Fordham Law Review

Volume 82 | Issue 6 Article 3

2014

The Monopoly Myth and Other Tales About the Superiority of Lawyers

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INTRODUCTION

The U.S. legal profession's so-called monopoly on the practice of law is under siege.[1] The monopoly depends on barriers to entry such as costly legal education, character and fitness inquiries, and other licensing requirements that are under sustained attack.[2] These barriers not only limit entry to the profession, but also are used to justify the profession's claim of technical and moral superiority over nonlawyer providers of legal services. At the same time, the legal profession's privileged status is also eroding, as laws that prohibit the unauthorized practice of law by nonlawyers are (slowly) being rewritten to permit nonlawyers to provide legal services to individuals in a variety of contexts.[3] Individuals are also increasingly turning to other legal information providers so that they can represent themselves both in and out of court.

In some ways, the surprise is not that the monopoly is eroding, but rather, that it has taken so long. Calls in the United States to permit nonlawyers to provide more legal services date back more than thirty-five years.[4] In many countries, legal services are not provided by a single group of professionals,

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1. In fact, the profession's conduct can more accurately be likened to a cartel than a monopoly. Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 4 n.7 (1981). Nevertheless, the term "monopoly" will be used here in its colloquial sense to mean that the profession controls most of the market for legal services.

2. *See, e.g.*, BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012); William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547 (2004); Deborah L. Rhode, *Moral Character As a Professional Credential*, 94 YALE L.J. 491 (1985).

3. *See infra* notes 30–32 and accompanying text.

4. Ralph Cavanagh & Deborah Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 165 (1976); *see also* Roger Hunter & Robert Klonoff, *A Dialogue on the Unauthorized Practice of Law*, 25 VILL. L. REV. 6, 21–22, 37 (1979); Quintin Johnstone, *The Unauthorized Practice Controversy, A Struggle Among Power Groups*, 4 U. KAN. L. REV. 1, 55 (1955) (suggesting this approach). By 1986, an American Bar Association report noted, "It can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients on any matter concerning the law." AM. BAR ASS'N COMM'N ON PROFESSIONALISM, ". . . . IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 52 (1986).

but rather by a variety of providers who perform different functions. One frequent line of demarcation has been between legal professionals who appear in court and those who provide other legal services. For example, in Japan, there are six different providers of legal services ranging from *bengoshi*, who appear in court, to *jun horitsuka* (quasi-lawyers) such as social insurance labor consultants.[5] In the United Kingdom, where barristers and some solicitors appear in court, nonlawyers—such as advice agencies—provide legal services to individuals outside of court.[6]

In the United States, lawyers have struggled to maintain their privileged status as providers of legal services. Although those efforts predated the American Revolution, 1870 to 1920 was the seminal period in the legal profession's campaign to prevent the practice of law by nonlawyers.[7] Elite lawyers formed bar associations and embarked on the professional project, that is, the effort by lawyers to attain market monopoly, social status, and autonomy.[8] The organized bar undertook to raise admission standards by requiring formal legal education, bar examinations, and character and fitness requirements to signal that lawyers possessed the technical expertise and moral fiber to be viewed as a profession and to be entrusted with legal work.[9] Bar associations also created lawyer disciplinary processes, in part to convey to the public that lawyers were trustworthy and capable of self-regulation.[10]

Since then, the bar and the courts have used the rhetoric of public protection to justify the claim that only lawyers should be permitted to provide legal services to the public.[11] They contend that lawyers' formal

5. *See* Kyoko Ishida, *The Growing Influences of "Lawyer Substitutes" on Citizens' Access to Legal Services*, 27 WASEDA BULL. COMP. L. 15, 15, 24–25 (2007).

6. *See Key Facts About the Citizens Advice Service*, CITIZENS ADVICE BUREAU, http://www.citizensadvice.org.uk/index/aboutus/cab_key_facts.htm (last visited Apr. 26, 2014); *We're Here To Help You*, COUNCIL LICENSED CONVEYANCERS, http://www.clc-uk.org/consumers.php (last visited Apr. 26, 2014) (describing subject areas in which advice or assistance is provided).

7. Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 166–69, 186.

8. *See* RICHARD L. ABEL, AMERICAN LAWYERS 20, 25 (1989); TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 67–68 (1987); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 49–50 (1977); Robert W. Gordon, *The Legal Profession*, *in* LOOKING BACK AT LAW'S CENTURY 287, 294–97 (Austin Sarat et al. eds., 2002).

9. *See* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 272, 287, 361 (1950); Christensen, *supra* note 7, at 175–77; Johnstone, *supra* note 4, at 5.

10. HALLIDAY, *supra* note 8, at 69–72; MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 24–28 (1988).

11. *See, e.g.*, Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27, 31 (Mass. 1943) (explaining that the justification for excluding nonlawyers from the practice of law was "found, not in the protection of the bar from competition, but in the protection of the public from being advised and represented in legal matters by incompetent and unreliable persons"); *see also* Richmond Ass'n of Credit Men v. Bar Ass'n, 189 S.E. 153, 157 (Va. 1937); *In re* Coop. Law Co., 92 N.E. 15, 16 (N.Y. 1910); John G. Jackson et al., *Report of the Special Committee on Unauthorized Practice of Law*, 57 ANN. REP. A.B.A. 562, 564 (1932); *Report of the Standing Committee on the Unauthorized Practice of Law*, 66 ANN. REP. A.B.A. 268 (1941).

training, moral character, and commitment to professional ideals help ensure public protection.[12] This can be seen in the 1969 American Bar Association's (ABA) Model Code of Professional Responsibility, which explains that the "prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services."[13] Unlike nonlawyers, who "are not governed as to integrity or legal competence," lawyers are subject to regulation and "also [are] committed to high standards of ethical conduct."[14] Similar claims about the technical and moral superiority of lawyers continue to the present.[15] But as a practical matter, the credentials required to become a lawyer (i.e., a graduate law degree and passage of a bar examination) "often far exceed the skills demanded."[16] There is also scant evidence that lawyers are more effective or trustworthy than nonlawyer providers of certain legal services.

The monopoly is problematic not simply because lawyers are unfairly advantaged in the marketplace for legal services. It contributes to a more fundamental problem: many poor, near-poor, and middle-class individuals cannot afford a lawyer. The scope and consequences of this problem have been eloquently described elsewhere.[17] But, in essence, to qualify for free legal services, an individual must be extremely poor.[18] And even among those who qualify for free legal services, less than one in five receive the legal assistance they need.[19] While attorneys annually provide millions of

12. Christensen, *supra* note 7, at 188; Jackson et al., *supra* note 11, at 564.

13. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-1 (1969). It further states that because of "the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession." *Id.*

14. *Id.* EC 3-3.

15. *See, e.g.*, Jean Cotton, *Legal Technicians Aren't the Answer: The Family Law Section's Executive Committee Weighs In*, WASH. ST. B. NEWS, July 2008, at 30, 32 (stating that "[a]llowing inexpert non-lawyers to practice the complex specialty of family law poses a risk to the public that cannot be ignored"); Mike France, *Bar Chiefs Protect the Guild: A Lobbying Blitz Engulfs an ABA Panel on Non-lawyer Practice*, NAT'L L.J., Aug. 7, 1995, at A1, A28.

16. ABEL, *supra* note 8, at 21.

17. *See, e.g.*, Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 52–60 (2010); Gillian K. Hadfield, *Summary of Testimony: Task Force To Expand Access to Civil Legal Services in New York*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (Oct. 1, 2012), http://richardzorza.files.wordpress.com/2012/10/hadfield-testimony-october-2012-final-2.pdf.

18. To qualify for Legal Services Corporation–funded services, a family of four typically can only earn up to 125 percent of the poverty level, or $29,438. *Fact Sheet on the Legal Services Corporation*, LEGAL SERVS. CORP., http://www.lsc.gov/about/what-is-lsc (last visited Apr. 26, 2014).

19. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 3 (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf. The New York Legal Aid Society was able to help only one out of nine New Yorkers who sought its help with civil legal problems. THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK

hours of pro bono legal services,[20] these efforts have proved inadequate to meet the needs of individuals who cannot afford legal representation. Indeed, even if every lawyer in the country performed 100 hours of pro bono work annually, it would not fill the enormous gap in the need for legal services.[21] This has led to a significant access to justice problem for millions of individuals who cannot afford a lawyer to represent them in important matters involving their most basic legal needs. It has also led to a crisis in many courts as they attempt to address the needs of self-represented litigants who are unfamiliar with legal forms and proceedings.[22] This access to justice problem raises the urgent and obvious question: why should lawyers' near monopoly of the legal services market continue?

