not expect to win popularity contests. . . . Lawyers will never be widely loved as long as they are really doing their jobs."²⁴¹ Professor Rotunda continued:

When people are asked what they dislike most about lawyers, the top fault [according to surveys] is that [they] are "too interested in money," (31%); second, lawyers file "too many unnecessary lawsuits," (27%); and third, lawyers "manipulate the legal system without regard for right and wrong." (26%). Now, what do people like about lawyers? For the general public, the most positive aspect of lawyers is: "Putting clients' interests first," (46%); second, lawyers protect people's rights (25%). . . . We receive accolades and denunciations for doing the same thing.²⁴²

In other words, just because the public has a criticism or does not like lawyers does not necessarily mean that the profession should do something

237. See, e.g., *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682 (D.D.C. 1978) (finding that lawyers aided security law violations); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998) (describing the role of large firm lawyers in helping Charles Keating evade government scrutiny in relation to the savings and loan scandals).

238. See, e.g., James V. Grimaldi, *Jamail Goes On the Offensive In Defense of Vinson & Elkins*, WASH. POST, Feb. 25, 2002, at E1 (describing the role of lawyers in the Enron scandal).

239. If the profession ignores these types of criticism, it risks losing control over some of its rulemaking authority. For example, the ABA House of Delegates recently voted down an amendment to the duty of confidentiality which would have allowed a lawyer to disclose confidential information when a client engages in a crime or fraud that would likely "result in substantial injury to the financial interests or property interests of another." MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (Proposed Amend. 2002). The SEC is now seeking to circumvent the ABA's rejection of the amendment by imposing new obligations on lawyers who represent publicly traded companies. Grimaldi, *supra* note 238 (arguing that the ABA's unwillingness to change Model Rule 1.6 to cover financial crimes led to the SEC's current attempt to accomplish the same effect).

240. Tyler, *supra* note 234, at 854.

241. ROTUNDA, *supra* note 193, at 36.

242. *Id.* at 36-37; see also RHODE, *supra* note 16, at 6-7 (making a similar observation).

about it. The profession, in the last analysis, has simply paid too much attention to its image in the creation of structural rules.

B. *The Problem With Self-Interest*

One might assume that self-interest is an ugly justification for professional regulations, but there is at least one legitimate reason for the profession's protectionism. Professor Thomas Morgan has observed that "[t]he high level of specialized professional skill with its extended training period is costly to develop. Members of the Bar seek both to have a satisfying career and to make a good living practicing law."²⁴³ For these reasons, Professor Morgan correctly concludes that self-interest deserves at least some small role in the rule-making process.²⁴⁴

That said, Professor Morgan rightly notes that the profession has placed too much emphasis on its interests.²⁴⁵ Professor Deborah Rhode, another prominent ethicist who has identified the profession's self-interested behavior in much of her writing, reaches a similar conclusion. She writes that "[r]egulation of the legal profession has been designed primarily by and for the profession, and too often protects its concerns at the public's expense."²⁴⁶ Indeed, Professors Rhode and Morgan recognize what should almost be axiomatic: the bar should not unduly emphasize its own interests when creating the profession's structural rules. Such an emphasis fails to give sufficient attention to other, more important concerns, such as the needs of the justice system as a whole. Of course, this conclusion does not preclude some emphasis on the bar's self-interests; it simply suggests that those interests have received too much attention.

The subsequent parts of this Article propose shifting the bar's focus away from protectionism and image consciousness and toward more compelling justifications for structural rules. This proposal sounds fine in theory, but it would likely find considerable resistance in practice. Although this Article does not offer much in the way of political strategies to avoid such resistance, Professor Rhode has suggested one important reform. She has argued that the bar should have greater lay involvement in its regulatory processes.²⁴⁷ That involvement would help mitigate the extent of the bar's self-interested rule-making, while still keeping professional regulation in the hands of lawyers.

Putting aside the political problems with reducing the bar's focus on self-interest, it is nonetheless important to recognize that the focus exists

243. Morgan, *supra* note 19, at 706.

244. *Id.*; *see also* Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 292-93 (1985) (Rehnquist, J., dissenting) (suggesting that a state has an interest in protecting the economic well-being of its own lawyers).

245. Morgan, *supra* note 19, at 706.

246. RHODE, *supra* note 16, at 208.

247. *Id.* at 146-47, 222.

and is excessive. One might argue that the bar has relied on other important factors in its regulatory efforts, including consumer protection, economic efficiency, and the like. This is no doubt true. The point, though, is that image and self-interest are simply two of the most prominent sources of rule-making guidance, and the bar has given them an unjustifiably large role, even when mixed with more benign objectives. The question then becomes: is there a way to create a more appealing framework for conceptualizing structural rules?

V. TOWARD A THEORY OF STRUCTURAL RULES

One can imagine two different approaches to creating a theory of structural rules. First, one could look to the well-developed models that ethicists have applied in the context of representational rules. Alternatively, one could develop a theory that is unique to the structural context. This Part contends that conventional models of lawyer behavior, such as the dominant view and its critics, ultimately offer the most compelling framework because those models would unify our vision of professional regulations. That is, they would provide us with one body of theory that would explain both representational and structural regulations.

One might object that this unification of theory ignores key differences between representational and structural rules. Unlike representational rules, which must address the realities that attorneys face in the context of representing individual clients, structural rules address larger objectives, such as the needs of the justice system as a whole. Or one might argue that representational rules need to rest on a vision of the attorney-client relationship, whereas structural rules rest on a broader set of ideals about the lawyer's role in society as a whole. Theories of systemic reform, according to this view, need to rely on a different set of concerns than do theories about representational rules.

In reality, both representational and structural rules ultimately aim—or at least should aim—to accomplish the same objective: creating the best possible system of justice. Discussions about attorney values, the importance of the attorney-client relationship, and the role of lawyers in society all boil down to a fundamental difference of opinion over the ideal justice system. For example, dominant view proponents believe that the best system is one in which parties engage in an adversarial search for the truth, with each lawyer advocating her client's objectives to the fullest extent the law allows.²⁴⁸ Dominant view critics, in contrast, believe the best system emphasizes other values, such as morality or justice in particular cases.²⁴⁹

248. *See supra* Part III.A.

249. *See id.*

Structural rules are no different; their content affects the shape of the justice system, so any attempt to craft effective structural regulations must necessarily consider what the ideal system should look like. For example, unauthorized practice laws dictate who can practice law and, accordingly, affect the contours of the justice system. To determine the ideal substance of such laws, one must necessarily make reference to some conception of the ideal system, and conventional theories provide a ready-made framework.

Another reason to unify ethics theory is the interrelatedness of professional regulations. For instance, many commentators have argued that MDPs would have a significant impact on how lawyers behave, including affecting lawyers' zealousness, their willingness to abide by their duty of confidentiality, and their obedience to conflict of interest rules.²⁵⁰ The structural regulation, therefore, would interact in important ways with representational rules. To ensure that structural rules of this sort do not conflict with the purposes underlying representational regulations, it makes sense to refer to the purposes of representational regulations when creating the structural rules themselves. That is, consistency dictates using the same rationales for structural rules that we use for representational rules.²⁵¹

One might respond that, even if one assumes that both types of professional rules should rely on a common theory, the conventional models offer an unduly limited universe from which to choose such a theory. For example, economic efficiency²⁵² and consumer protection both offer equally compelling objectives for professional rules, but they are not often part of the standard theoretical discussions. This objection lies not so much in the need for a unified theory as in the content of such a theory. Taking a stand on the most attractive model, however, is beyond the scope of this Article, and readers are urged to consult the wonderful literature that already exists on the issue.²⁵³ This Article makes a simpler point, but one no less important: the debates about ethics theory have more dramatic implications than commentators have tended to acknowledge. Namely, ethicists should apply the theories to rules that govern the very structure of the legal profession rather than limiting their application to representational rules.

