ARTICLES

SHOULD SOCIAL WORKERS ENGAGE IN THE UNAUTHORIZED PRACTICE OF LAW?

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I. INTRODUCTION: THEORY MUST NOT FAIL PRACTICE

> [A] theory may be incomplete, perhaps to be supplemented only by additional experiments and experiences from which the trained physician, agriculturist, or economist can and should abstract new rules of his own, to complete his theory. Thus, when the theory did not work too well in practice, the fault lay, not in the theory, but rather in there being *not enough* theory which a man should have learned through experience . . . In a theory based on the *concept of duty*, however, there need be no concern for empty ideality. For the pursuit of a certain effect of our will would be no duty if the effect were not also possible in experience (whether conceived as complete, or as constantly approaching completion).[1]

Kant's statement regarding the essentiality of the nexus between theory and practice provides a concise summary of the logic behind the view that unauthorized practice prohibitions are inappropriate when applied to routine legal services, particularly in the case of poor persons. It is difficult to justify such prohibitions as protecting the public from legal services of questionable quality when the result is that the poor population simply cannot afford any legal assistance.[2] It is equally difficult to assert that persons have meaningful access to justice resulting from the right to proceed *pro se* when a lay person cannot realisti-

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[1] IMMANUEL KANT, ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON'T WORK IN PRACTICE 41-42 (1974).

[2] *See, e.g.*, Roger Cramton, *The Future of the Legal Profession: The Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 37 STAN. L. REV. 1 (1981) ("Rhode I"); Deborah Rhode, *The Delivery of Legal Services by Nonlawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990) ("Rhode II").

cally negotiate our complex legal system.[3] Additionally, unauthorized practice law[4] proscribes most rudimentary assistance by anyone other than a lawyer,[5] thereby further diminishing the accessibility of justice.

Many social workers, such as those working at settlement houses and community centers, are well-positioned to assist poor persons with simple legal problems. This article analyzes their ability to do so given current bar regulations[6] and case law, and presents a theoretical justification of the notion that social work is the appropriate profession to assist in this area. Part II begins with an analysis of the need for nonlawyer legal services. The discussion proceeds to the position of community center social workers, their current knowledge of legal problems, and their proposed role in providing rudimentary legal services. Part II ends with a proposal for the expansion of community center services to include basic legal assistance. In Part III, an economic theory underlying the bar's justification for unauthorized practice prohibitions[7] is juxtaposed with ethical and empirical rationales for relaxing these prohibitions with regard to routine legal matters. Case analysis of the prohibition is the subject of Part IV. Part V synthesizes these previous sections' considerations into a proposal for the role of social workers and responds to potential criticisms. Part VI contains concluding remarks.

Before moving to a discussion of the need for basic legal services among the poor and the ability of social workers to meet a portion of that need, several caveats are appropriate. A critical aspect of the proposal which will be revisited throughout this article is that it purports to relieve some of the deficiencies in service provision only for the poor. It is not intended to assist the middle-class, although there is demonstrated legal need among some of its members.[8] Furthermore, the proposal is for social worker assistance on civil matters only, and includes no criminal scenarios. Additionally, since the proposal is based on the existence of community centers, it is most suited to urban settings, where such centers are abundant. The following proposal should not be seen as violative of unauthorized law practice prohibitions. In fact, it is arguable whether some of the activities encouraged herein would properly be included in a definition of the practice of law. This possibility was not overlooked; rather, this article presents an argument, based on sound public policy and recognized by several appellate courts, that the role for community center social workers endorsed herein does not constitute the type of public danger targeted by unauthorized practice prohibitions. This argument is not intended to be jurisdictionally bound, as a

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[3] *See e.g.*, LUBAN, *supra* note 2, at 237-277.

[4] *See infra* note 175.

[5] *See, e.g.*, Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978); Florida Bar v. Furman, 376 So. 2d 378 (Fla. 1979). As will be discussed *infra* Parts II.B, II.C, and V, social workers employed in community centers may be able to provide certain elementary assistance as a condition of their employment.

[6] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1983).

[7] *See* GEORGE AKERLOF, AN ECONOMIC THEORIST'S BOOK OF TALES 7-22 (1984).

[8] *See generally* notes 23-28 and accompanying text.

number of courts are represented in the case law reviewed below. The focus is on the policy reasoning of these decisions, not on peculiar or narrow principles of state law involved in the decision. No included decision turns or is based exclusively on such principles.

II. LAW-RELATED NEEDS AND THE ROLE OF SOCIAL WORKERS IN MEETING THEM

A. *The Need for Lay Legal Services*

A number of social and legal changes have created a market for basic legal services provided by nonlawyers, particularly for assistance in preparing legal forms for *pro se* litigants on various civil legal matters.[9] In recent years, consumers of legal services have become more aware of the legal dispute resolution process and their rights within it.[10] Consequently, the demand has increased for "self-help legal assistance in general and *pro se* legal services in particular."[11] The simplification of certain legal procedures, such as family law, landlord and tenant law, and bankruptcy procedure, has resulted in additional demand for such services.[12]

These changes have occurred contemporaneously with dramatic cuts in legal aid services for the poor.[13] In 1994, the Pennsylvania General Assembly eradicated the entire state funding base for legal services, some 2.5 million dollars.[14] Public officials have responded to inadequacies in representation and the increasing number of legal needs among the poor. In October of 1996, the Chief Justice of the California Supreme Court wrote an unprecedented open letter to the members of the California Bar urging them to provide more free legal services to the state's indigent population.[15]

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[9] *See* Rhode II, *supra* note 2, at 214. In some states, such assistance by nonlawyer "self-help" agencies is permissible, and social workers are directed to refer clients to these agencies where available. *See also* ANDREA SALTZMAN & KATHLEEN PROCH, LAW IN SOCIAL WORK PRACTICE 437-38 (1990). Other states prohibit such agencies. *See supra* note 5.

[10] This is evidenced by the number of persons proceeding *pro se* or demanding the assistance of nonlawyers in simple matters. *See infra* note 12. *See also* Rhode II, *supra* note 2, at 214. *See generally* notes 23-28 and accompanying text.

[11] Rhode II, supra note 2, at 214.

[12] *See id.* "By the late 1980s in certain surveyed California counties, the proportion of *pro se* filings ranged from 39% to 62% of family law cases, 14% to 34% of landlord tenant cases, and 10% to 34% of bankruptcies. In one of these counties [Fresno], an estimated 70% to 80% of *pro se* divorce cases relied on form-preparation services." *Id.* at 214-15.

[13] *See id.* Government funds to the Legal Services Corporation were cut drastically in the 1980s under the Reagan Administration. *See also* MARK KESSLER, LEGAL SERVICES FOR THE POOR 9 (1987).

[14] *See* L.S. Rulli, *Pennsylvania Review - 1994 Foreword: Pennsylvania Legal Services at Risk*, 68 TEMP. L. REV. 541 (1995).