This Article considers the evidence concerning whether lawyers are superior to nonlawyer legal services providers in the results they obtain in certain legal matters, and the psychological and other evidence concerning whether lawyers are—or are likely to be—more trustworthy. The comparison focuses on whether lawyers are superior to nonlawyer representatives who are permitted to provide legal services (e.g., workers' compensation representatives) rather than to illegal providers (e.g., *notarios*). If lawyers are more effective or more ethical, then the legal profession's monopoly of the legal services market can be justified, at least in part, on the grounds that it helps to protect the public. If lawyers are not superior, then it is difficult to justify some of the current limitations on nonlawyer practice, especially when so many individuals cannot afford to hire a lawyer.

This Article begins in Part I with a description of the current U.S. legal services market, which is dominated by lawyers, but also includes nonlawyers who provide legal services in many contexts. Part II describes the empirical evidence concerning the effectiveness of nonlawyer legal services providers. The evidence suggests that experienced nonlawyers can provide competent legal services in certain contexts and in some cases, can seemingly do so as effectively as lawyers. Part III looks at the question of whether lawyers are more trustworthy or "ethical" than nonlawyer providers of legal services. It considers the effectiveness of the requirements imposed on lawyers that are thought to increase their trustworthiness (e.g., legal education and the character and fitness inquiry)

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38 (2010), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf.

20. PRO BONO INST., 2012 REPORT ON THE LAW FIRM PRO BONO CHALLENGE 1 (2013), *available at* http://www.probonoinst.org/wpps/wp-content/uploads/2012-Law-Firm-Challenge-Report.pdf.

21. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 152 (2010).

22. *See, e.g.*, THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *supra* note 19, at 1; U.S. BANKR. COURT CENT. DIST. OF CAL., ACCESS TO JUSTICE IN CRISIS: SELF-REPRESENTED PARTIES AND THE COURT 1–3, 8–9 (2011), *available at* http://ecf-ciao.cacb.uscourts.gov/Communications/prose/annualreport/2011/ProSeAnnual%20Report2011.pdf.

and also explores whether lawyers' psychological characteristics are likely to make them more trustworthy than nonlawyer legal services providers. Part IV discusses the implications of the existing research. It notes that since there is little evidence that lawyers are more effective at providing certain legal services or more ethical than qualified nonlawyers, the primary justification for the legal profession's monopoly of the legal services market does not hold up to scrutiny. Instead, the public would be better served if more nonlawyer representatives—who were subject to educational and licensing requirements—could provide more legal services to the public.

I. THE MONOPOLY MYTH AND THE U.S. LEGAL SERVICES MARKET

Lawyers are not the only providers of legal services in the United States. Accountants routinely give tax advice, which is based on complex tax law and regulations.[23] Realtors handle real estate closings in many states.[24] Nonlawyers also represent individuals in many federal agencies. For instance, nonlawyer patent agents admitted to the U.S. Patent and Trademark Office prepare and file complex patent applications.[25] Nonlawyer accredited representatives recognized by the Board of Immigration Appeals represent individuals in immigration proceedings.[26] Nonlawyers can represent individuals before the Department of Labor's Wage and Appeals Board.[27] Many state agencies also permit nonlawyers to represent parties in their proceedings.[28]

In most other circumstances, however, nonlawyers who are not working under the supervision of lawyers are limited to selling and typing up legal forms for self-represented individuals.[29] Only a few states allow qualified nonlawyers to provide additional assistance when they are operating on their own. Certified legal document preparers in Arizona and legal document assistants in California can help prepare legal documents for self-represented litigants and provide some general information, but they cannot give legal advice.[30] Immigration consultants in some states can help immigrants complete forms, translate documents, and secure supporting documents.[31] Limited license legal technicians (LLLTs) in Washington can

23. *See* Christensen, *supra* note 7, at 204–05.
24. *See id.* at 197–98, 208, 210–11.
25. 37 C.F.R. § 11.6(b) (2013).
26. 8 C.F.R. § 1291.2(d) (2014). Accredited representatives must work for a qualified nonprofit organization, but are not required to be supervised by a lawyer.
27. *See* 20 C.F.R. § 725.362(a), 725.363(b).
28. *See* HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 11 (1998); *see also infra* note 154 and accompanying text.
29. *See* Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 829–30 (2002).
30. *See* ARIZ. CODE JUD. ADMIN. § 7-208(F)(1) (2007); CAL. BUS. & PROF. CODE § 6400(c) (West 2003). Unlawful detainer assistants can also help individuals complete forms in eviction proceedings. CAL. BUS. & PROF. CODE § 6400(a), (d).
31. *See, e.g.*, CAL. BUS. & PROF. CODE § 22441.

help individuals with document preparation and provide legal advice in the area of family law.[32]

The market for legal services also includes those who provide legal services illegally. This practice is especially prevalent and problematic in the area of immigration law. These nonlawyers, sometimes known as *notarios* or immigration consultants, often live in neighborhoods populated by immigrants.[33] *Notarios* can put competitive pressure on lawyers because they often charge less than lawyers and promise results that lawyers cannot guarantee.[34] *Notarios* are not trained in immigration law—which is substantively complex—and their inaccurate advice can have devastating consequences, including removal of their clients from the country in cases where removal would not have otherwise occurred.

Finally, the market for legal services has been affected by the steep rise in individuals who are engaging in self-representation either because they cannot afford a lawyer or because they believe they can handle their legal problems on their own.[35] Both groups often rely on "do-it-yourself" information that can be found in books, in courthouses, and on the internet. The number of self-represented litigants in some courts is enormous. For example, 98 percent of tenants in eviction cases in New York State are not represented.[36] Over 80 percent of divorce cases in some jurisdictions involve one or more self-represented parties.[37] Many self-represented litigants also appear before state agencies in important legal matters, such as cases involving denial or termination of subsistence benefits. The legal profession has sought to address this increase in self-represented litigants by allowing lawyers to provide limited scope representation (LSR) to individuals who are otherwise representing themselves. In LSR arrangements, a lawyer and a client enter into an attorney-client relationship in which they agree that the lawyer will only perform specific tasks (e.g., review or preparation of forms, legal research, preparation of evidence to

32. WASH. ADMISSION TO PRACTICE R. 28(F), *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&groupName=ga&setName=apr&pdf=1.

33. *See* Leslie C. Levin, *Immigration Lawyers and the Lying Client*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 87, 95 (Leslie C. Levin & Lynn Mather eds. 2012).

34. *See id.*; Emily A. Unger, Note, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQ. 425, 425–27 (2011).

35. *See* Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 172–73 (2003); Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 567 (1993).

36. THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *supra* note 19, at 1, 17; *see also* Hannaford-Agor & Mott, *supra* note 35, at 169 (noting that in Cook County, Illinois, neither party was represented by counsel in more than 90 percent of eviction cases).

37. *See, e.g.*, Lynn Mather & Craig A. McEwen, *Client Grievances and Lawyer Conduct: The Challenges of Divorce Practice*, *in* LAWYERS IN PRACTICE, *supra* note 33, at 63–64; *Pro Se Statistics*, NAT'L ASS'N CT. MGMT. (June 21, 2006), https://nacmnet.org/sites/default/files/04Greacen_ProSeStatisticsSummary.pdf.

present in court).[38] In most jurisdictions, nonlawyers are not permitted to perform these same functions for the public.

II. LAWYER VERSUS NONLAWYER PERFORMANCE

The conventional wisdom—and the vast majority of studies—indicate that individuals who are represented by lawyers obtain better outcomes in civil proceedings than those who are not.[39] For example, 21 percent of asylum seekers who were represented by counsel obtained relief as compared to 1 percent who were not represented by counsel.[40] Lawyer representation in social security disability appeals increases the represented party's chances of success.[41] Individuals represented by counsel in small claims courts enjoy better outcomes.[42] Represented parties obtain significantly better financial results in cases tried before the Tax Court than unrepresented parties.[43]

Although these findings align with our intuitions about the value of counsel, their reliability has been seriously questioned because they are mostly based on nonrandom observational studies of outcomes.[44] The problem with such studies is that a simple comparison of the outcomes in cases where a client is represented by a lawyer and where an individual self-represents cannot account for *other* factors that may affect outcomes, including factors that affect whether a client will obtain a lawyer.[45] For instance, the ability to obtain legal representation may depend upon the individual's perseverance or articulateness or other characteristics that may also be relevant to case outcomes.[46] The ability to obtain counsel may also

38. *See, e.g.*, *Limited Scope Representation*, CAL. COURTS: JUD. BRANCH CAL., http://www.courts.ca.gov/1085.htm (last visited Apr. 26, 2014).