250. See *infra* Part VI.C.

251. Interestingly, even if one were to cling to the public image justification for structural rules, it is worth noting that ethics theories would still have relevance in that context. See, e.g., PAUL G. HASKELL, *WHY LAWYERS BEHAVE AS THEY DO* xiii (1998) (suggesting that the public's poor impression of lawyers turns at least in part on the lawyer's adherence to the dominant view of ethics).

252. See, e.g., RHODE, *supra* note 16, at 144 (discussing market theories of professional regulation); FISCHEL, *supra* note 121, at 969-74.

253. For more detail, see *supra* Part III.A.

That said, it is worth noting that the often-mentioned goal of consumer protection is not a particularly attractive unifying rationale for ethics regulations. As the discussions of MDP, MJP, and non-lawyer practice make clear, consumer protection is frequently used to mask protectionist and image-related objectives. Another problem is that consumer protection is already a component of existing legal ethics theories. Consider again the Florida Bar's thirty day restriction on mail solicitation.²⁵⁴ When assessing the rule, the dominant view would consider the rule's impact on zealous advocacy. If the rule adversely affected consumers (i.e., clients and potential clients), it would also be inconsistent with the dominant view. In this way, the dominant view necessarily incorporates consumer protection into the analysis. Similarly, critics of the dominant view express a concern for consumer protection. If a lawyer engages in behavior that hurts consumers and does nothing to forward the interests of justice, dominant view critics would favor banning the conduct. Consumer protection, therefore, should not serve as a unifying theory of professional responsibility because it is already a component of the more elaborate understandings of the lawyer's role embodied in the dominant view and its critics.

In contrast, proponents of law and economics do not encounter the same issues, and they have successfully applied a single theory—economic analysis—to both representational and structural rules.²⁵⁵ Although these scholars have not expressly acknowledged their advocacy of a unified theory of professional responsibility, their work is an implied admission that such a theory is not only possible, but desirable. The hope is that these scholars will more explicitly recognize the unified nature of their approach and that advocates of competing views will begin to extend their frameworks in similar ways. In short, the application of law and economics to professional responsibility is helpful, not necessarily because of the merits of the analysis but because of the possibilities it implies.

Finally, one might make a somewhat different objection to the use of conventional ethics theory in the structural context: traditional models are not intended to offer prescriptions about the specifics of professional rules, not even at the representational level. Indeed, many ethicists try either to explain how lawyers should exercise their judgment in the absence of binding law or argue for more discretionary approaches to existing rules. Professor Simon, for example, has advanced a view of ethics that gives lawyers more freedom to decide how to represent their clients, and he

254. See *supra* note 9 and accompanying text.

255. See, e.g., Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 *FORDHAM L. REV.* 579, 580-82 (1992) (applying an economic analysis to conflict of interest rules); Fischel, *supra* note 121, at 969-70 (applying law and economics to a structural issue); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 *IOWA L. REV.* 965, 966-68 (1997).

admittedly offers few prescriptions about the content of particular rules.²⁵⁶ Rather, Professor Simon describes the institutions that would support his discretionary view of attorney behavior.²⁵⁷ Accordingly, one might argue that conventional models like Simon's are specifically intended not to define the content of professional rules and would thus make poor models for structural matters.

What this potential objection overlooks is that, even if an ethics theory (such as Simon's) does not offer specific prescriptions for the content of representational rules, it necessarily incorporates a vision of the ideal justice system. For the reasons explained earlier, any such vision inherently contains prescriptions for structural rules. So even though Simon does not spell out the ideal content of representational regulations, his commitment to promoting justice in particular cases has consequences for the profession's structure. Part VI offers some detail about what those consequences might be, but for now it suffices to note that conventional models—even those pitched at a more abstract level—are important sources for a unified theory of professional responsibility.

Conventional ethics theories, of course, will not always yield clear answers on issues of systemic reform, nor should we necessarily import such theories wholesale. Rather, my contention is that prevailing models would help frame systemic issues more crisply and in a way that is consistent with theories of individual lawyer behavior. Moreover, even if we must modify conventional ethics theory to inform discussions of professional structure, a recognition of the relationship between the two forms of professional regulation would yield a more unified and coherent lawyering model.

VI. THE UNEXPLORED IMPLICATIONS OF CONVENTIONAL THEORIES: SOME EXAMPLES

Conventional ethics models have a great deal to offer in the context of structural regulations, though theorists rarely suggest that possibility. This Part reviews three key issues of structural concern—client solicitation, unauthorized practice laws, and MDPs—and explains how conventional ethics theories can offer new insights. Moreover, this Part suggests that, although the dominant view and its critics offer conflicting prescriptions in the context of representational regulations, they often have surprisingly similar and progressive implications for structural reform.

256. SIMON, *supra* note 5, at 195.

257. *Id.* at 195-215.

A. Client Solicitation Rules

Client solicitation rules offer an excellent example of how conventional ethics theories can advance the profession's dialogue on questions of structural significance.²⁵⁸ In addition, the theories offer a surprisingly unified argument in favor of more liberal solicitation rules.

1. The Dominant View

The dominant view offers a strong case for more permissive client solicitation rules. Recall that the dominant view posits that lawyers should employ all possible lawful means to accomplish a client's ends and that a key value underlying the dominant view is the promotion of a client's autonomy.²⁵⁹ The very essence of autonomy is trust in an individual's ability to choose for herself, to choose from a variety of alternatives and to do so in her own best interests. The client—not the lawyer, not society, not anyone—is the best judge of what is best for the client, or so dominant view adherents maintain.

An emphasis on client autonomy could cut two ways in the context of solicitation rules. On the one hand, a lawyer is not supposed to interfere with a client's decisionmaking process and should merely follow the client's instructions.²⁶⁰ It follows that direct solicitations are undesirable because they influence individual choices, a consequence at odds with the value of autonomy that lies at the heart of the dominant view.²⁶¹ Accordingly, strict regulations—like the thirty-day prohibition on post-accident solicitation letters upheld by the United States Supreme Court in *Florida Bar v. Went for It*²⁶²—would have some appeal.

A different and ultimately more persuasive claim is that the goal of client autonomy does not preclude a lawyer from giving a client advice. Rather, autonomy requires that the lawyer comply with the client's informed decision after the lawyer has presented a client with various

258. The focus here is on solicitations instead of traditional advertising because unlike other forms of advertising, the United States Supreme Court has upheld solicitation restrictions as constitutional. As a result, solicitation questions turn more squarely on policy considerations. *See generally* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995).

259. *See supra* Part II.A.

260. LUBAN, *supra* note 5, at 167 (presenting this conception of the dominant view). *But see* Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 829, 847 n.91 (2001) (suggesting that Luban's description of the dominant view on questions of moral dialogue does not match the views of the dominant view's own proponents).

261. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-58 (1978) (making a similar argument in upholding a ban on in-person solicitations). *But see In re Primus*, 436 U.S. 412, 439 (1978) (striking down as unconstitutional a ban on in-person solicitations when the lawyer solicits a client for a pro bono matter).

262. 515 U.S. at 620.

options and perhaps suggested the best course of action.²⁶³ This description paints a richer and more attractive portrait of autonomy in that the client has more information and is consequently more able to make a decision that is in her best interests.²⁶⁴ Of course, the lawyer could manipulate the information given to a client in such a way as to make the lawyer's preferences more appealing,²⁶⁵ but for many clients—particularly knowledgeable individuals or corporations—some information about a choice (even if manipulated in some way by the lawyer) is arguably better than no information at all.²⁶⁶

One might argue that the types of prospective clients who lawyers will personally solicit are not well-informed individuals or corporate entities; rather, soliciting lawyers will target unsophisticated consumers. As a result, the potential for undue lawyer influence is large. Even if this is true, however, the existence of other soliciting lawyers offers a market-based corrective to any lawyer misconduct. If all lawyers are free to solicit clients, the chances are slim that one lawyer's misrepresentation will go uncorrected by another lawyer. The existence of other soliciting lawyers arguably makes it *less* likely that a lawyer will distort information than under the current system. Presently, a prospective client could seek out one or a small number of prospective counsel, leaving fewer opportunities for correction by competing lawyers.

Another potential objection is that unsophisticated clients will not necessarily choose the best lawyer; they will choose the lawyer who does the best job of soliciting them. As a result, in-person solicitation would produce inferior representation, a result at odds with the dominant view. What this objection assumes, however, is that unsophisticated clients would choose a more competent attorney in the absence of solicitations. There is little empirical evidence to support this assumption, and intuitively, it would seem that one would be just as likely to retain a poor lawyer by using a phone book or the Internet. From this perspective, even the most aggressive forms of solicitation—such as in-person contact within thirty days of an accident—fail to undermine and might even enhance an individual's autonomy.²⁶⁷

263. This process is sometimes referred to as moral consultation or moral dialogue and is not inconsistent with the dominant view. FREEDMAN & SMITH, *supra* note 5, at 60-62; Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 192-94 (1999); Perlman, *supra* note 260, at 847-48.

264. *But see* Simon, *supra* note 51, at 165-76 (critiquing the standard theories of moral dialogue and suggesting that it is difficult for a lawyer to identify a client's autonomous choices without referencing the lawyer's own sense of what is in the client's best interests); Morgan, *supra* note 19, at 719.

265. *See* Pepper, *supra* note 263, at 192-93.

266. *Cf. id.* at 194-95 (suggesting that corporate and sophisticated individual clients will not be adversely affected by moral dialogue).

267. FREEDMAN & SMITH, *supra* note 5, at 329-31 (making a similar point from the

One might respond that this approach still allows disturbing behavior, such as a lawyer knocking on the door of an accident victim's family the day after a fatal automobile collision. This conduct could result in the family bringing a lawsuit they would not otherwise have brought, hiring a lawyer that they would not have chosen, or entering into an unfavorable fee agreement with the lawyer. Another fear is that a client would have difficulty documenting what a lawyer said during an in-person meeting and would thus have trouble proving that a lawyer had made a fraudulent claim or stretched the truth about what she was capable of doing.²⁶⁸ On top of it all, one might find that the solicitation is just plain offensive because it intrudes on the privacy of grieving individuals.

These fears overstate the costs and understate the benefits of in-person solicitations. As an initial matter, a lawyer who misrepresents herself or her fees is subject to discipline, so although it is more difficult to prove what went on behind closed doors, it is not hard to imagine that lawyers who engage in deceptive practices would not get away with it for long.²⁶⁹ As for concerns about a client feeling pressured into hiring a lawyer, statutes exist in many states that permit a client to terminate a contract for legal services within a certain period of time after the client signs the contract.²⁷⁰ Although a client may not discover this right on her own, other visiting lawyers would certainly do so, making the availability of in-person solicitations that much more important. The doomsday scenario also overlooks the substantial benefits that an individual might obtain because of the rapid hiring of an attorney. In particular, the visiting lawyer could make the victim's family aware of legal rights and give the family the opportunity to hire a lawyer who could immediately set to work on accumulating valuable, fresh evidence.²⁷¹ Also underestimated is an individual's capacity to tell a soliciting lawyer to take a hike (to put it mildly).²⁷² There is also the possibility that competition will encourage

perspective of the dominant view).

268. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 466-67 (1978).

269. Indeed, the lawyer in *Ohralik* abused his position in a number of ways when seeking clients through in-person solicitations, such as surreptitiously tape-recording conversations with clients, using the tape recording to obtain fees after the client terminated the relationship, and using confidential information gleaned from one client in order to encourage another client to hire him. *Id.* at 449-52. His shenanigans did not go unreported, nor likely would similar misbehavior by other lawyers.

270. Fla. Bar v. *Went For It, Inc.*, 515 U.S. 618, 643 (1995) (Kennedy, J., dissenting). Again, *Ohralik* is an example. The client in that case fired the lawyer shortly after hiring him. *Ohralik*, 436 U.S. at 451-52. Of course, in *Ohralik* the lawyer sued the client for fees, suggesting that the in-person solicitation did the client much more harm than good. See *id.* at 452. *Ohralik*'s consequent disbarment, *id.* at 453-54, however, should demonstrate why such lawyer behavior would likely be rare.

271. Cf. *Went For It*, 515 U.S. at 636 (Kennedy, J., dissenting); see also FREEDMAN & SMITH, *supra* note 5, at 329-31.

272. *Went For It*, 515 U.S. at 643 (suggesting that "clients will not hire lawyers who offend

lawyers to offer lower prices, whether in the form of lower billable rates or more client-favorable contingency arrangements.²⁷³ Finally, and perhaps most critically, the lawyer might protect the family from defense lawyers who might try to negotiate a low-ball settlement with the family before they hire their own attorney.²⁷⁴ In any event, the visit might be offensive and may upset a family already in grief, but it also may advance, not undermine, the key value of autonomy underlying the dominant view.²⁷⁵

In the same way, in-person solicitations are consistent with the dominant view's prescription of zealous advocacy. By waiting thirty days to contact an individual to inform her of her legal rights, the lawyer is arguably failing to work in the potential client's best interests. As explained above, witness recollections diminish and evidence may disappear or become stale during a thirty day period; moreover, defense counsel might visit the prospective client and influence the person to sign away important rights.²⁷⁶ Put simply, delays in obtaining counsel can adversely affect the representation that a person receives and are counter to a client's interests.²⁷⁷ The key value of autonomy thus suggests a more permissive approach to solicitation rules, and the core prescription of zealous advocacy supports it as well.

Even if one thinks that the most aggressive form of in-person solicitation described above undermines autonomy or should otherwise be prohibited, the reasons for that conclusion are much less applicable to regulations, such as the one in *Went For It*, that prohibit mailings. In that case, even fewer concerns about interfering with autonomy are present, and the concerns about invading a family's privacy are substantially reduced.²⁷⁸ The argument here is not necessarily that the Supreme Court decided the *Went For It* case incorrectly as a matter of constitutional law,

them") (Kennedy, J., dissenting).