[15] H. Weinstein, *State Chief Justice Urges Lawyers to Give More Free Services to*

Legal aid societies[16] remain the major service providers for meeting the legal needs of low-income citizens. The types of cases presently pursued by legal aid lawyers can be characterized as either individual representation or social reform litigation. *Individual representation* includes routine matters that require the assistance of an attorney, such as bankruptcy, divorce, and will preparation. *Social reform litigation* is the representation of a group of individuals with a common problem, such as the residents of a deteriorating housing project. Social reform litigation is more prestigious for the attorneys involved and generally brings more public attention to the agency due to the highly visible issues involved. Though recent legislation has curtailed social reform opportunities for legal aid attorneys,[17] many still undertake such cases on a variety of topics. It is against this backdrop that legal aid lawyers determine the interests of the individuals they serve.[18] Historically, local legal aid societies have not made individual representation a high priority.[19] Staff lawyers at these agencies have a great deal of influence over the setting of such priorities.[20] According to Roger Cramton, "[t]he establishment of a priority in one area, such as public housing issues, may lead to refusing service in categories of other cases. A number of legal services programs, for example, refuse to accept divorce cases."[21]

Legal needs studies have been conducted at the national level since the early 1970s.[22] One nationwide research project commissioned by the ABA, the Comprehensive Legal Needs Study ("CLNS"), found that many indigent persons are not aware that help is available, and many of those who are aware choose to avoid the justice system for other reasons, particularly cost.[23] The study found that in 1992, 48% of low-income households surveyed reported involvement in a

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Poor, L.A. TIMES, Oct. 20, 1996, at A3.

[16] "Legal aid societies" are legal assistance agencies funded by Legal Services Corporation ("LSC"). Some privately funded agencies play a lesser role, though these are not captured by the terms "legal aid" or "legal aid society." *See infra* note 92.

[17] *See* 42 U.S.C.S. § 2996e(d)(5) (stating that "[n]o class action suit, class action appeal, or amicus curiae class action may be undertaken, directly or through others, by a staff attorney, except with the express approval of a project director of a recipient in accordance with policies established by the governing body of such recipient").

[18] *See* Cramton, *supra* note 2, at 591.

[19] *See id.*

[20] *See id.*

[21] *Id.*

[22] *See* ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY (1989); ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, COMPREHENSIVE LEGAL NEEDS STUDY (1994) ("CLNS"); ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE: FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY (1996) ("CLNS II"). *See also* BARBARA CURRAN & F.O. SPAULDING, THE LEGAL NEEDS OF THE PUBLIC (1974).

[23] *See* CLNS, *supra* note 22. *See also* CLNS II, *supra* note 22.

situation of requisite severity for resolution in the justice system.[24] Of those households, 29% sought a remedy in the justice system, 13% consulted a non-legal third party, 41% attempted to resolve the matter themselves, and 38% did absolutely nothing (with some households taking more than one action).[25] Perhaps the most disturbing figures presented in the study were those regarding "unmet needs"[26] - legally significant situations where nothing was done, or where third party consultation produced unsatisfactory results. In studies where the supply of lawyers included all of the nation's private practitioners, there were fifty-five cases of unmet needs per lawyer among low and middle-income households in 1992.[27] This is a sobering contradiction to the Reagan-era assertion that *pro bono* services alone will meet the needs of Americans who cannot afford to pay for legal services.[28]

This article offers a proposal designed to raise the percentage of poor persons contacting nonlawyer third parties about legal needs from the paltry 13% noted above. This can be achieved by creating a low-cost alternative for the 79% of persons who handle matters themselves or do nothing. This plan differs from mandatory *pro bono,* which attempts to create incentives for current or newly certified lawyers to handle some of the fifty-five unmet needs per lawyer nationwide. The program also differs from proposals advocated by social workers purporting to address the problem of legal services for the poor. Such measures include "establishing a commission within the National Association of Social Workers ("NASW") and creating a generic occupational designation for social workers who practice within the judicial system."[29] While those proposals aim to define a role for social workers within the judicial system,[30] the present program would enable social workers to bridge the gap between individuals and the judicial system; a traditional "interstitial" role which will be discussed in the next subsection.[31] Although the above-mentioned approaches are fundamentally different, they are not mutually exclusive. If both are adopted, the social workers at community centers will assist both new and experienced lawyers in more effectively meeting the needs of poor clients.

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[24] *See* CLNS II, *supra* note 22, at 4.

[25] *See id.*

[26] *See id.* at 8.

[27] *See id.*

[28] *See* KESSLER, *supra* note 13, at 9.

[29] Rufus Sylvester Lynch & Edward Allan Brawley, *Social Workers and the Judicial System: Looking for a Better Fit*, 10 J. TEACHING IN SOC. WORK 65, 71 (1994).

[30] Lawyers and social workers have met to discuss their respective places in the child welfare system, and how they might better serve each other. *See, e.g.,* Paul Johnson & Catherine Kahn, *Symposium: Improving Child Welfare Practice Through Improvements in Attorney-Social Worker Relationships*, 54 U. PITT. L. REV. 229, 230-31 (1992).

[31] Andrew Abbott, *Boundaries of Social Work or Social Work of Boundaries?*, 69 SOC. SERV. REV. 545, 549 (1995).

B. *A Proposal: An Increased Role for Social Workers in Community Centers*

The community center is a trusted point of first contact for residents in its service area regarding social services, such as child care and free medical services. Community center social workers are intimately familiar with the local area and, where non-English speakers are prevalent, the workers are usually fluent in the appropriate languages. It is possible to expand that role to include initial contacts for information on legal matters. Residents who are in need of legal assistance but avoid law offices because of perceived high fees, and legal aid societies due to long wait lists, could visit the familiar community center for advice on legal problems. A social worker could identify the character of the legal problem, make contacts, prepare papers,[32] and resolve routine issues. If difficult or complex issues were involved, the social worker would refer the client to a private lawyer or to legal aid. This would increase the number of persons seeking necessary legal assistance. Additionally, as social workers in this role gain increased knowledge of legal issues, their referrals will become more informed and will allow lawyers to efficiently dispose of referred matters.

In the initial stage of the program, inadequacies in the knowledge base of community center social workers, such as those seen in the brief survey described above, must be identified and remedied. This can be accomplished by training employees to identify legal issues in the areas of greatest need; to assist clients by giving instructions for *pro se* procedures or informed referral to available legal services, including members of the private bar;[33] and to represent clients in nonadversarial administrative hearings in typical problem areas, such as obtaining public assistance benefits.[34] No social worker would perform legal research under this proposal.[35] The long-term educational goal of the program would be to integrate a more practical legal component to the continuing education, baccalaureate, and master's level training of social workers.

The subject matter of the training would include legally significant topics commonly encountered by social workers in community practice. Such areas include[36]:

1. Juvenile matters, e.g., dependency, neglect, delinquency, abuse, and guardianship.

2. Marriage, e.g., licensing procedures, uncontested fault/no-fault divorce, child custody, child/spousal support, and financial settlements.

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[32] As a practical matter, many poor clients, because of educational deficiencies, will need more than mere assistance in the procurement of forms.

[33] A portion of this training would include information on selecting private lawyers with good reputations.

[34] *See infra* notes 184-88 and accompanying text.

[35] This distinguishes their activity from that of the lawyer in *Agran v. Shapiro*. *See infra* Part IV.A. Their main reference materials would be legal handbooks, rather than primary sources, such as case law and statutes.

[36] Many published sources note common legal issues faced by the poor. *See generally*, DONALD BRIELAND & JOHN LEMMON, SOCIAL WORK AND THE LAW (1985). *See also* SALTZMAN & PROCH, *supra* note 9.