39. *See* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2175–81 (2012) (citing the studies).

40. FELINDA MOTTINO, VERA INST. OF JUSTICE, MOVING FORWARD: THE ROLE OF LEGAL COUNSEL IN NEW YORK CITY IMMIGRATION COURTS 40 (2000), *available at* http://www.vera.org/sites/default/files/resources/downloads/353.409747_MF.pdf#page=41&zoom=auto,0,73.

41. KRITZER, *supra* note 28, at 114–16. *But see* William D. Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989, 1042 (1977) ("Attorneys are not helpful at the Social Security reconsideration stage . . . .").

42. *See* Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339, 370 (1976); John Montague Steadman & Richard S. Rosenstein, *"Small Claims" Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study*, 121 U. PA. L. REV. 1309, 1333 (1973).

43. *See* Leandra Lederman & Warren B. Hrung, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1239 (2006). Represented parties, do not, however, seem to obtain better outcomes in settled cases. *Id.*

44. *See* Greiner & Pattanayak, *supra* note 39, at 2183–84.

45. *Id.* at 2188–95. In addition, a "simple" comparison of outcomes is often not possible because the range of acceptable outcomes for clients is not binary. Some clients who achieve an acceptable outcome may decide not to continue to pursue the outcome that is being measured.

46. *See id.* at 2166–68; Sandefur, *supra* note 17, at 70.

depend upon the strength of the client's case, which may affect whether a private lawyer would take the case on a contingent fee basis or whether a legal services lawyer would view the case as worth the investment of office resources.[47] A straight comparison of outcomes cannot account for these factors.

There have been a few randomized studies in which lawyer representation was assigned to one group and compared to a control group of unrepresented individuals. In one such study, tenants represented by lawyers in Manhattan Housing Court had significantly better outcomes than those who were not represented.[48] Likewise, a study comparing the outcomes achieved by summary eviction defendants in Massachusetts who received traditional legal assistance from legal aid lawyers with outcomes achieved by defendants who only attended instructional clinics run by a legal aid attorney found that approximately two-thirds of the treated group retained possession of their housing compared to one-third of the control group.[49] However, a randomized study of unemployment appeals claimants found that representation by the Harvard Law School clinic had no statistically significant effect on the probability that claimants would win their appeals as compared to self-represented litigants.[50] An older randomized study of the impact of legal representation in juvenile courts yielded mixed results.[51] Thus, the randomized studies provide less robust support for the view that individuals obtain better outcomes when represented by lawyers.

Rebecca Sandefur's analysis of mostly non-randomized studies suggests that the procedural complexity of the matters may affect the degree of differences in outcomes when individuals are represented by lawyers and when they are not. When comparing outcomes in matters of below average procedural complexity (e.g., welfare hearings), those represented by

47. *See* Rebecca L. Sandefur, Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes 8 n.iv (2014) (unpublished manuscript) (on file with author).

48. Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 426–27 (2001). Only approximately 32 percent of the treatment group (which was offered legal representation) had judgments entered against them as compared to 52 percent of the control group. *Id.* at 427.

49. D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 908 (2013). In cases involving nonpayment of rent or other monetary counterclaims, the treated group also obtained substantially more rent relief than the control group. *Id.* at 908–09.

50. Greiner & Pattanayak, *supra* note 39, at 2124. The authors note that the win rate for the control group was much higher than the win rate in the overall Massachusetts system and suggested that the claimants in the control group (who had initiated contact with the Harvard Clinic even though they did not ultimately receive legal representation from the clinic) possessed personal characteristics making them more likely to win cases. *Id.* at 2173, 2175.

51. In one jurisdiction, legal representation in juvenile court significantly affected outcomes while in another it did not. W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 66–68 (1972). One possible explanation for the disparity was because of differences between the judges and procedures in the two jurisdictions. *Id.* at 155–58.

attorneys were, on average, 40 percent more likely to win than those who were self-represented.[52] In fields of average procedural complexity in trial courts, lawyer-represented individuals were, on average, 6.5 times more likely to win than self-represented individuals.[53] Lawyers' potential impact is also greater in adversarial fora (trial courts) than in simplified fora (e.g., small claims courts).[54] Sandefur suggests that part of the reason individuals do better when represented by lawyers may be because lawyers help claimants navigate procedural complexity.[55] The presence of lawyers may also serve as an endorsement of a case's merits and may encourage the tribunal to follow the law and its own rules.[56]

There do not appear to be randomized studies involving nonlawyer representatives.[57] While non-randomized studies of case outcomes raise the same methodological concerns described above,[58] it is still instructive to consider the studies that explore whether lawyers obtain better outcomes than nonlawyer representatives. Taken together, the studies suggest there is little evidence to support the legal profession's claims of superiority as compared to nonlawyer representatives in certain legal contexts.[59]

In the most systematic of the U.S. studies,[60] Herbert Kritzer looked at lawyer and nonlawyer representation in four types of civil proceedings in an effort to answer the question: "Does it really matter whether an advocate

52. Sandefur, *supra* note 17, at 73.

53. *Id.*

54. Sandefur, *supra* note 47, at 26.

55. Sandefur, *supra* note 17, at 74; Sandefur, *supra* note 47, at 28.

56. *See* Sandefur, *supra* note 47, at 4, 29–30.

57. The closest is the Harvard study involving law clinic students. But the investigators expressly discount the possibility that the failure to find a difference there between those who were represented and those who were not was due to the fact that the students were not lawyers. They point to the quality of the lawyer supervision and the high quality of representation provided. Greiner & Pattanayak, *supra* note 39, at 2172.

58. *See supra* notes 44–47 and accompanying text. For example, lawyers may screen out weak cases because they work on a contingent fee basis. Thus, lawyers' success rate may be higher than the success rates of nonlawyers, who do not work on a contingent fee basis. *See* KRITZER, *supra* note 28, at 116.

59. *See, e.g.*, *infra* notes 62–64, 70, 72 and accompanying text; *see also* Richard Moorhead, Precarious Professionalism: Empirical and Behavioural Perspectives on Lawyers, at 9–10 (March 6, 2014) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407370. *But see* Sandefur, *supra* note 47, at 26–27 (reporting in a meta-analysis of several studies that individuals represented by lawyers were more likely to prevail than if they were represented by nonlawyer advocates).

60. Earlier studies also explored these issues. A study of the Social Security hearing system, which permits lay representation, found that "the contribution of counsel to the accuracy, consistency, or timeliness of the decision process [was] indeterminable. Everything hinges on the ability and attention of the representative." JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM, at xxiv (1978). Individuals who were represented by counsel before the Board of Veterans Appeals had a slightly higher ultimate success rate, as compared to the success rate when service organizations represented individuals, and when individuals were self-represented, but it was not clear whether these differences were statistically significant. 1 LEGAL SERVS. CORP., SPECIAL LEGAL PROBLEMS AND PROBLEMS OF ACCESS TO LEGAL SERVICES summary app., at A-12 to A-13 (1978). Lawyers who did not specialize "were not useful" and were "irrelevant." *Id.* at A-18 to A-19.

has formal legal training?"[61] He found that in unemployment compensation appeals, experienced nonlawyer advocates could effectively represent parties and that legal training did not ensure that an advocate would be effective if the advocate was not familiar with the regulations or procedures governing unemployment compensation appeals.[62] In the social security disability appeals context, attorneys were slightly more successful than nonattorney representatives, probably because of the work of a small group of highly effective attorneys who specialized in social security cases.[63] In the state labor grievance arbitration context, there were no statistically significant differences between the outcomes when there was lawyer rather than nonlawyer representation.[64] In the tax appeals context, nonlawyer representatives often lacked the procedural expertise to be as effective as lawyers.[65]

Kritzer concluded that the "presence or absence of formal legal training is less important than substantial experience with the setting."[66] Three types of expertise were important: knowledge about the substantive law, an understanding of the procedures, and familiarity with the regular players in the process.[67] Those who had experience with the forum were able to obtain better results, because they knew the decision makers and were able to tailor their presentations effectively.[68]

Similar findings about nonlawyer representatives have emerged from the United Kingdom. A 1989 observational study found that in four administrative tribunals (social security appeals, immigration hearings, mental health review, and industrial tribunals), "a representative significantly and independently increases the probability that appellants and applicants will succeed with their case at a tribunal hearing."[69] Specialist lay representation was as effective as representation by lawyers, except in industrial tribunals.[70] In all tribunals, specialization and expertise were viewed as the most important qualifications for good representation and those who specialized provided the greatest assistance to their clients.[71]

More recently, Moorhead, Paterson, and Sherr found, based on a review of case files, the use of "model clients," and client surveys, that nonlawyers performed to higher standards than lawyers when providing representation

61. KRITZER, *supra* note 28, at 14.

62. *Id.* at 77.