273. See, e.g., COMM'N ON ADVERTISING, *supra* note 120, at 2-3 (noting the correlation between advertising and lower fees and observing that "advertising is a major factor in the delivery of legal services, especially to the poor"); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Constitutional Rights*, 83 MICH. L. REV. 1, 166-69 (1984); John R. Schroeter *et al.*, *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, J. INDUS. ECON., Sept. 1987, at 49.

274. See, e.g., Rotunda, *supra* note 13, at 721.

275. Perhaps state bars can adopt the same kind of "don't call" lists that states now use in the context of telemarketers. See, e.g., Michael McCarthy & Jayne O'Donnell, *FTC Could Get Telemarketers to Stop Calling*, USA TODAY, June 5, 2002, at B1 (describing a telemarketer proposal at the federal level). Specifically, if people do not wish to be contacted by an attorney, they could simply put their names on a "don't call" list for attorneys created by the state bars. Lawyers who do not comply could be disciplined.

276. See, e.g., FREEDMAN & SMITH, *supra* note 5, at 329-31 (identifying and elaborating on an actual example of this scenario, *Gunn v. Washek*, 176 A.2d 635 (1961)).

277. Morgan, *supra* note 19, at 721.

278. See generally *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635-645 (1995) (Kennedy, J., dissenting).

although there is ample evidence that it did.²⁷⁹ Rather, the claim is that Florida and other states²⁸⁰ that have adopted similar measures should rescind them as inconsistent with the premises of the dominant view.²⁸¹

2. Critics of the Dominant View

Despite differing prescriptions for representational rules, dominant view critics would likely generate similar prescriptions for solicitation provisions. Assume, for example, that one adopts Professor Simon's critique of the dominant view and believes that justice—rather than zealous advocacy—should serve as a lawyer's professional touchstone. A prerequisite of justice is that people are actually aware of their legal rights and have access to the justice system.²⁸² In-person solicitations and targeted mailings of the type at issue in *Went For It* advance these goals.²⁸³ First, both forms of solicitation make people aware of their legal rights. Moreover, solicitations—and advertising more generally—can affect the affordability of and access to legal services by producing lower prices

279. There are a number of reasons to question the Court's decision. First, there is considerable empirical evidence to suggest that the studies relied on in *Went For It* were flawed. See, e.g., sources cited *supra* note 151. Moreover, even if one believes in the validity of the evidence the Court cites, the study at issue found that only 27% of recipients of the direct solicitation letters had a reduced image of the profession. *Went For It*, 515 U.S. at 627. How the other 73% of recipients changed their view of the profession (if at all) we are not told. It suffices to say, however, that the vast majority of recipients of such mailings *did not* have a lower view of the profession. ROTUNDA, *supra* note 115, at 691. In addition, it is at least arguable that lawyer communications to prospective clients go to the very core of First Amendment activity and deserve more than the protections afforded commercial speech. Indeed, communications to individuals offering to help them seek legal redress through the government (i.e., the courts) appear to be what the First Amendment is designed to protect. *Went For It*, 515 U.S. at 635-37 (Kennedy, J., dissenting). Finally, the Court fails to explain why the Florida restrictions should apply only to plaintiffs' lawyers. Is it not equally offensive for a defense lawyer to get a victim or a victim's family to sign a hastily considered settlement agreement in the days immediately following an accident? One would think so, but the Florida law does not prohibit that behavior. Rotunda, *supra* note 13, at 721-22. One is left to believe that the law reflects an attack on a particular kind of message from lawyers (i.e., you should sue), rather than an attempt to regulate the conduct of the messenger, making the rule an unconstitutional form of viewpoint discrimination. See Gross, *supra* note 209, at 1459-60.

280. See, e.g., HAZARD ET AL., *supra* note 37, at 1033 n.9; John Phillips, *Six Years After Florida Bar v. Went For It, Inc.: The Continual Erosion of First Amendment Rights*, 14 GEO J. LEGAL ETHICS 197, 203-09 (2000) (describing the enactment of similar rules in several other states).

281. One recent case distinguished *Went For It* and struck down a statute relating to the solicitation of criminal defendants. See *Ficker v. Curran*, 119 F.3d 1150, 1150 (4th Cir. 1997).

282. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1092-93 (1988).

283. Cf. *In re Primus*, 436 U.S. 412 (1978) (finding client solicitation restrictions in the context of pro bono work to be unconstitutional).

through increased competition.²⁸⁴ Specifically, the more that attorneys have access to potential clients, the more competitive the market for legal services should become and the more access people should have. With some studies suggesting that as much as eighty percent of the poor's legal needs go unmet,²⁸⁵ greater access and lower prices would forward the interests of justice. So to the extent that client solicitation advances these interests, it would be consistent with at least one critique of the dominant view.

One could make other arguments about the proper scope of solicitation rules using Professor Simon's framework and similar critiques. The goal in this Article, however, is not necessarily to offer the definitive description of what those critiques mean for solicitation rules, but merely to suggest that ethicists should spend more time exploring those implications. This Part is simply a first step toward such a discussion, offering one possible way of bridging the gap between treatments of representational and structural regulations. Significantly, these preliminary assessments produce the notable conclusion that seemingly conflicting theories of legal ethics may offer similar conclusions in a key area of structural concern.

B. *Unauthorized Practice Laws*

As is the case with lawyer self-promotion, conventional ethics theories have not said enough about the rules and statutes that govern the unauthorized practice of law. An examination of what they could say suggests that conventional theories offer support for a more permissive approach to determining who should be allowed to practice law in a particular state.

Initially, it is worth noting that statutes and state ethics rules regarding unauthorized practice (UPLs) regulate two different forms of conduct. First, UPLs address what most people think of when they hear the term "unauthorized practice of law"; namely, they prohibit non-lawyers from engaging in law practice. This type of UPL defines what constitutes the practice of law and then prohibits non-lawyers from engaging in those activities. Second, UPLs regulate what *lawyers* can do in a particular state when they are not licensed to practice in that jurisdiction, such as when a Massachusetts lawyer travels to New York to conduct business on behalf of a client. This issue, commonly referred to as multijurisdictional practice (MJP), has become increasingly controversial in recent years because of

284. See *supra* note 273 and accompanying text; see also ABEL, *supra* note 36, at 121-22.

285. THE SPANGENBERG GROUP, INC., NATIONAL SURVEY OF THE CIVIL LEGAL NEEDS OF THE POOR, in A.B.A. CONSORTIUM ON LEGAL SERVICES FOR THE PUBLIC, TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENT OF THE POOR & PUBLIC GENERALLY 37 (1989) (finding that 80% of the poor's legal needs currently go unmet); see also Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 n.1 (2001) (citing numerous studies supporting this claim).

two developments. First, the California Supreme Court in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*,²⁸⁶ invalidated most of a one million dollar fee owed to New York lawyers because the lawyers had earned the money while negotiating a settlement in California and were not admitted to the California bar.²⁸⁷ The ruling caught many lawyers by surprise, as the *Birbrower* attorneys never appeared in a California courtroom and had merely sought a settlement for their client through the use of arbitration.²⁸⁸ Even more recently and partly in response to the first development, the ABA adopted a proposed revision to the Model Rules, which would (if adopted by states) loosen restrictions on MJP.²⁸⁹ The contention below is that conventional theories contribute to the debate regarding both types of UPLs.