3. Children, e.g., abortion, unmarried parents, paternity, adoption, emancipation, and placement.

4. Elder Issues, e.g., federal programs, competence, employment eligibility, and health care.

5. Benefits, e.g., welfare and Supplemental Security Income/Social Security Disability.

6. Housing, e.g., tenants' rights, housing code enforcement, rent withholding, eviction, and public housing.

7. Education, e.g., right to education, corporal punishment, pregnancy, dress, and requiring students to repeat grades.

Continuing social work education,[37] comprised of lecture and situational analysis, could achieve this goal. For example, one class session could be devoted to each substantive area. In addition to such substantive training, community center social workers would develop an understanding of the role of the Legal Aid Society in providing free legal assistance, as well as the availability of *pro bono* counsel in various subject areas.

Following the educational phase, procedures for intake and consultation with clients on legal issues would be developed for use at participating community centers. These procedures would ensure client confidentiality[38] and efficient service provision.[39] An income check would also be done to ensure that only persons with incomes at or below 150% of poverty[40] would be assisted. Individuals with incomes exceeding that amount would be eligible for referral to an attorney.[41] Malpractice and negligent conduct would be considered, and an appropriate check would be constructed. The judiciary would have the power to revoke social workers' licenses for failure to respect the law. Further, a client alleging that a social worker mishandled a simple matter, or failed to refer a complex matter to an attorney, could seek compensation through the tort of negligent conduct.[42] A publicity campaign would be conducted to alert residents in neigh-

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[37] Continuing education has historically been used to enhance social workers' knowledge of the law. For example, when the Ohio elder abuse law was enacted in 1989, there was a flurry of continuing education efforts to make social workers aware of the legal system and its use in advancing client goals and treatment. *See* OHIO REV. CODE ANN. § 2101.26.

[38] *See infra* notes 197-99 and accompanying text.

[39] These would be developed in conjunction with community center employees through focus groups, rather than by *ex ante* speculation.

[40] This is slightly higher than the 125% of poverty guideline used for LSC funded services. The intent is to include those who cannot utilize legal aid services, but who are still too poor to afford private counsel. Of course, any arbitrary guideline will exclude some deserving persons, but it is more fair than the current system.

[41] Because the social worker could refer the client to an affordable attorney whom the client might not otherwise have found, this would be a significant improvement over the current situation.

[42] Social workers have the following ethical duty, legally enforceable by a court to advise only within the limits of their individual competence:

3.01 Supervision and Consultation

borhoods with participating community centers that legal services will be available. Finally, the proposal would take effect and its performance would be reviewed after six months and again after one year. If, after one year, the program was incapable of meeting its goals, it would be discontinued. Alternatively, if successful, it would be continued and expanded with attention to difficulties identified in the program evaluation.

One Cleveland organization serves as an excellent example of an operation facing training needs similar to those of the community centers under this proposal. The Women's Re-entry Resource Network ("WRRN") assists formerly imprisoned individuals with their re-entry to society.[43] Re-entry assistance organizations are in a unique position among social welfare agencies with respect to the need to understand our legal system. Of all active WRRN clients not currently incarcerated, some 47% have legal needs, which WRRN attempts to address through non-legal avenues, often leading to incomplete, ineffective, or temporary solutions.[44] These needs generally fall within the areas of child custody, marital status, child support, and the establishment of paternity.[45] As an advocacy group, WRRN has as its mission the active assistance of its clients with their re-entry to society; however, concerning even the most basic legal needs (those not requiring the assistance of counsel), high-quality assistance is simply not possible given the WRRN staff's limited legal knowledge.[46] Referrals to the legal aid society on family law matters are queued in a wait list which is approximately one year long, and the services of *pro bono* attorneys and clinical legal education programs from a local law school have fallen short of WRRN's needs.[47] If the social workers employed by WRRN were able to identify legal issues, educate clients about the bureaucratic process of dispute resolution, and make the appropriate bureaucratic or bar contacts, the advocacy mission would be greatly improved. WRRN's needs do not require that its employees become lawyers, but that they understand the *pro se* avenues available to their clients. If a client had a complex problem, the social worker would make an educated referral to legal aid, *pro bono*, or private counsel. Such referrals would proceed more efficiently because, after training, WRRN employees would be better able to identify legal

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(a) Social workers who provide supervision or consultation should have the necessary knowledge and skill to supervise or consult appropriately and should do so only within their areas of knowledge and competence.

National Association of Social Workers, *NASW Code of Ethics*, (visited Jan. 3, 1998) <http://www.naswdc.org/Code/cdstan3.htm>.

[43] Telephone interview with Kathleen J. Farkas, Women's Reentry Resource Network, in Cleveland, Ohio. (Nov. 13, 1997).

[44] *See id.*

[45] *See id.*

[46] This is precisely the problem faced by the organized bar with respect to unauthorized practice and the need for discipline. However, under this proposal, both license revocation and a remedy in tort are available in the event of misconduct or negligence. *See supra* notes 41-42 and accompanying text.

[47] *See* telephone interview with Kathleen J. Farkas, *supra* note 43.

issues. WRRN would benefit from an increased practice-oriented knowledge of elementary legal issue spotting and an expanded referral data bank. This is precisely what training under this proposal would provide to social workers in community centers.

Consider some examples of situations in which the proposed program would function. Suppose a low-income client enters a community center stating that she has been told to leave her place of residence. A social worker would most likely contact shelters and agencies, which could house the client on a short-term basis, but the assistance on this particular matter would probably stop at that point. Under the proposal, the social worker would inquire about the character of the living arrangement. Is there a lease? Was rent paid? At what interval is rent typically paid? Does she possess property that she cannot recover as a result of the eviction? Such questions would enable the community center employee to determine whether the client has a right to re-enter her residence and whether the problem can be handled by the social worker or through a quick, informed referral to *pro bono* counsel.

Consider the same client who now states that she could not pay her rent because she did not receive payment from her current job. Was there a work contract? What type of work arrangement existed? Had the employer made any past payments to the client? If the client's wages will be paid within a short time, it might be possible for the social worker to contact the landlord and reach an agreement whereby payment will be made when the client receives her money. Direct contact with the employer might also be possible.

Presently, social workers often refer clients to lawyers and have some knowledge of effective referrals, though the present proposal would require refinement of such skills.[48] A leading master's level textbook on law and social work practice suggests the following:

> You may save your clients much time and aggravation if you check first with your referrals to see if and when they will see your clients, what they can do for your clients, and what they will charge for their services.
>
> If you are making a direct referral to a lawyer for a client, you may want to provide the lawyer with your client's history and the history of the problem which the client is bringing to a lawyer. This can save the lawyer's time, and thus the client's expense, and will enable the lawyer to prepare in advance for the first meeting with the client . . . You must ask your client to consent to the disclosure, but you can assure your client that lawyers are bound by much stricter confidentiality rules than social workers.
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> Before making referrals to lawyers, without giving the clients the legal advice they will get from the lawyer, you should try to explain something about the legal process to your clients, attempt to ease the stress they may

[48] Social workers often use assessment tools - questionnaires completed by intake personnel - as a guide in determining the social situation of a client. These assessment tools should be revised, given the present proposal, to reflect legal problems. Consequently, the theme of integrating basic legal service provision into the typical functions of community center social workers would be served.