63. *Id.* at 118–19, 143.

64. *Id.* at 171. In this context, an experienced nonlawyer had a high likelihood of success against an inexperienced lawyer, and "[s]pecialist nonlawyers and specialist lawyers appeared to be better advocates than non-specialist lawyers." *Id.* at 185.

65. *Id.* at 109.

66. *Id.* at 201.

67. *Id.* at 203.

68. *Id.* at 196.

69. HAZEL GENN & YVETTE GENN, THE EFFECTIVENESS OF REPRESENTATION AT TRIBUNALS: REPORT TO THE LORD CHANCELLOR 243 (1989).

70. *See id.* at 247. The analysis of the effects of representation in the industrial tribunals was "fraught with difficulty" because of the high rate of prehearing settlements and the need to consider both the applicant's and the respondent's representation. *Id.* at 87.

71. *Id.* at 245–47.

in the areas of welfare benefits work, housing, and debt matters.[72] The likelihood of a solicitor getting a positive financial result in a welfare benefit case was about a quarter of the likelihood of a nonlawyer agency, and in employment cases, solicitors were about half as likely to get a positive result as nonlawyer representatives.[73] Peer review of files found that where cases were handled by a solicitor's firm rather than a nonlawyer agency, the likelihood of a case being assessed as being handled below the threshold of competency increased.[74] Client surveys indicated that clients were somewhat more satisfied with nonlawyer representatives, although nonlawyers did less well with handling the initial client appointment.[75] Overall, nonlawyers had "clients with slightly higher satisfaction ratings and got significantly better results, and their work on cases was more likely to be graded at higher levels of quality by experienced practitioners working in their field."[76] Like some of the other studies, the findings suggest that "specialization is usually more important than legal qualifications in determining the quality of advocacy."[77]

III. THE ETHICAL SUPERIORITY OF LAWYERS?

As noted, the bar also justifies its monopoly of the legal services market with the argument that lawyers are more trustworthy (i.e., ethical) than nonlawyers. Lawyers bolster their claim with references to their legal training, their ethical code, the character and fitness inquiry, the lawyer discipline system, and the threat of malpractice liability.[78] It is not clear, however, that these factors contribute significantly to the trustworthiness of lawyers. For example, studies have not demonstrated that legal education positively affects the moral development of lawyers.[79] Law students learn

72. Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC'Y REV. 765, 788–89, 795 (2003). For a description of this and other studies showing that solicitor performance was not superior to nonsolicitor performance, see Moorhead, *supra* note 59, at 9–10.

73. In the housing context, the situation is more mixed. *Id.* at 787.

74. *Id.* at 788.

75. *Id.* at 784–86, 791, 794.

76. *Id.* at 789.

77. *Id.* at 796; *see also* GENN & GENN, *supra* note 69, at 245–46.

78. *E.g.*, AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 163–64 (1995); *Report of the Standing Committee on the Unauthorized Practice of Law*, *supra* note 11, at 268; France, *supra* note 15.

79. Maury Landsman & Steven P. McNeel, *Moral Judgment of Law Students Across Three Years: Influences of Gender, Political Ideology and Interest in Altruistic Law Practice*, 45 S. TEX. L. REV. 891, 914 (2004) (reporting that assessments of law students' moral judgments using the Defining Issues Test revealed that scores did not improve while students were in law school); *see also* Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306, 354, 355 (1981) (showing no statistically significant change in moral reasoning of students during law school). *But see* Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 527 (1995) (reporting that experientially taught professional responsibility courses significantly influenced students' moral reasoning).

about the Rules of Professional Conduct in law school—including the rules concerning competence, confidentiality, and conflicts—but it is not known how much this experience affects their ethical decisions in practice.[80]

This is not to say that the factors that the legal profession point to as evidence of superior trustworthiness have no influence on lawyers' conduct, but rather that the significance of these factors is unproven—and may be overstated. For example, the ambiguity of lawyers' professional rules permit lawyers to interpret their responsibilities in self-interested ways.[81] Moreover, it is unclear whether lawyers' rules of professional conduct affect behavior any more than rules governing the conduct of any other licensed profession. Likewise, the character and fitness inquiry, which is intended to screen out those who lack the moral character to practice law, has not been shown to do so. Very few bar applicants are denied admission on character and fitness grounds and the information elicited during that process (e.g., prior convictions, substance abuse) does not strongly predict who will later be disciplined.[82] Concerns about discipline sanctions shape lawyer conduct in certain practice contexts,[83] as does the threat of civil liability, but it is not clear that they do so any more than in other regulated industries (e.g., the securities industry). In other words, if nonlawyer providers of legal services had a code of conduct and faced the threat of sanctions or civil liability, their ethical behavior might be affected with equal force.

As an empirical matter, the bar's claim that lawyers are *more* trustworthy than nonlawyer legal services providers is exceedingly difficult to test. Much misconduct by lawyers and nonlawyer providers is undetected or unreported, so the true extent is unknown. Even a comparison of complaints against lawyers and nonlawyers is difficult as the complaints can be made in different fora,[84] and the ease of filing a complaint against lawyers and nonlawyer providers of legal services differs considerably.[85] Complaint information and sanctions involving lawyers are often not

80. *See* Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 HOUS. L. REV. 309, 370 (2004) (reporting on the "disconnect" between the rules and the realities of practice); *see also* Moorhead, *supra* note 59, at 34 (noting the lack of evidence of the efficacy of prequalification ethical training in the United Kingdom).

81. *See infra* note 126 and accompanying text.

82. Leslie C. Levin et al., *The Questionable Character of the Bar's Character and Fitness Inquiry*, 40 LAW & SOC. INQUIRY (forthcoming 2015) (manuscript at 2–3) (on file with author). In Connecticut, for example, only one to two applicants a year are denied admission. *Id.* (manuscript at 4 n.3). While some additional number of potential applicants may be deterred from applying, that number is not known. Nor is it known whether those who were deterred would have been untrustworthy lawyers. *Id.* (manuscript at 5 n.4).

83. *See* Levin, *supra* note 33, at 103–04.

84. Complaints against lawyers are made to lawyer discipline authorities, to courts, to administrative agencies, and to prosecutors. Complaints against nonlawyer providers are made to lawyer discipline authorities, to consumer protection and other administrative agencies, to state attorneys general, and to prosecutors.

85. State discipline systems have made significant strides in publicizing how to file a complaint against a lawyer. Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 20–21 (2007). It is much more difficult for the public to determine how and where to complain about nonlawyer legal services providers.

publicly available;[86] it is even harder to find records of complaints or discipline involving nonlawyer providers.[87] Even when lawyers and nonlawyer representatives operate in the same forum, comparisons are difficult because the decisionmaker may apply different standards or otherwise handle complaints against lawyers and nonlawyers differently.[88]

While direct comparisons of misconduct by lawyers and nonlawyer legal services providers are not available, it is useful to consider whether there is something about the personalities or psychological attributes of lawyers that might make them more likely to behave in a trustworthy fashion than others. As it turns out, lawyers' decisionmaking processes have not been shown to be different than the decisionmaking processes of other individuals. Lawyers do differ, however, from the general public in their personality traits and mental health in ways that may affect their ethical behavior.

A. Psychological Characteristics of Law Students and Lawyers

The choice of profession is associated with specific personality types.[89] On the Myers-Briggs Type Indicator (MBTI), which assesses personality types, law students appear to prefer "thinking" (e.g., looking at the logical consequences of a choice or action) over "feeling" (e.g., making decisions based on values and what is important to them and to others).[90] They are also more likely to prefer "judging" (e.g., living in a planned, orderly way) over "perceiving" (e.g., living in a flexible, spontaneous way).[91]

Law students may be somewhat more ethical than other graduate students—but they are not that ethical. A small study that tested the moral judgment of law students found that incoming first-year law students scored higher than most other first-year graduate students.[92] Unfortunately, their judgment does not appear to improve during law school.[93] Moreover, 45 percent of law students admitted to cheating in law school in the previous year.[94] While this is less than the 56 percent of graduate business students

86. *See id.* at 19–20.