1. Non-Lawyer Practice

By applying the dominant view to the issue of non-lawyer practice, we once again find that the concepts of client autonomy and free choice have distinct implications. The concepts imply that a client should have control over whom she selects to perform her legal services, especially since that choice will have a substantial impact on the quality of the client's representation. From this perspective, the dominant view appears to support a client's freedom to select a non-lawyer representative.

One might respond that the importance of legal services actually suggests the need for *strict* controls over non-lawyer practice. As explained in the advertising context, autonomy is valuable only to the extent that an individual has received information from which to make a choice. By employing a non-lawyer, a client might not receive the best available information and would consequently make poor decisions and receive inadequate representation. The client, according to this view, would not be sufficiently informed to satisfy the demands of autonomy and, even if the client received adequate information, the non-lawyer would conduct the work the client requested less effectively than would a lawyer. To avoid these outcomes, the profession must ensure that only lawyers provide legal services to individuals.

One problem with this reasoning is that it rests on a faulty premise. It assumes that, if we loosen UPLs, people who currently employ lawyers will become customers of non-lawyers. In reality, a substantial number of people cannot afford to hire lawyers and, if faced with the choice between

286. 949 P.2d 1 (Cal. 1998).

287. *Id.* at 2-4. California subsequently amended state law to permit lawyers to practice in cases similar to *Birbrower*, but the amendment was only temporary. See, e.g., Joaquin Vieira, *Reciprocal Licensing Signed Into Law*, METROPOLITAN NEWS ENTERPRISE, Aug. 29, 2000, at 5.

288. *Id.*

289. COMM'N ON MULTIJURISDICTIONAL PRACTICE, *supra* note 3, at 4 (noting that the *Birbrower* case was one of the causes of the current concern for MJP issues).

representing themselves and getting an attorney (the choice they face with strict UPLs), these people will represent themselves or, in a proceeding they want to initiate, fail to initiate it.²⁹⁰ The choice, therefore, is not between a lawyer and a non-lawyer; it is between a non-lawyer assistant and no assistance at all.²⁹¹ The only remaining question is whether non-lawyers who specialize in a given area (e.g., divorce) can do a better job than people representing themselves *pro se*. The answer is that scholars have produced ample evidence that lay people would benefit from non-lawyer assistance.²⁹² Accordingly, for a great number of people access to a non-lawyer will improve—not diminish—the quality of legal assistance they receive. Thus, the choice of a non-lawyer is an appropriate expression of autonomy that the profession should support.

One might respond that, even if the poor might benefit from the loosening of UPLs, non-lawyers would under-price lawyers and cause people who *could* afford lawyers to hire non-lawyers. The result is the usual parade of horrors: inadequate information, inferior representation, and decreased respect for the legal system and the administration of justice. First, this reasoning is counter to the idea of client autonomy that lies at the heart of the dominant view. If people really think that non-lawyers can provide a better value, why not let them try? As long as people know that an individual is not a lawyer, the individual is assuming that risk and can be informed of that risk when incurring it. Second, there is actually little evidence to suggest that non-lawyers would do an inferior job when representing individuals on routine legal matters (e.g., divorce). In fact, there is considerable evidence that non-lawyers can be at least as effective as lawyers when handling such issues.²⁹³ And even if some non-lawyers are truly incompetent or constitute significant drains on judicial

290. One might argue that, if no lawyer finds a case valuable enough to litigate, society should not expend resources to handle the matter because the matter is too insignificant. But this reasoning assumes that a lawyer's profit incentive is the proper metric by which to determine whether a claim should be heard. Indeed, there may be other reasons a legal matter is worth pursuing, even if it does not offer immediate remunerative benefits for a lawyer. For example, some types of civil rights cases might not produce significant legal fees but are worth pursuing because of their legal importance. Moreover, the drafting of documents (such as wills) might help save people and the court system money in the long run, but a low-income individual might not be able to afford the fees of a lawyer to draft such a document.

291. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000) (observing "that many persons can ill afford . . . the typically higher cost of lawyer services").

292. Actually, the evidence suggests not only that non-lawyer professionals could do a better job than lay persons, but that they can even do as good a job as lawyers on simple matters. *See* Rhode, *supra* note 285, at 1806. Indeed, the benefits of nonlawyer practice have been recognized for years by scholars and practitioners, but lawyers have done little to weaken their own monopoly. *Id.*; *see also* ROTUNDA, *supra* note 115, at 573 (noting the pervasiveness of nonlawyer work in non-courtroom settings in Europe).

293. *See* sources cited *supra* note 292; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000).

resources (e.g., because of frivolous filings), wronged clients could bring negligence actions against such practitioners (who could be required to carry insurance), or the courts could simply bar these people from engaging in non-lawyer practice. The bottom line is that the benefits of non-lawyer practice in routine areas outweigh the costs of such services and ultimately further clients' interests in zealous representation.

True believers in zealous advocacy also should go one step further. Rather than simply loosening UPLs, they should also argue for more government funding for entities like the Legal Services Corporation to ensure that people also receive proper representation for more complicated legal matters.²⁹⁴ Put another way, autonomy and zealous advocacy require not only greater access to legal advice through non-lawyers, but also greater funding for civil legal services organizations as well.²⁹⁵ Along the same lines, a dominant view proponent also should be an advocate of mandatory pro bono to the extent that legal services programs are unable to provide sufficient representation on more complicated matters.

Dominant view critics would reach similar conclusions but through different reasoning. For example, Professor Simon focuses on achieving justice in individual cases, a position that necessarily entails access to legal services. The United States Supreme Court recognized this reality in the criminal context when it decided the seminal case of *Gideon v. Wainwright*.²⁹⁶ The Court found that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."²⁹⁷ The Court's conclusion seems no less true in the civil context, where parties also need adequate legal advice in order to ensure just resolutions.²⁹⁸ Simon's position, in other words, implies that individuals should receive legal advice for all matters that involve the justice system, not just criminal proceedings.

Ideally, people would receive civil legal advice from attorneys. The reality, though, is that the Court is unlikely to extend *Gideon* to civil matters, and government's willingness to expand the availability of civil

294. Cf. Pepper, *supra* note 5, at 617 (observing that "[individual] autonomy is often dependent upon access to the law"). Unfortunately, Pepper does not explore the deeper structural significance of his statement in relation to unauthorized practice of law or government funding for legal services, even though his position has implications for these areas.

295. Interestingly, Professor Pepper explicitly declines to make this point, arguing that unequal access is simply the by-product of a market-based system. *Id.* at 619-20. His emphasis on autonomy, however, is hard to square with his rejection of calls for greater access. Cf. David Luban, *The Lysistraton Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 643-44 (finding faults with Pepper's reluctance to address inequalities in access to legal services).

296. 372 U.S. 335 (1963).

297. *Id.* at 344.

298. Cf. LUBAN, *supra* note 5, at 261-62 (making a similar argument regarding the potential scope of *Gideon*).

legal counsel is questionable given the cost.²⁹⁹ Moreover, with few exceptions (Florida being one), states have consistently resisted attempts to impose mandatory pro bono requirements.³⁰⁰ As a result, the increased availability of non-lawyers who specialize in routine legal matters would offer the greatest likelihood that justice would occur in individual cases. The availability of non-lawyers would lower the cost of legal services, enabling more people to access legal advice, and thus presumably increase the likelihood that justice is achieved in a greater number of legal matters.³⁰¹

Luban, like Simon, not only would—but does—support loosening unauthorized practice laws.³⁰² The limitation of Luban's analysis is that he does not reach his conclusion by relying on his theory of lawyer behavior; rather, he examines what the United States government requires in order to maintain its legitimacy and concludes that expanded access is necessary to that end.³⁰³ Luban need not have been so reluctant to draw on his theory of lawyer behavior. If one assumes (as Luban does) that lawyers have an obligation to pursue morally worthy ends using morally acceptable means,³⁰⁴ then that premise would seem no less true when applied to the legal profession as a whole. That is, the legal profession has moral obligations just as the individual members of that profession.