> feel at seeing a lawyer, and get them to address the emotional aspects of their legal problems . . . .
>
> If you have made a direct referral to a lawyer, it is a good idea to keep in touch with the lawyer – assuming your client has given you permission to do so . . . . Your assistance can make the lawyer's job much easier and the process more satisfactory for the client.[49]

Social workers are presently encouraged to acquire a basic package of legal skills, namely: (1) working communication skills with regard to legal resources; (2) the ability to see a problem through a legal lens; (3) a working knowledge of the legal process; and, (4) a working knowledge of client communication techniques.[50] The authors of this text also point prospective social workers toward legal aid, *pro bono* and low-cost private sources, legal assistance hotlines, contingency fee arrangements for torts and injuries, public defender offices, and the like.[51] This suggests that social workers can be expected to acquire basic legal knowledge through professional school and continuing education coursework. The next question is whether social workers may legally give assistance pursuant to this proposal.

Consider the example of uncontested divorce. The preliminary question is whether the average poor person will be able to procure any legal advice on filing for divorce. Some of these matters can be handled by an educated individual proceeding *pro se.* However, the prohibition on the unauthorized practice of law bars nonlawyers such as social workers from giving legal advice to individuals. Florida courts, for example, permit the distribution of divorce materials by lay agencies under First Amendment doctrine, but do not allow members of those agencies to help clients fill them out.[52] According to Cramton, "[t]he most common formulation [of the unauthorized practice test] is the 'professional judgment' test: Is the activity one in which a lawyer's presumed special training and skills are relevant?"[53] For example, the *Brumbaugh* court found as follows:

> [The] respondent, under the guise of a "secretarial" or "typing" service prepares, for a fee, all papers deemed by her to be needed for the pleading, filing, and securing of a dissolution of marriage, as well as detailed instructions as to how the suit should be filed, notice served, hearings set, trial conducted, and the final decree secured. The referee also found that in one instance, respondent prepared a quit claim deed in reference to the marital property of the parties. The referee determined that respondent's contention that she merely operates a typing service is rebutted by numerous facts in

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[49] SALTZMAN & PROCH, *supra* note 9, at 437-38.

[50] *See id.*

[51] *See id.* at 432-35. The difficulty is that community center social workers do not regularly employ this knowledge. *See infra* notes 83-85 and accompanying text.

[52] *See* Florida Bar v. Brumbaugh 355 So.2d 1186 (Fla. 1978); Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979).

[53] Cramton, *supra* note 2, at 568. This test is a generalization of the incidental test developed *infra* Part IV. Since this proposal makes the questionable services incidental to the practice of social work, it is best evaluated under the incidental test.

> evidence. Ms. Brumbaugh has no blank forms either to sell or to fill out. Rather, she types up the documents for her customers after they have asked her to prepare a petition or an entire set of dissolution of marriage papers. Prior to typing up the papers, respondent asks her customers whether custody, child support, or alimony is involved.[54]

Ms. Brumbaugh's activities, and their treatment by the bar and the court, present an excellent backdrop for the important issue of affordability. A poor person in need of minor civil legal assistance could visit Ms. Brumbaugh's agency and obtain the requisite assistance for fifty dollars.[55] A lawyer would charge several hundred dollars. Furthermore, no unsatisfied client brought a disciplinary action against Ms. Brumbaugh.[56] That case was originated by the Florida Bar, which suspected that she had given legal advice without a license.[57] A community center social worker might provide similar services exclusively to poor persons, satisfying a large part of the need regarding simple legal matters, and be held accountable for negligence and misconduct in tort and through license revocation. Because of her professional training, a social worker is more keenly aware of her client's situation than any other professional involved with the individual would be. Armed with a working knowledge of the process which a potential *pro se* civil litigant must undergo, the social worker can assist both the client, by helping them acquire and complete forms and administrative procedures, and the lawyer, by reporting the underlying circumstances and the steps the client took prior to the initial consultation.

These are the benefits of permitting social workers to participate at this level. Parts III and IV discuss the theoretical underpinnings of the unauthorized practice prohibition upheld by the *Brumbaugh* court, as well as a line of cases indicating the permissibility of the proposal, even if some activities included therein fall within the practice of law.[58]

C. *The Positioning and Efforts of Social Workers*

The previous section suggested that social workers in community centers can help to reduce the unmet legal needs of poor persons. This part asks whether social work should be the profession to lend such assistance. This article argues that social workers are ethically committed to helping the poor, and connecting the poor with services facilitating their effective participation in society is a traditional role of the profession. Beginning with the results of a survey of

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[54] *Brumbaugh*, 355 So.2d at 1190.

[55] *See id.*

[56] *See id.*

[57] *See id.* It is unlikely that similar bar action will result from implementation of the instant proposal because it is limited to legal services for the poor that are not presently provided by members of the private bar. The proposal does not create a mechanism for middle-class persons to bypass lawyers in the interest of lower fees.

[58] However, a court is unlikely to find that such activities constitute the practice of law. *See supra* Part I.

Greater Cleveland community centers, this section argues that, although social workers have some legal knowledge, the aforementioned proposal is necessary because practitioners can and should go far beyond their present efforts in meeting legal needs.

In its Code of Ethics, the NASW details the social worker's professional responsibility to the poor as follows:

> 6.01 Social Welfare
> Social workers should promote the general welfare of society, from local to global levels, and the development of people, their communities, and their environments. Social workers should advocate for living conditions conducive to the fulfillment of basic human needs and should promote social, economic, political, and cultural values and institutions that are compatible with the realization of social justice.[59]

Social workers engaged in community practice are increasingly involved in advocacy roles, which can be defined as follows:

> Advocacy is related to backup of individuals and disadvantaged groups, particularly related to neighborhood and community needs. . . . Advocacy in social work practice and education is gaining momentum. Many social workers in community settings and agencies are assisting their clients with support and guidelines in facing social problems and in trying to change strong debilitating situations and patterns. Social workers must be willing to learn and use principles of advocacy when they encounter dehumanizing conditions or abusive treatment within service agencies.[60]

The history of social work, particularly during the settlement house movement suggests a commitment to social justice advocacy:

> [B]oth Josephine Shaw Lowell, spokeswoman for the organized charities, and Jane Addams, leader and philosopher of the settlement house movement in America, emphasized sacrifice and human fellowship, the need to bring the rich and the poor together, to reduce social disintegration and class divisiveness. The question was not whether they had a commitment to the poor, but how that commitment could best be discharged.[61]

The notion of discharging a presupposed commitment to helping the poor is central to this proposal, and is instructive as to the social worker's role in the American politico-economic landscape. If the lawyer is, as David Luban suggests below, a necessary part of a meaningful right to justice for any citizen, then the social worker, according to the Abbott synthesis proffered below, is committed to connecting the poor with lawyers, as lawyers are the conduit to

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[59] National Association of Social Workers, *NASW Code of Ethics* (visited Nov. 18, 1997) <ftp://ftp.naswdc.org/pub/webpage/ethics.doc>.

[60] REX SKIDMORE, et al., INTRODUCTION TO SOCIAL WORK 112 (4th ed. 1988). An example of such an advocacy role is that of the Women's Reentry Resource Network ("WRRN"), with which the author has been affiliated. *See infra* Part III (discussing the advocacy characteristics of WRRN).