87. *See, e.g.*, Isabel Medina, *The Challenges of Facilitating Effective Legal Defense in Deportation Proceedings: Allowing Nonlawyer Practice of Law Through Accredited Representatives in Removals*, 53 S. TEX. L. REV. 459, 471 (2012).

88. *See, e.g.*, David Hricik, *Patent Agents: The Person You Are*, 20 GEO. J. LEGAL ETHICS 261, 267–68 (2007).

89. Lawrence R. Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States*, 29 CAP. U. L. REV. 979, 981, 1027 (2002); Gidi Rubinstein & Sally Strul, *The Five Factor Model (FFM) Among Four Groups of Male and Female Professionals*, 41 J. RES. ON PERSONALITY 931, 932 (2007).

90. Paul Van R. Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460, 465 (1967); Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 91–92 (1995).

91. Randall, *supra* note 90, at 96.

92. Landsman & McNeel, *supra* note 79, at 904.

93. *Id.* at 914.

94. Leigh Jones, *Cheating 2.0: Law Schools Confront New Twists on a Venerable Temptation*, NAT'L L.J., May 25, 2009, at 1. It should be noted that the response rate was 13 percent, which is low. Donald L. McCabe et al., *Academic Dishonesty in Graduate Business*

and the 54 percent of engineering students who reported cheating,[95] the lower rate reported by law students may have been due to concerns about the consequences for bar admission if they were caught.[96] This amount of cheating in law school is troubling, as there appears to be a relationship between academic cheating and dishonest behaviors in the workplace.[97]

Personality testing of lawyers is consistent with the findings about law students. MBTI preferences for lawyers are significantly different from those found in the general population.[98] Like law students, lawyers tend to be "thinking" and "judging" types rather than "feeling" and "perceiving" types.[99] They prefer introversion to extraversion and are less interpersonally oriented,[100] which is likely to affect the quality of communication between lawyers and clients.[101] This may account for why clients sometimes express greater satisfaction with assistance from lay specialists than from lawyers.[102]

Lawyers also appear to be less resilient than other people.[103] Resilience is characterized as the ability to bounce back quickly from criticism, rejection, or setbacks by flexible adaptation to changing demands or stressful experiences.[104] Resilient individuals have optimistic approaches to life, higher self-worth, better coping skills, and positive emotions even in

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Programs: Prevalence, Causes and Proposed Action, 5 ACAD. MGMT. LEARNING EDUC. 294, 297 (2006).

95. Emily Sachar, *MBA Students Cheat More Than Other Grad Students, Study Finds*, BLOOMBERG.COM (Sept. 25, 2006), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aw7s9m0BmcBo; *see also* McCabe et al., *supra* note 94, at 299.

96. *See* Lucia Graves, *Which Types of Students Cheat Most?*, U.S. NEWS & WORLD REPORT (Oct. 3, 2008), http://www.usnews.com/education/articles/2008/10/03/which-types-of-students-cheat-most.

97. Sarath Nonis & Cathy Owens Swift, *An Examination of the Relationship Between Academic Dishonesty and Workplace Dishonesty: A Multicampus Investigation*, 77 J. BUS. EDUC. 69, 75 (2001); Randi L. Sims, *The Relationship Between Academic Dishonesty and Unethical Business Practices*, 68 J. BUS. EDUC. 207, 209–10 (1993).

98. Richard, *supra* note 89, at 1015–17, 1029.

99. Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1392–93 (1997); Richard, *supra* note 89, at 1029.

100. Daicoff, *supra* note 99, at 1394; Richard, *supra* note 89, at 1017, 1029; Larry Richard & Lisa Roher, *A Breed Apart? How Personality Characteristics Influence Who Becomes a Lawyer—and How Far They Rise*, AM. LAW., July/Aug. 2011, at 43–44.

101. Richard, *supra* note 89, at 1042.

102. *See, e.g.*, REPORT OF THE STATE BAR OF CALIFORNIA COMMISSION ON LEGAL TECHNICIANS 14 (1990) (noting that while 64 percent of those who received assistance from lawyers were happy overall with the service, 76 percent of those who received nonlawyer assistance were happy with the service); Moorhead et al., *supra* note 72, at 784 (noting somewhat higher satisfaction among nonlawyers' clients than solicitors' clients).

103. The average for this trait among the public is the fiftieth percentile; among lawyers, the average is the thirtieth percentile. Many lawyers score below 10 percent. LARRY RICHARD, HERDING CATS: THE LAWYER PERSONALITY REVEALED 7, *available at* http://www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20-%20Herding%20Cats%20-%20Richard%20-%203-5-121.pdf.

104. Dmitry M. Davydov et al., *Resilience and Mental Health*, 30 CLINICAL PSYCHOL. REV. 479, 481 (2010); Michele M. Tugade & Barbara L. Frederickson, *Resilient Individuals Use Positive Emotions To Bounce Back from Negative Emotional Experiences*, 86 J. PERSONALITY & SOC. PSYCHOL. 320, 320 (2004).

the face of stress;[105] low-resilience individuals score high on emotional instability and low on agreeableness and openness to experience.[106] People who are low on resilience tend to be defensive and resistant to feedback.[107] They may also be predisposed toward anxiety and chronic dysphoria.[108]

Low resilience may be a predictor of depressive symptoms[109] and may help explain why lawyers suffer from elevated levels of depression and psychological disorders beyond that found in the nonlawyer population.[110] Individuals with low resilience may find it difficult to cope with law school and the pressures of practice.[111] A study in the 1980s found the prevalence of major depressive disorders in U.S. lawyers was 10 percent, which was one of the highest overall prevalence rates among all occupations and substantially higher than the 3 to 5 percent found among the general population.[112] Two other studies revealed that more than 20 percent of the lawyers surveyed manifested significant symptoms of depression and that they did so at a rate far greater than would be expected in the general population.[113] In one of those studies, many male lawyers also reported interpersonal sensitivity (30.2 percent),[114] anxiety (27.8 percent), social alienation and isolation (24.6 percent), paranoid ideation (13.2 percent), and a Global Severity Index (18.3 percent) at a significantly higher rate than the

105. Maureen Davey et al., *Resilience Processes in Adolescents: Personality Profiles, Self-Worth, and Coping*, 18 J. ADOLESCENT RES. 347, 348, 358 (2003); Tugade & Frederickson, *supra* note 104, at 320.

106. *See* Davey et al., *supra* note 105, at 354–55. Low resilience also has a relationship to neuroticism, which encompasses a proneness to negative emotions and difficulty coping. L. Campbell Sills et al., *Relationship of Resilience to Personality, Coping, and Psychiatric Symptoms in Young Adults*, 44 BEHAV. & RES. THERAPY 585, 593 (2006).

107. *See* RICHARD, *supra* note 103, at 7.

108. Jack Block & Adam M. Kremen, *IQ and Ego-Resiliency: Conceptual and Empirical Connections and Separateness*, 70 J. PERSONALITY & SOC. PSYCHOL. 349, 351 (1996).

109. Odin Hjemdal et al., *Resilience As a Predictor of Depressive Symptoms: A Correlational Study with Young Adolescents*, 12 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 91, 99 (2007).

110. *See* Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1 (1995). This is also true in other countries. *See, e.g.*, NORM KELK ET AL., COURTING THE BLUES: ATTITUDES TOWARDS DEPRESSION IN AUSTRALIAN LAW STUDENTS AND LEGAL PRACTITIONERS 37 (2009), *available at* http://www.cald.asn.au/docs/Law%20Report%20Website%20version%204%20May%2009.pdf.

111. Prior to entering law school, law students experience approximately the same levels of distress and depression as the normal population. G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students*, 1986 AM. B. FOUND. RES. J. 225, 246; *see also* Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 267, 270 (2004) (reporting that on the first day of law school students evidenced higher positive affect and life satisfaction than undergraduates). Shortly after beginning law school, students' psychological symptoms emerged, and remained elevated beyond the level found in the normal population even after graduation. *See, e.g.*, Beck et al., *supra* note 110, at 45; Benjamin et al., *supra*, at 240, 248.