Luban does argue for mandatory pro bono,³⁰⁵ but he does not explore what would happen if (as seems likely) mandatory pro bono does not solve the problem of inadequate legal services for the poor. In that case, it would seem that lawyers also have an obligation to ensure that people have access to legal advice through other means, namely through loosening the rules on non-lawyer professionals. Luban's framework, therefore, is consistent with calls for loosening the profession's monopolistic grip on routine legal services, though Luban does not explore this line of argument to the extent that he could.

The preceding discussion is in no way intended to replace or even summarize the very rich and powerful literature that already exists on

299. The sparse funds allocated to legal services organizations through the Legal Services Corporation and other funding sources supply only a small fraction of the legal needs of the poor. See *supra* note 162 and accompanying text.

300. See Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations With Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 156 (1997).

301. But see Richard L. Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 LAW & POL'Y Q. 5, 40-42 (1979) (questioning whether access to legal services will affect the poor to the extent that many believe); Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y. REV. 95, 149-51 (1974) (same).

302. LUBAN, *supra* note 5, at 269-73.

303. *Id.* at 252-56.

304. *Id.* at xxii.

305. *Id.* at 282-88.

unauthorized practice.³⁰⁶ The discussion is instead intended to suggest that the literature has too often overlooked the importance of conventional theories when addressing the issue of non-lawyer practice. In addition, the analysis implies that ethics theories offer a more uniform recommendation about the unauthorized practice of law than they do in the context of representational rules.³⁰⁷

2. Multijurisdictional Practice

The ABA recently approved a revision to the Model Rules that would (if adopted by the states) make it easier for lawyers to practice in jurisdictions where they are not admitted to the bar.³⁰⁸ In the process of drafting the rule revision, the Commission on Multijurisdictional Practice rejected an even more radical idea dubbed the “Common Sense Proposal.”³⁰⁹ Rather than simply making it easier to engage in multijurisdictional practice, the Common Sense Proposal would have created a national licensing system similar to what states use in the context of drivers’ licenses.³¹⁰ Once admitted in one jurisdiction, a lawyer would have been able to practice anywhere else in the United States with only limited exceptions.³¹¹ The following discussion contends that the Common Sense Proposal was more consistent with the profession’s pre-existing theories of lawyering and that the idea should have received more enthusiastic support from the bar.

From the perspective of the dominant view and, in particular, its reliance on client autonomy, the Common Sense Proposal has considerable appeal. Autonomy requires that clients be given choices, and as explained

306. See, e.g., COMMISSION ON NONLAWYER PRACTICE, *supra* note 161; Rhode, *supra* note 285; Rhode, *supra* note 122, at 209; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

307. Interestingly, even if one believes that we should care greatly about the profession’s public image, there is some evidence that more permissive UPLs would enhance the public’s perception, or at least avoid some troubling images that arise when states crack down on non-lawyer practice. See, e.g., Rhode, *supra* note 306, at 219 (citing the negative publicity arising out of Florida’s campaign against a lay person’s divorce service); LEO J. SHAPIRO & ASSOC., *supra* note 216, at 32 (identifying the education of the public in handling common legal problems as the best way to enhance the profession’s image). Moreover, the ABA—M/A/R/C Research Study discussed earlier identifies access as the most significant method for improving confidence in the justice system. M/A/R/C RESEARCH, *supra* note 210, at 82. In short, even if one believes that systemic trust should serve as the touchstone for structural rules, that premise also appears to support more permissive unauthorized practice laws.

308. See Stephen Gillers, *It’s an MJP World: Model Rules Revisions Open the Door for Lawyers to Work Outside Their Home Jurisdictions*, A.B.A. J., Dec. 2002, at 51.

309. See *Interim Recommendations Need Changes, Speakers Urge at MJP Commission Hearing*, *supra* note 180.

310. *Id.*

311. *Id.*

earlier, there are few choices in the legal context more fundamental than one's selection of a legal representative. Accordingly, if a Rhode Island citizen wants to hire a Massachusetts lawyer to draft a will (a scenario permissible under the Common Sense Proposal but probably not under the proposal actually adopted by the ABA), why should the client be prohibited from doing so? The most common answer is that the Massachusetts lawyer is less likely to be familiar with the relevant law in Rhode Island than a Rhode Island lawyer, so strict MJP provisions are necessary as a matter of consumer protection.³¹²

The consumer protection argument has a number of important weaknesses. First, there is no evidence that a Massachusetts lawyer, particularly one who specializes in wills, would have any difficulty uncovering the nuances of Rhode Island law as it relates to writing such a document. The skills of legal research are the same in every state, so although it might take a Massachusetts lawyer a bit longer, the work product should be no worse than what a similarly-experienced Rhode Island lawyer could produce. As the MJP Commission itself pointed out: "Often, the most significant qualification to render assistance in a legal matter is not knowledge of any given state's law, but knowledge of federal or international law or *familiarity with a particular type of business or personal transaction or legal proceeding*."³¹³

One might respond that the client should not have to pay for the Massachusetts lawyer's self-education on Rhode Island law. If the lawyer does not charge by the hour, however, the consideration would be irrelevant. Moreover, even if the Massachusetts lawyer bills by the hour, the hourly rate would presumably reflect the lawyer's knowledge of the law just as it does for in-state attorneys. When young lawyers pass the bar, their billable rate is lower than the rate of more experienced attorneys; one would expect experienced lawyers to adjust their rates in the same way when they have to undertake an unusual amount of self-education. Of course, it might turn out that a lawyer misjudges her knowledge, does not adjust her rate in advance, and leaves the client paying more than if the client had hired an in-state practitioner.³¹⁴ But such fears arise no less frequently for in-state lawyers who try to tackle new practice areas but discover that they overestimated their knowledge. Thus, out-of-state lawyers present problems in this regard that are no different from the problems that states already have with their own lawyers.

A second reason to be skeptical of the consumer protection argument is that there is no reason to believe that a Massachusetts lawyer will have any more difficulty understanding the relevant law than a recent law school graduate who just passed the Rhode Island bar exam. Why should

312. See, e.g., COMM'N ON MULTIJURISDICTIONAL PRACTICE, *supra* note 3, at 7, 14-15.

313. *Id.* at 3 (emphasis added).

314. *Id.* at 15.

the latter lawyer, who would likely have no practical experience and little substantive knowledge, be allowed to service the Rhode Islander, while a Massachusetts lawyer with substantially more experience would not? This question is particularly pointed, given that the recently-admitted Rhode Island lawyer would not have had to obtain substantial knowledge about Rhode Island law in order to pass the bar exam. For the most part, states administer bar examinations that draw heavily (and in some states exclusively) on nationally accepted legal concepts,³¹⁵ so it would appear that a lawyer's membership in a particular bar says little about the lawyer's knowledge of local law.