[61] WALTER TRATTNER, FROM POOR LAW TO WELFARE STATE 150 (4th ed. 1989).

justice. Access to justice is an essential part of the effort to "bring the rich and the poor together."[62]

Social work as a profession has been characterized by sociologist Andrew Abbott as "the profession of interstitiality, the profession whose job was to mediate between all the others . . . [T]he heart of what [social workers] did was to broker between doctors, lawyers, and psychiatrists on the one hand, and patients, institution, and, sometimes, family on the other."[63] For Abbott, "[p]robably the vast majority of what people with the title 'social worker' actually do in the United States is indeed connecting together services provided largely by other professions and other institutions."[64] Over time, Abbott observed, society's needs for such brokerage change: "[w]here in one decade, the chief brokering needs might lie between educational institutions and jails, in another, more might lie between hospitals and families,"[65] or between poor individuals and lawyers. He suggests that professions develop from a consciousness of their boundaries, and that "local sites of difference always exist - even within the various inchoate areas of current welfare-related tasks - from which new professions or subprofessions could emerge."[66] Hence, even within the profession of interstitiality, sub-professions such as medical social work and the proposed "judicial social worker"[67] designation can be carved out in consonance with developments in law, though as welfare roles they remain embryonic within social work.[68] This is true because social work "is perpetually at the mercy of changes in other professions."[69] For example, Abbott states, "the very decline in 'helping' within the hospitals [as they become bureaucratic economic creatures within a highly competitive market] has benefited social workers who plan for the less expensive 'helping' outside."[70] Likewise, the legal system, with ever increasing lawyers' fees and concurrent declines in funding to the LSC and public interest law groups, has exhibited a diminished propensity toward helping. This proposal suggests that social workers expand their current legal roles not by creating a new subcategory of social workers, but by efficiently connecting persons with services, in keeping with their interstitial function.

Legal services for the poor are presently controversial. Therefore, as Abbott observed, social workers are likely candidates for providing such assistance: "no other profession wants [the poor], which makes it a fertile ground for professional work . . . .The bad news is that central parameters defining what can be done with the group are set by other agents. . . ."[71] In the principal scenario, the

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[62] *Id.*

[63] Abbott, *supra* note 31, at 549.

[64] *Id.* at 559.

[65] *Id.* at 552.

[66] *Id.* at 558.

[67] *See* Lynch & Brawley, *supra* note 29, at 72.

[68] *See* Abbott, *supra* note 31, at 559.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 560.

other agent at issue is the bar and its rules against unauthorized practice. This is the subject of Parts III and IV. This proposal does not intend to completely circumvent the bar's practice regulations, which have some merit in protecting the public, but to understand their scope with regard to the public interest in providing legal services for the poor. This would allow social workers to enter the picture, not as lawyers, but as connectors of services and needy individuals – their interstitial role.

Envision the social worker, imbued with the abovementioned professional responsibilities, working in the neighborhood community center. Imagine that this social worker is approached by a member of the community which she serves and is asked a question that has legal implications. What does she do? If the question is simple enough, is there any valid reason to refer the client to the long wait list[72] of the legal aid society or to a fee-for-services lawyer, whose fees may serve as a barrier to service access? If, notwithstanding the unauthorized practice concerns which are the subject of Parts III and IV, one concludes that there is not, does the social worker have sufficient knowledge of the governmental bureaucracy or the bar to make an appropriate referral? Can the social worker determine that the problem presented has legal implications?

A brief survey of Neighborhood Centers in Metropolitan Cleveland suggests that, at present, the answer to both of these latter questions is "rarely." The directors and the most experienced intake social workers on staff in several Neighborhood Centers in the cities of Cleveland, Ohio and East Cleveland, Ohio were asked what they would do if presented with an issue having legal implications.[73]

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[72] Currently, the period from referral to service in Cleveland is approximately one year. *See* telephone interview with Kathleen J. Farkas, *supra* note 43.

[73] The questionnaire is printed below, and was approved by the Office of Research Administration at Case Western Reserve University on October 27, 1997. The survey was conducted on October 31, 1997.

Survey

I am a research fellow at Case Western Reserve University conducting research on the handling of legal problems by social workers. I am contacting community centers in the cities of Cleveland and East Cleveland to inquire about the responses they give to clients who present an issue that sounds legal. Patterns across the sample are of primary interest, and no individual whatsoever will be named in the study. Please do not refer to any clients by name in your responses. You may stop the questioning at any time.

A large legal needs assessment commissioned by the American Bar Association identified the following categories of legal needs:

Home, including housing, real estate transactions, and the neighborhood or community

Family, including domestic matters, children's education, and advance directives, estates, and guardianship

Livelihood, including work, retirement, vocational training, and benefits programs

Health, disability, and health care

Serious disagreements and disputes, including personal finance, credit, consumer matters, and torts

Civil liberties, including improper search and seizure, freedom of speech and religion, and voting rights

Of the twenty-three member centers of the Cleveland Neighborhood Centers Association, sixteen can be identified as full service community centers — those offering a range of services rather than specializing in one area, such as child care.[74] Full-service centers are the optimal agents for carrying out the proposal discussed in Part II.B, since they serve as centralized resources that neighborhood residents can contact for a variety of services, including legal assistance questions. From these sixteen centers, a sample of six was drawn and contacted. These six centers serve[75] a total population of approximately 110,000 persons[76] and a population living below the poverty line of 37,625 persons.[77] The total population of Cleveland, Ohio, is 502,931[78] while East Cleveland has 31,421 residents.[79] The combined number of persons below the poverty line in these cities is 158,750.[80] Thus, the sampled centers serve slightly more than 20% of the total population in these cities and 24% of the poor population in Cleveland and East

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Situations affecting special populations. including immigrants, Native Americans, military personnel, and veterans.

American Bar Association, Consortium on Legal Services and the Public, Legal Needs and Civil Justice: A Survey of Americans, 6-7 (1994). If a client visits the center expressing a concern that falls into each of the above areas, which of the following actions do you take?

(a) Refer the client to the Legal Aid Society for free legal services (assuming they qualify).

(b) Distribute information about local *LEGAL* services that are available for help on this type of problem.

(c) Distribute information about local *NON-LEGAL* services that are available for help on this type of problem.

(d) Refer the client to a fee-for-services lawyer.

(e) I don't recognize this as a legal issue.

(f) Other action (explain).

The survey was conducted by telephone, and question one was asked once for every category mentioned above.

[74] Information regarding the services provided by individual community centers is available on the World Wide Web at <http://little.nhlink.net/nca/ncahome.htm> (homepage of Greater Cleveland Neighborhood Centers Association).

[75] The individuals served by these centers are those living in neighborhoods serviced by the community centers included in the sample who would be eligible to visit them for legal help under the proposal.

[76] Population estimates produced in 1994. Search of CANDO database, Center on Urban Poverty and Social Change, Cleveland, Ohio (Nov. 4, 1997).

[77] Poverty estimates produced in 1994. Search of CANDO database, Center on Urban Poverty and Social Change, Cleveland, Ohio (Nov. 4, 1997).

[78] Population estimates produced in 1994. Search of CANDO database, Center on Urban Poverty and Social Change, Cleveland, Ohio (Nov. 4, 1997).

[79] Population estimates produced in 1994. Search of CANDO database, Center on Urban Poverty and Social Change, Cleveland, Ohio (Nov. 4, 1997).

[80] Poverty estimates produced in 1994. Search of CANDO database, Center on Urban Poverty and Social Change, Cleveland, Ohio (Nov. 4, 1997).