112. William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1081 (1990).

113. Beck et al., *supra* note 110, at 18.

114. "Interpersonal sensitivity" included feelings of inferiority to others, self-consciousness, and easily hurt feelings. Beck et al., *supra* note 110, at 54–55.

average adult population.[115] The study's authors noted, "Although the data are not sufficient to suggest that psychological distress has detrimentally affected the lawyers' ability to practice competently, the warning signs are present."[116]

Lawyers may also abuse alcohol more than the general population of employed workers.[117] One study in the 1980s found that 18 percent of Washington State lawyers may have alcohol-related problems.[118] The actual level of alcohol abuse and addiction is not clear.[119] Discipline authorities report a high rate of depression and substance abuse among lawyers who are disciplined.[120] The evidence that there is a higher rate of depression—and possibly alcohol problems—among lawyers than in the general population suggests lawyers may be less trustworthy than they claim.

B. Lawyers, Cognitive Biases, and Ethical Decisionmaking

Lawyers are not immune from the cognitive biases that affect all human judgment. This may seem surprising, in light of evidence that most lawyers are "thinkers" on the MBTI and often pride themselves on being "rational" and objective. Yet much ethical decisionmaking appears to be nonconscious and intuitive rather than conscious and deliberate.[121] Moreover, even when people consciously engage in decisionmaking, they are not objective information processors.[122] The brightest, most competent

115. *Id.* at 23–24. The Global Severity Index measures the intensity of the psychological distress being experienced. *Id.* at 15. Women lawyers also reported elevated levels on these measures, but not as high as men. *Id.* at 2.

116. *Id.*

117. G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 235, 241 (1990).

118. *Id.* at 241.

119. The Washington study relies on the Michigan Alcoholism Screening Test-Revised score, which indicates that an alcohol problem is likely. *Id.* at 241. This is not the same as finding that there was alcoholism or alcohol dependency. Beck et al., *supra* note 110, at 50. Another study conducted during the same period indicated that the rate of alcohol abuse or dependence among lawyers was 9.42 percent, which was slightly less than the prevalence in the general labor force. Frederick S. Stinson et al., *Prevalence of DSM-III-R Alcohol Abuse and/or Dependence Among Selected Occupations*, 16 ALCOHOL HEALTH & RES. WORLD 165, 167–68 (1992).

120. *See* Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready To Address the Denial?*, 31 CREIGHTON L. REV. 265, 268 (1997); Cynthia L. Spanhel, *The Impact of Impaired Attorneys on the Texas Grievance Process*, 52 TEX. B.J. 312, 312 (1989); Stephen Anderson, *New Data Link Mental Impairment with Discipline*, ISBA B. NEWS, March 1, 1994, at 2.

121. *See* LINDA KLEBE TREVIÑO & GARY R. WEAVER, MANAGING ETHICS IN BUSINESS ORGANIZATIONS 160–61 (2003); Fiery Cushman et al., *The Role of Conscious Reasoning and Intuition in Moral Judgment: Testing Three Principles of Harm*, 17 PSYCHOL. SCI. 1082, 1087–88 (2006); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 822 (2001).

122. George Loewenstein, *Behavioral Decision Theory and Business Ethics: Skewed Trade-Offs Between Self and Other*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 214, 221 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

people—including lawyers—are susceptible to cognitive biases even as they continue to believe in their own objectivity.[123] When lawyers' personal characteristics are coupled with the demands of law practice and certain cognitive biases, they may become susceptible to poor ethical decisionmaking.[124]

Most individuals see themselves as better than average in many respects: for example, more objective, more competent, and more ethical.[125] It is not difficult to imagine how lawyers may be especially susceptible to these self-serving biases. They are trained to approach problems in an objective, competent, and ethical manner and pride themselves on doing so. Cognitive biases also cause individuals to see themselves as more deserving than others, and to resolve ambiguity and questions about fairness in self-interested ways.[126] This can be especially problematic for lawyers, who constantly confront factual and legal ambiguity, but receive only limited assistance from the rules of professional conduct in resolving ambiguity because the rules themselves are often ambiguous.[127]

The *overconfidence bias* facilitates many of these other biases by making people more confident in their judgments than is warranted by objective facts.[128] Overconfidence has been found in a variety of experts, including lawyers, and especially where the issues are personally relevant.[129] Overconfidence causes people to think that they are making good choices and that they do not need to reconsider how to approach decisions they have

123. MAX H. BAZERMAN & DON A. MOORE, JUDGMENT IN MANAGERIAL DECISION MAKING 1 (8th ed. 2013).

124. *See, e.g.*, Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 BROOK. L. REV. 629, 647–49 (1997); Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from* Lawyers in the Dock, 22 GEO. J. LEGAL ETHICS 1549, 1570–73 (2009); Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 952–53, 957, 982 (2007); Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1124–36, 1140–44 (2013).

125. David Alain Armor, The Illusion of Objectivity: Bias in the Belief in Freedom from Bias, at 57–58 (1998) (Ph.D. dissertation, University of California Los Angeles) (on file with *Fordham Law Review*); *see also* Nicholas Epley & David Dunning, *Feeling "Holier Than Thou": Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J. PERSONALITY & SOC. 861, 862 (2000); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 793 (2004).

126. *See* BAZERMAN & MOORE, *supra* note 123, at 113–14, 200; Loewenstein, *supra* note 122, at 222.

127. *See* Lynn Mather & Leslie C. Levin, *Why Context Matters*, *in* LAWYERS IN PRACTICE, *supra* note 33, at 3, 12.

128. *See* BAZERMAN & MOORE, *supra* note 123, at 15; SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 217–20 (1993); Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411, 411 (1992).

129. Willem A. Wagenaar & Gideon B. Keren, *Does the Expert Know? The Reliability of Predictions and Confidence Ratings of Experts*, *in* INTELLIGENT DECISION SUPPORT IN PROCESS ENVIRONMENTS 87, 100–01 (Erik Hollnagel et al. eds., 1986); *see* Derek J. Koehler et al., *The Calibration of Expert Judgment: Heuristics and Biases Beyond the Laboratory*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 128, at 686, 706.

previously made.[130] Once judgments are made, *confirmation bias* causes people to see confirming evidence of their decisions as more relevant than evidence that disconfirms the correctness of their choices.[131] After they have committed to a course of action, they prefer to act in ways that are consistent with past conduct, in part because they do not wish to consider—or admit to others—that they have made a mistake.[132] These psychological processes (and others) can give rise to ethical blind spots that interfere with the ability to resolve ethical issues appropriately.

Lawyers are as susceptible to these ethical blind spots as anyone else.[133] In fact, the conditions of law practice may exacerbate the likelihood of certain biased decisionmaking. People rely on intuitive reasoning—which is often skewed by cognitive biases—when they are busy and rushed.[134] Unethical decisions are more common when the decisionmaker is under time pressure, sleep deprived, or cognitively taxed.[135] These are the conditions under which much of law practice occurs.

Moreover, many lawyers have low resilience and rate high on interpersonal sensitivity,[136] which may make them in particular need of ego protection. The ego has been compared to a totalitarian state "in which unflattering or undesirable facts are suppressed in the interest of self-enhancement."[137] This occurs because people need to see themselves as good and reasonable, and they subconsciously distort evidence to bolster or

130. *See* BAZERMAN & MOORE, *supra* note 123, at 15.

131. ELLIOT ARONSON, THE SOCIAL ANIMAL 188–90 (7th ed. 1995); PLOUS, *supra* note 128, at 234; Scott Sonenshein, *The Role of Construction, Intuition, and Justification in Responding to Ethical Issues at Work: The Sensemaking-Intuition Model*, 32 ACAD. MGMT. REV. 1022, 1031 (2007).

132. *See* BAZERMAN & MOORE, *supra* note 123, at 104–05; ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 52–53 (5th ed. 2009); Richard W. Painter, *Convergence and Competition in Rules Governing Lawyers and Auditors*, 29 J. CORP. L. 397, 415 n.62 (2004); Barry M. Staw, *The Escalation of Commitment to a Course of Action*, 6 ACAD. MGMT. REV. 577, 580–81, 583–84 (1981).

133. BAZERMAN & MOORE, *supra* note 123, at 154; Levin, *supra* note 124, at 1566–70; Robbennolt & Sternlight, *supra* note 124, at 1129–30, 1146.

134. BAZERMAN & MOORE, *supra* note 123, at 3, 23; *see also* Moorhead, *supra* note 59, at 19–21 (noting other ways in which lawyers are subconsciously primed that may adversely affect their ethical decisionmaking).