One might argue that Rhode Island would want control over the out-of-state lawyer for disciplinary purposes,³¹⁶ but there is precedent for allowing states to discipline out-of-state lawyers who engage in practice within the state.³¹⁷ Moreover, one could easily adopt a reciprocal system of disciplinary enforcement, such as the ABA's recent amendment of Rule 22 of the Model Rules of Lawyers Disciplinary Enforcement.³¹⁸ The new rule encourages states to discipline their own lawyers whenever those lawyers are disciplined for conduct that occurred in another jurisdiction.³¹⁹

Another objection to national practice is that it will produce a "race to the bottom," allowing lawyers to gain admission to the bar in states with easier admissions requirements and then to move to states with stricter standards.³²⁰ As an initial matter, bar admission standards are only a rough measure of a lawyer's knowledge and ability. Is it possible to say that someone who barely passes the bar examination in Minnesota (a statistically easier bar exam) will be a worse lawyer than someone who barely passes the California bar (a traditionally difficult exam)? Not really. But even if we are concerned about such a problem, one could simply identify a bar exam test result that would qualify for national licensing. That way, a person with a barely passing score in a jurisdiction with easy bar admission requirements would not become nationally licensed and would receive only local licensing.

315. Melvin A. Eisenberg, *The Concept of National Law and the Rule of Recognition*, 29 FLA. ST. U. L. REV. 1229, 1239 (2002); Michael J. Thomas, *The American Lawyer's Next Hurdle: The State-Based Bar Examination System*, 24 J. LEGAL PROF. 235, 245-46 (2000).

316. COMM'N ON MULTIJURISDICTIONAL PRACTICE, *supra* note 3, at 9.

317. See, e.g., *In re Murgatroyd*, 741 N.E.2d 719 (Ind. 2001); *ABA Delegates Approve Proposals to Allow Some Multijurisdictional Practice by Lawyers*, 71 U.S.L.W. 2106, 2107 (2002) [hereinafter *ABA Delegates Approve Proposals*] (describing the ABA's revision of Model Rule 8.5, which would allow a state to discipline a lawyer who acts within its borders even if the lawyer is not admitted to practice there).

318. *ABA Delegates Approve Proposals*, *supra* note 317, at 2107; see also COMM'N ON MULTIJURISDICTIONAL PRACTICE, *supra* note 3, at 33-36 (making a recommendation for reciprocal discipline).

319. *Id.*

320. COMM'N ON MULTIJURISDICTIONAL PRACTICE, *supra* note 3, at 15.

Others have argued that a national practice would adversely affect lawyers' independence and cause a related threat to the profession's ability to protect the public against government abuses.³²¹ These objections usually assume that a national system of law practice would require regulation by the federal government and that the government would consequently have more control over the way in which lawyers behave.³²² One could imagine, however, a national form of practice that would not require federal government oversight or administrative involvement. States could simply have their own disciplinary rules (as they do now), and lawyers would have to comply with them when they entered new states to practice law. Just as we all have to follow the laws of a state when we visit even if they differ from those of our home state, lawyers would have to follow the rules of the jurisdictions they visit. In short, a national practice regime would not necessarily implicate federal government involvement and is thus not inconsistent with state control over lawyer behavior.

In the end, states restrict the practice of out-of-state lawyers considerably more than they do their own newly minted and inexperienced attorneys. But if states are willing to give clients the freedom to choose inexperienced recent law school graduates, one finds it hard to explain why clients should not also have the same autonomy when it comes to out-of-state lawyers. Given that all lawyers—whether in-state or out-of-state—are prohibited from taking on cases they are unqualified to handle,³²³ the fears of out-of-state lawyers are difficult to justify.³²⁴ Or at least this is what dominant view proponents would likely argue.³²⁵

Critics of the dominant view would reach similar conclusions through alternative reasoning. As explained above, proponents of both the Luban and Simon critiques of the dominant view would agree that access to legal advice is critical. Access, of course, often turns on price, so the lower the price, the more people will be able to afford legal services. It stands to reason that, by increasing the supply of lawyers who are able and willing

321. See, e.g., Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 781-85 (1995); Wolfram, *supra* note 177, at 703-07.

322. See, e.g., Daly, *supra* note 321, at 783-85; Wolfram, *supra* note 177, at 704-07. For one very recent example that scholars might cite in support of this argument, see *SEC Must Issue Attorney Conduct Rules Under New Federal Accounting Reform Law*, 71 U.S.L.W. 2079, 2079 (2002).

323. COMM'N ON MULTIJURISDICTIONAL PRACTICE, *supra* note 3, at 8.

324. *But see id.* at 14 (identifying these arguments and suggesting that they are ultimately unpersuasive).

325. One additional objection to a national licensing scheme is that it could jeopardize the local nature of the bar, causing reductions in pro bono work and other public interest initiatives. *Id.* at 15. There is little empirical support for this claim, though, and it is hard to imagine pro bono work falling below the already minimal levels we currently witness. Moreover, if the level of pro bono commitment were really a concern, states could mitigate the problem through the adoption of mandatory pro bono requirements.

to provide legal services in a particular state, the more competitive prices will become. To the extent that lower prices make lawyers affordable for more people (hardly a radical assumption), dominant view critics are also likely to support quite liberal MJP rules.

Interestingly, the ABA's MJP Commission recognized the weight of many of the arguments that adherents of the dominant view and its critics would likely advance. Rather than identifying counter-arguments, it simply concluded that there is an "absence of empirical evidence about how the elimination of jurisdictional restrictions would affect law practice in the United States [O]ne cannot necessarily conclude from [available evidence] that eliminating geographical restrictions in their entirety will be harmless. . . . Thus, the question is how to proceed in an area of uncertainty."³²⁶ The Commission answered this question by favoring a more moderate liberalization of MJP rules.³²⁷ In support of its conclusion, the Commission cited "the principle of state-based judicial regulation of the legal profession, the assumptions underlying that principle, and the support of a large segment of the bar for preserving it."³²⁸ The Commission, unfortunately, gave few reasons for why the sentiments of "a large segment of the bar" should dictate policy on a question so interrelated to lawyers' pocketbooks. The Commission also offered few justifications for why it believed national practice would undermine the state-based system of legal regulation; as explained earlier, national practice is not inconsistent with state control over professional regulations and discipline. Ultimately, given the bar's previous tendency to favor self-protection, the MJP Commission should have proceeded in this area of uncertainty by favoring the competition-enhancing proposal reflected in the national licensing model.

There are, of course, many arguments on both sides of this issue, and the reader is urged to consult the numerous sources that have discussed the subject.³²⁹ The point is simply that the prevailing theories would support an approach to MJP that is more progressive than even the most recent liberalization allows.

C. *Multidisciplinary Practices*

MDPs raise yet another structural issue about which traditional theories would have much to say. As explained earlier, MDPs are entities in which lawyers partner and share fees with non-lawyer professionals, such as accountants and consultants. An ABA Commission on Multidisciplinary

326. *Id.*

327. *Id.*

328. *Id.*

329. See, e.g., Symposium, *Ethics and the Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 657 (1995).

Practice issued a report that advocated changing the Model Rules to allow lawyers to enter into these types of arrangements,³³⁰ but the ABA's House of Delegates recently defeated the Commission's proposal.³³¹ The question examined here is whether conventional ethics theories would support a rule-revision to permit MDPs.