Cleveland.[81] As such, the sample is quite representative of the population at whom this proposal is aimed.[82]

The results of the survey are summarized in Table 1. The overwhelming majority of those surveyed did not see the need to contact members of either the private bar or the legal aid society regarding any of the problems presented. Moreover, there is a startlingly low propensity to refer clients to fee-for-services lawyers.[83] One respondent replied that as a rule "we [center employees] never use fee-for-services lawyers," while another said that her center had never done so. Those respondents who suggested utilizing the fee-for-services bar did so only in conjunction with needs in the "serious disagreements and disputes" group, situations typically understood to be the province of lawyers. The remainder of the legal work was left to legal aid. Though all respondents stated that their responses would depend on the particular situation, none suggested that the time involved or the magnitude of damages would make a difference in the choice to defer to legal aid.

Table 1: Survey Responses

Center	*Home*	*Family*	*Livelihood*	*Health, Disability And Health Care*	*Serious Disagreements And Disputes*	*Civil Liberties*	*Situations Affecting Special Populations*
1	c	a	c	c	n/a	b	c
2	c	c	a	c	a,d	a,b	b,c
3	b	a,c	c	c	c	a	c
4	a,b	b,c	c,a	c	a,b	a	c
5	n/a	a,c	c	c	a,c	n/a	c
6	b	c	c	c	c,d	b,c	c

(a) Refer the client to the Legal Aid Society for free legal services (assuming they qualify).
(b) Distribute information about local **LEGAL** services that are available for help on this type of problem.
(c) Distribute information about local **NON-LEGAL** services that are available for help on this type of problem.
(d) Refer the client to a fee-for-services lawyer.
(n/a) Never experienced the problem and would not know how to answer.

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[81] Population and poverty estimates produced in 1994. Search of CANDO database, Center on Urban Poverty and Social Change, Cleveland, Ohio (Nov. 4, 1997).

[82] Given the availability of community centers, the principal proposal would be most effective in meeting the needs of the urban poor. Thus, an urban sample is appropriate.

[83] This is true even though basic texts on the legal aspects of social work practice used in undergraduate and master's level social work programs discuss and encourage referral. *See* SALTZMAN & PROCH, *supra* note 9, at 437.

The categories in which respondents most frequently stated that they would seek legal assistance were family issues, serious disagreements and disputes, and civil liberties. In the family category, none of the respondents stated that they would contact a fee-for-services lawyer, while two respondents would connect the client with only non-legal services. The only legal resource that any respondents stated they would contact with regard to family issues was the legal aid society. Additionally, one center director displayed a knowledge of legal assistance available from the American Civil Liberties Union, the National Association for the Advancement of Colored People, the local housing authority, and other such agencies as well as a willingness to refer appropriate matters to those agencies. No other respondent provided evidence of such a working knowledge, despite its inclusion in an elementary social work textbook.[84]

The lesson of this limited study is that although social workers in community centers are properly situated to assist low-income persons with simple civil matters, currently, at least in Cleveland, they fail to fully meet their clients' social needs because they ignore their basic legal needs. The issue of law-related training was not explicitly a part of the survey, though the results imply such training is lacking. Teaching social workers to identify legal issues, fill out forms, and know when to refer to legal aid or the private bar, can be accomplished through existing continuing education requirements and undergraduate and master's level electives.[85] A short term problem identified by the study is that those social workers positioned to implement this proposal are not equipped with an adequate understanding of the legal assistance network in their communities. This situation can be remedied by continuing education. The more permanent problem is that most courses in the legal aspects of social work are not sufficiently effective. Implementing the following proposal would alert those seeking jobs in community centers that this kind of practical legal training will be a vital part of their practice. This will create an incentive for students to enroll in law and social work courses, and for faculties to improve upon the quality and practicality of such courses.

In sum, social workers are ethically committed to assist the poor in the manner outlined in the present proposal, but they are not currently fulfilling these important obligations. This proposal is an innovative way for social workers to perform an interstitial task with regard to a critical social justice issue - effective participation in the justice system.

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[84] *See id.* at 432 (discussing referral options for poor clients).

[85] This article argues that this goal can be achieved notwithstanding the views of authors who would prefer to separate the work of lawyers and social workers by the portion of the brain employed in their respective tasks, or those who claim that lawyers and social workers have disagreeing perceptions of the role they must play in areas such as the child welfare system. *See* Judith Lau, *Lawyers vs. Social Workers: Is Cerebral Hemisphericity the Culprit?*, 62 CHILD WELFARE 27 (1983); Michael Benjamin, *Child Abuse and the Interdisciplinary Team: Panacea or Problem?, in* FAMILY LAW: AN INTERDISCIPLINARY PERSPECTIVE 125, 130-35 (Howard H. Irving, ed., 1981).

III. COMPETING THEORIES OF THE VIABILITY OF UNAUTHORIZED PRACTICE PROHIBITIONS

Part III compares the economic theory underlying the bar's unauthorized practice prohibitions - essentially that low cost services will be low in quality - with a liberal political and ethical theory of access to justice. The bar's position on unauthorized practice is based on the economic conception of markets in defective goods advanced by George Akerlof,[86] while the right of access argument is that of David Luban.[87] Given this theoretical contrast, this article argues that Akerlofian reasoning is inappropriate when applied to the activities endorsed in the proposal advanced in Part II.B.

A. *Akerlof's "Market for Lemons"*[88]

A neoclassical economic argument for restricting the provision of legal services to bar-certified lawyers begins with a characterization of the market for legal services. First, prospective clients assess the attorneys they might employ primarily by their reputations as gleaned from advertisements, information services, and word-of-mouth.[89] Second, "[t]here is incentive for sellers to market poor quality merchandise, since returns for good quality accrue mainly to the entire group whose statistic is affected rather than to the individual seller."[90] Low quality lawyering will reflect poorly on the legal profession; however, for legal services, there is nowhere else to turn. Third, the social rate of return (the benefit to society from the particular actions of lawyers) is different from the private rate of return (the benefit to individual lawyers from their actions).[91] This creates the incentive to ban nonlawyers from the practice of law, even in routine situations. Fourth, government intervention in the market, such as mandatory legal assistance in civil matters and present Legal Services Corporation funded activities,[92] can augment public welfare.[93] Finally, concentrations of power are present

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[86] *See* Cramton, *supra* note 2, at 553 (noting that Akerlof's theory underlies unauthorized practice prohibitions).

[87] *See* LUBAN, *supra* note 2.

[88] AKERLOF, *supra* note 7, at 7. This section interprets Akerlof's seminal article as applied to the legal system. *See* Hayne Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328 (1979) for a more formal and robust model of professional licensure as a device for increasing the quality of service provision.

[89] Reputation acts as the market statistic for quality. *See* AKERLOF, *supra* note 7, at 7.

[90] *Id.*

[91] *See id.*

[92] The Legal Services Corporation is the quasi-governmental funding agency for legal aid programs. Until the mid-1960s, legal services for indigent citizens were provided by privately-funded legal assistance organizations. *See generally* E. BROWNELL, LEGAL AID IN THE UNITED STATES (1951); J.S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976). The American Bar Association ("ABA"), was concerned about the provision of legal services to the poor, but it had, in the period prior to 1965, vehemently criticized any proposals of federally-financed legal assistance programs

among amalgamated practitioners in specific subject areas of law practice, such as corporate lawyers, divorce lawyers, bankruptcy lawyers.[94] These groups receive benefits from restrictions on nonlawyer practice in the form of higher fees and limited competition on quality and price.[95] Given this information, Akerlof's model identifies a market ripe for the production of "lemons."[96]

The market for legal services is further characterized as having an informational asymmetry – consumers and producers of legal services have different levels of information about the true quality of such services.[97] Assume, for simplicity, that the demand for legal services depends on three variables: the price of the service offered, p, the average quality of that service, aq, and the supply of legal services, S, will be functions of p.[98] The equilibrium condition of any market is that supply must equal demand.[99] Therefore, as p falls, aq also falls.[100]

What results is analogous to Akerlof's example of the market for used cars:[101]

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as socialistic trampling of the Bar's freedom of self-regulation. *See* KESSLER, *supra* note 13, at 5.