135. Michael S. Christian & Aleksander P. K. Ellis, *Examining the Effects of Sleep Deprivation on Workplace Deviance: A Self-Regulatory Perspective*, 54 ACAD. MGMT. REV. 913, 925–26 (2011); Francesca Gino et al., *Unable To Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORG. BEHAV. & HUM. DECISION PROCESSES 191, 199 (2011); Shaul Shalvi et al., *Honesty Requires Time (and Lack of Justifications)*, 23 PSYCHOL. SCI. 1264, 1265 (2012).

136. *See supra* note 114 and accompanying text.

137. BAZERMAN & MOORE, *supra* note 123, at 90 (7th ed. 2009).

maintain a positive self-image.[138] The maintenance of self-esteem has been described "as a fundamental human impulse."[139]

As a result, once lawyers make a decision, they may be particularly resistant to rethinking that decision, even when faced with evidence that they may have made a mistake. People who are low on resilience "tend to be defensive, resist taking in feedback, and can be hypersensitive to criticism."[140] Thus, once lawyers have committed to a course of action, they may find it very difficult to change it, not only because of overconfidence and the confirmation bias, but because their need to protect their egos will not allow it. Most people want to believe they have made good decisions and to view themselves as consistent and competent decisionmakers.[141] Lawyers pride themselves on being especially good in this regard. Evidence to the contrary may be discounted because of the significant ego threat it presents.

It is important to note that there is no evidence that lawyers are *more* likely than nonlawyers to make unethical decisions because of these cognitive biases. Nor is there evidence that their low resilience, higher rates of depression, or other personal characteristics make them less ethical than other individuals. At the same time, there is scant evidence that their personalities or other psychological characteristics make them *superior* in their ethical decisions to nonlawyer representatives. On the contrary, lawyers may be especially susceptible to cognitive biases that can adversely affect their ethical judgments.

IV. MOVING BEYOND THE MONOPOLY

The legal profession's claims about lawyers' superiority rest largely on rhetoric rather than on empirical evidence. They also rely on extreme comparisons. No one seriously questions that an experienced securities litigator is more competent to handle a federal securities lawsuit than an untrained lay representative. The proper comparison is between the legal outcomes achieved by lawyers and nonlawyer representatives (NLRs)—such as patent agents or workers' compensation representatives—who are trained and licensed to work in a particular area of practice. Likewise, the

138. *See* Roland Bénabou & Jean Tirole, *Self-Confidence and Personal Motivation*, 117 Q.J. ECON. 871, 872 (2002); Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1575 (2000); Mark R. Leary & Deborah L. Downs, *Interpersonal Functions of the Self-Esteem Motive: The Self-Esteem System As a Sociometer*, *in* EFFICACY, AGENCY, AND SELF-ESTEEM 123, 123–25 (Michael H. Kernis ed., 1995).

139. Bénabou & Tirole, *supra* note 138, at 871; *see also* C. R. Snyder, *Collaborative Companions: The Relationship of Self-Deception and Excuse Making*, *in* SELF-DECEPTION AND SELF-UNDERSTANDING: NEW ESSAYS IN PHILOSOPHY AND PSYCHOLOGY 35, 36 (Mike W. Martin ed., 1985).

140. RICHARD, *supra* note 103, at 7.

141. *See* Roderick M. Kramer & David M. Messick, *Ethical Cognition and the Framing of Organizational Dilemmas: Decision Makers As Intuitive Lawyers*, *in* CODES OF CONDUCT, *supra* note 122, at 59, 69–70; Claude M. Steele et al., *Self-Image Resilience and Dissonance: The Role of Affirmational Resources*, 64 J. PERSONALITY & SOC. PSYCHOL. 885, 886 (1993).

correct comparison is not between the trustworthiness of lawyers and unregulated nonlawyers who are operating illegally. The comparison should be between lawyers and NLRs who are subject to discipline if they engage in misconduct. While it is not yet possible to prove, based on the existing studies, that NLRs are as effective or trustworthy as lawyers working in certain fields, it is also not possible to prove the opposite. The evidence that does exist in the United States and in countries where NLRs provide substantial legal assistance does not indicate that the public is significantly harmed as a result.[142]

In the absence of such evidence, the refusal to permit NLRs to provide more legal services in the United States is hard to justify when low-income individuals have so much unmet need for legal assistance.[143] Legal document preparers cannot fill this need because they cannot supply the advice and representation that many need in connection with their important legal problems.[144] Arizona and California permit approved legal document preparers who meet certain requirements to provide individuals with general legal information and assist with filing and service of papers, but they, too, cannot give legal advice.[145] The expanded licensing of NLRs in a variety of legal contexts is needed to increase access to justice for many Americans.

The Washington Supreme Court has recently taken a step in this direction, permitting nonlawyer limited license legal technicians to advise clients in the area of family law.[146] LLLTs will be permitted, inter alia, to explain the relevancy of facts to clients, to inform clients about applicable procedures and documents that must be filed, and to inform clients of the anticipated course of the legal proceeding.[147] LLLTs must have 3,000

142. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000) (noting that experience in states that have allowed nonlawyers to provide legal services "indicates no significant risk of harm to consumers of such services"); Moorhead et al., *supra* note 72, at 788; Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2595 (2014). *But see* DAVID J. MORRIS, REPORT TO THE ATTORNEY GENERAL OF ONTARIO, REPORT OF APPOINTEE'S FIVE-YEAR REVIEW OF PARALEGAL REGULATION IN ONTARIO 17 (2012), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/paralegal_review/Morris_five_year_review-ENG.pdf (reporting that some independent paralegals in Canada engage in unethical behavior). The primary problem seemed to be unethical advertising practices. *Id.* It is unclear whether the public was harmed as a result or whether the paralegals engaged in more unethical advertising practices than lawyers.

143. *See supra* notes 18–21 and accompanying text.

144. *See supra* note 29 and accompanying text. Court service centers in some states also provide self-represented litigants with help completing forms, but they do not provide advice. *See, e.g.*, *Court Service Centers*, ST. CONN. JUD. BRANCH, http://www.jud.ct.gov/csc/services.htm (last visited Apr. 26, 2014).

145. ARIZ. CODE OF JUDICIAL ADMIN. § 7-208(E) (2007); CAL. BUS. & PROF. CODE §§ 6402–06 (West 2003 & Supp. 2014).

146. WASH. ADMISSION TO PRACTICE R. 28(D)–(E), *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&groupName=ga&setName=apr&pdf=1.

147. *Id.* R. 28(F). Washington expects to begin licensing LLLTs in late 2014 or early 2015. *Limited License Legal Technicians (LLLT)*, WASH. ST. B. ASS'N, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians (last visited Apr. 26, 2014).

hours of prior law-related experience supervised by a lawyer and either have an associate's degree or forty-five hours of paralegal education.[148] They must also receive fifteen hours of instruction in the area of family law, pass an examination, demonstrate good moral character, and engage in continuing legal education.[149] LLLTs will be held to the ethical standards of the LLLT Rules of Professional Conduct, subject to discipline for misconduct, held to the same standard of care as a lawyer, and required to carry malpractice insurance or to demonstrate their ability to respond to damage claims.[150]

In certain respects, Washington's LLLT requirements are *more* onerous than the requirements to become a lawyer. Unlike LLLTs, lawyers are not required to have any practice experience before representing clients on their own. Lawyers are not required to take any courses in family law before practicing in that area. Lawyers are not required to carry malpractice insurance (except in Oregon), or prove that they have the financial ability to respond to damages claims.[151] Indeed, the only requirements to become a lawyer that are more demanding than the LLLT requirements are the legal education requirement and the more extensive bar examination requirement.

In light of this, it is hard to argue that Washington's approach is insufficiently protective of the public, especially given the limited legal assistance that LLLTs can provide. LLLTs cannot write letters for clients (unless reviewed by a lawyer), negotiate on behalf of clients, or appear in courts or before other tribunals.[152] If LLLTs are more extensively trained in a single field and as highly regulated as lawyers, it is not clear why they should not be permitted to do more for clients—including negotiate for clients and appear in certain courts. In other words, it is not clear why they should not be true nonlawyer *representatives*.