The dominant view, with its emphasis on client autonomy, would likely favor MDPs for many of the same reasons that dominant view proponents would probably support liberalized MJP rules. Namely, clients should have the freedom to choose their legal representatives. If clients thought they could get better services or better rates from MDPs because of the "one stop shopping" MDPs would offer,³³² then clients should have the freedom to choose those entities as their legal service providers. If MDPs did not offer effective legal services or sufficiently zealous advocacy, clients would not hire the lawyers who worked in MDPs and the entities would fail as clients eschewed MDPs in favor of traditional law firms.³³³

One might argue that lawyers would necessarily lose professional independence if they partnered with non-lawyers because non-lawyers would control the legal work that MDP lawyers perform. As an initial matter, this supposed problem is no different from what in-house counsel regularly encounter: those lawyers do not act autonomously, but rather report directly to non-lawyer executives within their respective companies. Lawyers in other settings also encounter limited autonomy in many circumstances.³³⁴ Moreover, the MDP Commission anticipated this potential objection, and the proposed revision to the rules accordingly prohibited non-lawyers from having authority to dictate the direction of legal representation.³³⁵ The problem, in short, is one which the profession has already dealt with in other contexts and one which properly crafted rules could avoid.³³⁶

The MDP opponent might respond that, even if the profession could prevent a loss of lawyer autonomy through regulation, the potential for

330. COMM'N ON MULTIDISCIPLINARY PRACTICE, *supra* note 1.

331. Jenny B. Davis, *The Enron Factor*, A.B.A. J., Apr. 2002, at 45 (describing the ABA House of Delegates's defeat of the MDP Commission's proposal in 2000).

332. "One stop shopping" is a commonly cited reason for supporting MDPs. *See, e.g.*, RHODE, *supra* note 16, at 19. The idea is that clients would be able to obtain legal, accounting, consulting, and other such services from one entity and could thus receive discounted rates and other similar benefits from having a single provider of professional services. *Id.*

333. Incidentally, advocates of law and economics have made a similar argument. *See* Fischel, *supra* note 121, at 962.

334. *Id.* at 954-59; *see also* Perlman, *supra* note 260, at 834-42.

335. COMM'N ON MULTIDISCIPLINARY PRACTICE, *supra* note 1, at 7-8.

336. Another commonly stated fear is the opposite of overzealousness: underzealousness. The argument is that lawyers would not advocate vigorously for clients who were, for example, litigating against a large client of the consulting arm of the MDP. Although certainly a valid concern, this problem can also be avoided through a well-crafted conflicts of interest rule.

excessive zealousness remains. In the drive to enhance profits for the MDP, attorneys might bend the rules or the law to benefit the MDP's bottom line. The Enron fiasco offers excellent fodder; people argue that Arthur Anderson's creative accounting occurred because of its desire to please a particularly profitable client of the company's consulting arm.³³⁷ Using similar logic, the claim is that MDPs would create perverse incentives, pushing lawyers to bend or break the law on behalf of their clients in order to enhance the MDP's profits.³³⁸

This argument fails to recognize that the incentives for over-zealousness already exist to at least the same degree in the traditional legal workplace. Law firms, when representing their biggest clients, have the very same incentives to employ excessive zeal that lawyers would have within MDPs.³³⁹ Among other examples, some commentators have suggested that Vinson & Elkins's eagerness to please Enron contributed to the questionable legal advice that the law firm provided to the company.³⁴⁰ The incentives are even greater for in-house counsel; these lawyers receive a paycheck from a single client and thus have a particularly strong incentive to ensure their client's success. Even contingency cases create incentives to bend the rules in order to improve the lawyer's bottom line. Ultimately, MDP opponents correctly observe that pressures will exist within MDPs to engage in socially undesirable conduct, but these critics fail to recognize that such incentives are an inherent part of contemporary law practice regardless of the setting.³⁴¹

Dominant view critics, with their focus on justice or morality, would also find few reasons to reject MDPs. With the prospect of large retailers, such as Sears, offering legal services, the public would face lower fees. Just as large department stores can under-price smaller stores, these legal retailers could offer the public less expensive legal advice.³⁴² The result would be greater access and affordability of legal services, a consequence fully consistent with the ambitions of the dominant view critics. As with

337. Davis, *supra* note 331, at 45 (noting that the Enron debacle "seems to reinforce what MDP critics have always said—that MDP compromises such values as loyalty, confidentiality and independent judgment").

338. *Id.*

339. See, e.g., SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978).

340. See, e.g., Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 19-21 (2002).

341. Despite this argument in favor of MDPs in general, there may be reasons to limit MDPs that are fully consistent with the limitations that conflicts of interest rules place on more traditional work settings. For example, the ABA's MDP Commission recommended that accountants within an MDP should not be allowed to attest to the accuracy of financial documents when the MDP also represents the client's legal interests. See COMM'N ON MULTIDISCIPLINARY PRACTICE, A.B.A., FINAL REPORT TO THE HOUSE OF DELEGATES, at <http://www.abanet.org/cpr/mdpfinalrep2000.html> (describing the Commission's opposition to a single entity providing legal and audit services) (last visited Aug. 27, 2002).

342. Fischel, *supra* note 121, at 972.

all of the previous discussions, the analysis here is necessarily brief. At the very least, though, it suggests that conventional theories have something to contribute to the debate about structural rules. At the most, it suggests that scholars might well reach uniformly progressive conclusions about key issues currently facing the legal profession.

VII. CONCLUSION

This Article has offered an unabashed attempt to coax legal ethics theorists into the structural realm of professional regulation. If successful, the effort would unify the bar's treatment of structural and representational rules and offer a more compelling understanding of the very framework that governs the legal profession. Of course, ethicists already have addressed structural issues in considerable detail, and this Article in no way detracts from those efforts. Rather, the point is to recognize that conventional theories have addressed only a fraction of professional responsibility issues and that the theories actually could offer a different—and in many cases, a supporting—perspective from which to examine the profession's structure. In particular, existing ethics theories imply that we should allow multidisciplinary practices, adopt more liberal unauthorized practice rules, and enact more permissive regulations regarding client solicitations.

The Article also has noted that the incorporation of conventional theories into structural debates brings a surprisingly uniform perspective to those discussions. Unlike the theories' applications to representational regulations, which produce markedly different conclusions about the content of rules, the theories generally point in the same direction at the structural level. They suggest that the bar needs to take a more progressive approach to some of the most fundamental features of the profession. The Article thus reaches the notable conclusion that the traditional explanations of the lawyer's role uniformly supply potentially radical structural implications. The hope is that ethicists will recognize the utility of this proposed integrative approach and will explore in more detail what this Article necessarily does only in preliminary form.

Finally, the Article has important implications for the profession's development of its structural rules. If the bar is to downplay its image and economic interests when creating these regulations, it must maintain institutions that are less susceptible to self-interested considerations. As suggested earlier, Professor Rhode's argument for greater lay involvement in the bar's regulatory processes is one measure that would help.³⁴³ It would reduce the likelihood that the bar will engage in protectionist rule-making, while maintaining the bar's control over its regulatory processes. Ultimately, conventional theories offer strong support for more

343. RHODE, *supra* note 16, at 146-47.

progressive approaches to structural regulations, but those reforms will not come without institutional changes. With such changes, however, the profession can hope to achieve a more coherent and unified approach to the field of legal ethics.