In 1965, an important change in service provision occurred when Congress began to channel funds for free representation of indigent clients through the newly created Office of Economic Opportunity ("OEO") into the Legal Services Program ("LSP"). *See id.* at 6. The LSP provided community-based legal assistance with an emphasis on reform actions to remedy situations that disadvantaged groups of poor citizens. *See id.* Such law reform activities by LSP lawyers drew strong political pressure. *See id.* The 1970s brought the dissolution of the OEO by the Nixon administration. *See id.* at 7. As a result of pressure from the ABA and other supporters of the objectives of the LSP, the Legal Services Corporation ("LSC"), the non-partisan, quasi-public body that presently provides funding for indigent legal services, was created. *See id.* at 8.

[93] *See* AKERLOF, *supra* note 7, at 7.

[94] *See id.*

[95] However, minimum fee schedules for lawyers are prohibited. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[96] *See* AKERLOF, *supra* note 7, at 8.

[97] *See id.* at 9.

[98] *See id.*

[99] *See id.*

[100] *See id.* The formal equation is:

(1) $D = D((p, aq))$

(2) $S = S(p)$

(3) $aq = aq(p)$

Plugging (2) and (3) into (1), the equilibrium condition (4) is obtained:

$S(p) = D(p, aq(p))$

[101]

> Suppose . . . that there are just four kinds of cars. There are new cars and used cars. There are good cars and bad cars . . . 'lemons.' A new car may be a good car or a lemon, and of course the same is true of used cars. The individuals in this market buy a new automobile without knowing whether the car they buy will be good or a lemon . . . After owning a specific car, however, for a length of time, the car owner can form a good idea of the quality of this machine . . . This estimate is more accurate that the original estimate [made when buying the car new]. An asymmetry in

low quality services tend to drive out those of high quality. On the legal services market, Cramton observes,

> [t]he linchpin of the arguments supporting the exclusive professional license is the claim that the lawyer-client relationship is an asymmetric one: clients cannot adequately evaluate the quality of the service, and consequently they must trust those they consult. It is this theory, generally, that overcomes the strong presumption in economics that occupational licensing is a form of cartel activity that restrains trade to the disadvantage of consumers and the public.[102]

But for this justificatory principle, the professional monopoly of lawyers in this area would be simply inefficient and anti-competitive, as such restriction creates barriers to entry and price restraints.[103]

Following Akerlof's reasoning, restraints on competition are desirable to circumvent the development of a market for lemons:[104]

> [H]igh-quality producers have no way of assuring the additional compensation that their higher quality of service is worth (and perhaps costs). The socially undesirable result, given the importance to the public of quality in the provision of justice, is that the high-quality producers will be driven from the market or forced to reduce the quality of their services. Neither clients nor the public receive the higher quality of legal services which they want and would be willing to pay for if they could differentiate the quality

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> available information has developed, for the sellers now have more knowledge about the quality of a car than the buyers. But good cars and bad cars must still sell at the same price – since it is impossible for a buyer to tell the difference between a good car and a bad car . . . [Consequently,] most cars traded will be the 'lemons,' and good cars may not be traded at all. The 'bad' cars tend to drive out the good."

Id. at 8. Though there may be many reasons for car owners to engage in a "trade-in," this neoclassical model is exclusively concerned with incentives. There is an economic incentive to trade in only defective cars, and given that knowledge, owners will retain their vehicles as long as they run to avoid entering the market for 'lemons.' In equilibrium, all used cars will be defective. Reality is not equilibrium, nor is there perfect information. Hence, there are some good used cars in the market.

[102] Cramton, *supra* note 2, at 551.

[103] *See* HAL VARIAN, MICROECONOMIC ANALYSIS 249-53 (1992). Consumers of legal services face to what economists refer as, third degree price discrimination, which would occur

> [i]f the monopolist were able to distinguish among his customers in different groups, separated from one another more or less by some practicable mark, and could charge a separate monopoly price to the members of each group . . . [I]t may involve the refusal to satisfy, in one market, demands represented by demand prices in excess of some of those which, in another market, are satisfied.

ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE 244 (1920). Given the ability to define groups by ability to pay, there is no incentive for practicing lawyers to meet the demand generated by the poor, even if they could make a living doing so.

[104] *See* AKERLOF, *supra* note 7.

of service offered by individual lawyers.[105]

Such behavior was seen as early as the seventeenth century in the famous case of *Darcy v. Allein*,[106] where the defendant held a monopoly in the manufacture of playing cards in England. The court agreed with the defendant that if he were to lose his monopoly, the quality of England's cards would diminish. As a result, the influx of cheap cards from abroad would drive him out of business and leave Britons out of work. This justification for a quantity restriction on manufactured goods, as against professional services, is much less convincing today. It is unlikely that producers of playing cards currently fear that consumers cannot discern minimum acceptable quality standards for the decks they buy. Thus, the industry (except for sales of cards to gambling institutions) is unregulated.

The market for lemons model is inappropriate in the case of poor persons, who are effectively obstructed from legal assistance,[107] and permits lawyers to seek monopoly profits. The critical question is whether an average person can formulate a very rough estimate (i.e., extensive or minimal) of the amount of legal assistance necessary to solve a problem after receiving information and assistance from a social worker who has received the proposed training. This seems a reasonable task to entrust to individuals, since the decision is made only after guidance from a trained social worker, and applies only to the selection of assistance for the resolution of routine legal matters. For Cramton,

> [t]he necessity-for-trust claim ["I'm a professional and know what I'm doing."] . . . is generally stronger in medicine than in law, partly because the information gap between doctor and patient is wider than it is in law and partly because patients are typically sick individuals who are less able to remedy their information deficiencies. In the practice of law, however, the strength of the necessity-for-trust claim is highly variable depending upon the context of practice.[108]

Given the intervention of trained social workers, concerns of trust and quality assurance are vital components of the relationship between social worker and client. This is particularly true because social workers, like lawyers, have an ethical duty of confidentiality with respect to their interactions with clients,[109] as will be discussed in Part V.

The most convincing argument for the bar's position follows from the adversarial nature of the American judicial process:

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[105] Cramton, *supra* note 2, at 553. The market for legal services is often differentiated by types of clients. Thus, the knowledge of quality issue is more complex than a simple high-low distinction. Nonetheless, such a characterization is appropriate within a particular subject category, e.g., personal bankruptcy practice.

[106] 77 Eng. Rep. 1260 (K.B. 1602).

[107] *See infra* Part III.B.

[108] Cramton, *supra* note 2, at 553.

[109] *See* National Association of Social Workers, *supra* note 59.

> But the better the lawyer on one side of a case is, the greater will be the value to the opposing party of having a good lawyer on his side . . . If cartelization results in higher quality lawyers who produce higher quality briefs, judges' decisions will tend to be of higher quality and this will confer benefits on the community as a whole.[110]

This argument, however, is truly convincing only in litigation scenarios, and not in the case of the simple legal needs addressed in this article. For most poor individuals, the comparison is between having the assistance of counsel and having no assistance whatsoever. Moreover, this article does not intend to challenge the lawyer's proper place as advocate in the adversarial judicial process. In contrast to the bar's incentive-based approach, what follows is a consideration of the right of poor persons to effective participation in the civil legal system and the role of that right in the American political process.