The idea that NLRs should be permitted to act as representatives for individuals in certain matters—including in administrative proceedings and in some courts—finds support in the United States, where approved nonlawyers represent individuals before certain federal and state agencies, and in other countries. For example, nonlawyers can represent claimants before the U.S. Social Security Administration and recover a fee if they pass an examination and meet other requirements.[153] Licensed workers' compensation representatives can represent claimants in some states if they meet certain requirements, including passing an examination.[154] Independent paralegals in Ontario, who must pass a licensing examination,

148. WASH. ADMISSION TO PRACTICE R. 28(D)–(E).

149. *Id.* R. 28(D)–(E), (I); *Practice Area Courses*, WASH. ST. B. ASS'N, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/Practice-Area-Courses#requirement (last visited Apr. 26, 2014).

150. WASH. ADMISSION TO PRACTICE R. 28(C)(3), (E)(4), (K).

151. 5 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 36:1, at 3–4 (2010).

152. WASH. ADMISSION TO PRACTICE R. 28(H)(5). The exception is where other nonlawyers are permitted to appear under WASH. GEN. R. 24(b) (2013).

153. 42 U.S.C. § 406(e)(2) (2006); 20 C.F.R. § 404.1705(b) (2014).

154. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 12, § 302-1 (2013).

can provide representation in small claims court and traffic court, and before the Landlord and Tenant Board.[155] Qualified nonlawyers in the United Kingdom can represent individuals in immigration proceedings.[156]

The determination of when NLRs should be permitted to provide advice and representation to clients should focus on the procedural complexity of the forum, the substantive complexity of the law, and the likelihood of consumer confusion. Thus, trained NLRs should be permitted to represent individuals in courts of limited procedural complexity such as small claims courts. The experiences in Canada and the United Kingdom suggest that NLRs might also be licensed to represent individuals with respect to somewhat more complex matters, such as landlord-tenant cases. The wisdom of doing so would depend upon the complexity of the law and procedures in the forum. At the same time, even though the United States permits nonlawyer accredited representatives to represent clients in immigration proceedings,[157] this approach deserves careful scrutiny. Immigration law is complex and immigrants often have difficulty understanding the differences between lawyers and nonlawyer providers of legal services.[158] Accredited representatives, who can appear in proceedings on behalf of immigrants, are not required to take an examination or undergo any particular training.[159] Unless NLRs can be trained to provide competent representation in immigration proceedings, and the different capabilities of lawyers and NLRs can be effectively communicated to clients, nonlawyers should not be permitted to represent clients in immigration matters unless they are supervised by a lawyer.

The introduction of more NLRs into the market for legal services has associated costs, including the cost of regulation. In Washington, after an infusion of over $220,000 from the Washington State Bar Association, the cost of LLLT regulation is expected to be paid entirely through LLLT certification and examination fees.[160] NLRs should not, however, bear the full cost of regulation if NLRs are then forced to charge rates that

155. *Paralegal Frequently Asked Questions*, L. SOC'Y UPPER CAN., http://lsuc.on.ca/licensingprocessparalegal.aspx?id=2147491230 (last visited Apr. 26, 2014); *see also* MORRIS, *supra* note 142, at 11.

156. *OISC Level 3, Advocacy and Representation*, OISC, http://oisc.homeoffice.gov.uk/how_to_become_a_regulated_immigration_adviser/guidance_on_competence/oisc_level_3/ (last visited Apr. 26, 2014).

157. *See supra* note 26 and accompanying text.

158. *See* Levin, *supra* note 33, at 89–91; Ann M. Simmons, *Immigrants Exploited by 'Notarios': Officials Crack Down on Those Who Take Advantage of Confusion over the Word, Which Can Mean "Lawyer,"* L.A. TIMES, Aug. 10, 2004, at B1.

159. *See* Medina, *supra* note 87, at 460, 469–70. Not surprisingly, the quality of accredited representatives is reportedly mixed. *See* Careen Shannon, *To License or Not To License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437, 452–54 (2011).

160. *See* Email from Thea Jennings, Wash. State Bar Ass'n LLLT Program Lead, to author (Nov. 12, 2013, 15:14 EST) (on file with *Fordham Law Review*).

individuals cannot afford. Some state funding may be needed, just as it is needed for the administration of many state lawyer discipline systems.[161]

One other important cost that is not yet known is the rates that NLRs will charge their clients. Theoretically, NLRs' rates should be somewhat lower than lawyers' rates because NLRs do not incur the substantial cost (and debt) associated with three years of law school. Moreover, if NLRs are licensed only to work in a single area (e.g., family law), the limited scope of the work should make it easier to organize their work efficiently and provide it in a cost-effective manner. Nevertheless, NLRs would incur many of the same ongoing expenses incurred by lawyers including office space, computers, telephones, certification costs, and continuing legal education. They may also incur some expenses—such as malpractice insurance—that some other lawyers will not incur.[162] Even if the entry of NLRs into the legal services market forces the rates charged for certain legal services downward, it remains to be seen whether those rates will be affordable for low-income Americans.

If the entry of NLRs into the market for legal services causes the rates for certain legal services to fall, this may represent the type of disruptive innovation that will have significant market consequences.[163] Disruptive innovation occurs when the innovation targets new consumers or targets existing consumers in ways that are not of interest to the market incumbents.[164] NLRs may create new consumers of legal services who could not previously afford to pay for legal representation.[165] At the same time, they may drive lawyers out of less remunerative practice areas.[166] At a minimum, it seems likely that NLR entry into other areas will mean that some lawyers will leave the field (or choose not to enter it) because it has become less profitable. As the Washington Supreme Court noted, however, when it decided to allow LLLTs to provide advice in the area of family law, "[p]rotecting the monopoly status of attorneys in any practice area is not a legitimate objective."[167]

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161. AM. BAR ASS'N, STANDING COMM. ON PROF'L DISCIPLINE, 2009 ABA SURVEY ON LAWYER DISCIPLINE SYSTEMS chart VI (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/discipline/2009sold.authcheckdam.pdf.

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

163. "Disruptive innovation" is a term used by Clayton Christenson that describes how innovation can disrupt markets. Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & BUS. 1, 4–5, 9 (2012).

164. *Id.* at 10.

165. *See id.* at 11. Consistent with the theory of disruptive innovation, NLRs may also address the needs of "overshot consumers" by replacing the supplier of legal services who was more than a consumer needed (a lawyer) with a cheaper solution (an NLR) that might meet their needs. *Id.* at 12–13.

166. *See id.* at 18–19 (noting that over time, as new entrants improve the quality of their products, increasingly competing directly with incumbents, they may eventually drive the incumbents from the market to the higher-end market that remains open to them).

167. *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005, slip op. at 7 (Wash. June 15, 2012).

CONCLUSION

The legal profession has been remarkably effective in maintaining control over the legal services market, notwithstanding the lack of evidence that lawyers are more effective or ethical than trained and licensed nonlawyers in certain legal contexts. Research suggests that "[t]he control on entry into legal practice, years of legal education, and regulation of conduct and competence have done little or nothing to distinguish lawyers from their nonlawyer competitors."[168] Nevertheless, it is important to proceed cautiously when opening up legal services markets to NLRs. Some areas may not be appropriate for nonlawyer representation because of their procedural or substantive complexity or the possibility of consumer confusion.

The legal profession needs to decide what role to play in this market transition. The elite bar has been open to efforts to allow nonlawyers to provide more legal services to individuals,[169] in part because nonlawyers will not compete with them for high-end corporate work. Much of the rest of the organized bar has attempted to block efforts to expand entry of nonlawyer providers into the legal services market.[170] While the bar can continue to obstruct the opening of the legal market to NLRs, and may continue to win some battles, it will eventually lose the war. In order to prepare for the changes in the legal services market, the bar should instead consider how to make the delivery of legal services more accessible and cost-effective for consumers. The legal profession could also have a role shaping, in constructive ways, the future training and responsibilities of NLRs. If the bar attempts to cling to its monopoly, and does not engage with these changes, those issues are likely to be resolved by courts, legislatures, and the marketplace in ways that do not consider lawyers' legitimate interests and concerns.

168. Moorhead et al., *supra* note 72, at 795.

169. *See, e.g.*, COMM. ON PROF'L RESPONSIBILITY, N.Y.C. BAR, NARROWING THE "JUSTICE GAP": ROLES FOR NONLAWYER PRACTITIONERS (2013), *available at* http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf.

170. *See* AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, *supra* note 78, at 68–70 (1995); Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75, 101 (2013); Stephanie S. Johnson, *Florida Bar Board Rejects Proposals for Legal Technicians*, B. LEADER, Nov.–Dec. 1994, at 8; *see also* France, *supra* note 15.