B. *Luban's Ethical Argument*

David Luban begins his assessment of the low-income legal services dilemma with a bifurcation of the issue of legal services for the poor.[111] First, Luban asks whether the introduction of a comprehensive legal assistance program for those too poor to afford fee-based services is justifiable.[112] Second, he asks "[w]hat gives political legitimacy to legal practice designed to enact a political agenda in the name of empowering the powerless in our society?"[113] Regarding the former inquiry, Luban suggests that the nature of the adversarial system of American law rests on a presupposition that those regulated by such a system find it accessible.[114] Therefore, to ensure the proper operation of the adversarial system, legal assistance must be provided for those who are currently denied access for reasons such as inability to pay.[115] The level of legal assistance for which Luban argues is the minimum amount necessary to participate (for example, a lawyer to appear in court if necessary) though the system, by its nature, most likely requires more.[116]

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[110] Richard Posner, *The Material Basis of Jurisprudence*, 69 IND. L. J. 1, 19 (1993).

[111] *See* LUBAN, *supra* note 2, at 238.

[112] *See id.*

[113] *Id.* at 238-39.

[114] *See id.*

[115] *See id.* at 238.

[116] *See id.* at 240. "Minimally competent, overworked lawyers seldom do well against adversaries with large budgets for the investigation of cases, good law libraries, the ability to tolerate lengthy delays, and connections." *Id.* Luban claims that to require counsel of equal quality "would take more money than our society can be expected to provide for its poor, since it often seems barely willing to tolerate their existence at all." *Id.*

According to Luban, funding from LSC, *pro bono* services of the private bar, and other current programs do not provide the level of assistance necessary for poor persons to participate effectively in our legal system.[117] From the evidence above, Luban deduces that "it is a right of people too poor to afford legal assistance to have it provided for them, because otherwise they are deprived of equality before the law."[118] He bases this assertion on claims of necessity[119] and political legitimacy[120], and on the concept of implicit rights.[121]

Arguing from necessity, Luban suggests that "[r]ecourse to law . . . is the alternative to recourse to force . . . . If a legal system that won't protect [a person] nevertheless constrains her by punishing her if she resorts to force, it disadvantages and, indeed, oppresses her compared to those who have access to the law."[122] Our society, Luban continues, is not one of natural classes, where those with more privilege enjoy superior status under the law, but one which requires equality as a basis for the legitimacy of its government.[123] His claim is one of Lockean contractualism:[124] if a government is illegitimate, the right to resist that government attaches to those it governs.[125] In other words, if a government denies its subjects access to both force and its alternative, the legal system, then it breaches its obligations under the social contract.

Given Luban's position that legal assistance is necessary for access to justice,[126] one might argue that poverty is the result of the capitalist marketplace, not the legal system, and therefore the legal system is not to blame for denying poor persons access to justice.[127] However, Luban suggests that this is not true. It is the confinement of the practice of law to members of the organized bar through unauthorized practice restrictions[128] and the weak constraints on lawyers' fees[129] embodied in the law and ethical rules of the profession that foster exorbitant fees and the artificial shortage of legal assistance that currently exist.[130]

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[117] *See id.* at 241-42.

[118] *Id.* at 243.

[119] *See id.*

[120] *See id.* at 251.

[121] *See id.* at 249.

[122] *Id.* at 243.

[123] *See id.* at 244.

[124] The notion of a social contract between the government and the governed. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971) (exploring the concept of the social contract with respect to systems of justice). Rawls' work implies that the poor, due to their unequal societal stance, have a greater right to legal services than higher income groups.

[125] *See* LUBAN, *supra* note 2, at 244.

[126] *See id.* at 244.

[127] *See id.* at 246.

[128] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1983).

[129] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1980).

[130] *See* LUBAN, *supra* note 2, at 246-47. "The clear conclusion is that unauthorized practice regulations - state actions - prop up legal fees without serving any other significant public interest." *Id.* at 247. In other words, though the bar's Akerlofian reasoning

Luban asserts that although "[t]he official reason for unauthorized practice regulations is to protect consumers from the legal equivalent of Laetrile and orgone boxes,"[131] statistics show that only 2% of unauthorized practice "inquiries, investigations, and complaints" arise from consumer injury, and a full nineteen percent of those cases involved laypersons posing as attorneys.[132] Since a legal system both protects persons from one another and facilitates myriad transactions, denying access through high fees on the basis of insupportable claims of protection "intensifies the pariah status of the poor."[133]

Though Luban finds no moral right to legal services,[134] he couches his ultimate justification for granting them to all persons in the language of implicit rights – "rights granted by the rules of the game."[135] Luban states:

> Implicit rights, then, are not necessarily legal rights. They also do not have to be moral rights (though some may be). No one, we may believe, has a moral right to be an absolute hereditary monarch. Imagine, however, such a monarchy in which the king dies and usurping relatives of the prince succeed in an unjust suit to have his succession invalidated. After he has lost the suit, the prince has neither a moral or positive right to the throne; but, since we are assuming that the suit was wrongly decided, he still has an implicit right – a right granted by the rules of the (existing social) game.[136]

Luban distinguishes between rights implicit in the law – textual rights – and rights implicit in the political structure of society – legitimation rights.[137] Governments cannot make rights that contradict their legitimation principles, and "Equal Justice Under Law" is a legitimation right.[138] He derives this from the dialogue of American history on the issue:

> [E]ven opponents of economic egalitarianism have almost always favored the equality of legal rights, at least for citizens. Although women could not vote, they could sue in court; and the Civil War amendments that made black Americans citizens allowed them access to the courts. Supreme Court

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identifies and proposes to address the compelling interest of "quality control," its remedy - unauthorized practice prohibitions - is ineffective and unnecessarily raises legal fees. Luban does not disagree with the goal of quality control, but with the bar's means of achieving it.

[131] *Id.* at 247. Laetrile is a drug made from apricot pits that is claimed to cure cancer, while orgone boxes were wooden and metal containers that were said to cure the ills of those who spent some time locked within them. This is essentially the market for lemons theory advanced *supra* Part III.A.

[132] *Id.* (citing Rhode I, *supra* note 2, at 33-34).

[133] LUBAN, *supra* note 2, at 247.

[134] *See id.* at 248-49. Implicit rights are quite important for social workers. *See infra* text accompanying notes 213-15.

[135] *See* LUBAN at 249.

[136] *Id.* at 250.

[137] *See id.* at 251.

[138] *See id.* at 252.

> decisions, moreover, allow noncitizens access to American courts. I believe that a fair reading of American political history shows that equality-of-rights-not-fortunes has always been a common denominator of American political life.[139]

The provision of legal services to the poor is thereby tied to the legitimacy of the government and the legal system.

Luban notes that in three lines of cases, the Supreme Court has rejected his claim that legal counsel is necessary for real access to justice. First, the Court found the ability to divorce a fundamental interest, and that fees for divorce filings violated the Equal Protection Clause because they breached the social contract in the case of poor persons who could not pay them.[140] However, it subsequently held that bankruptcy was not a fundamental interest, and moreover, that alternatives to the court system exist for individuals attempting to settle a creditor dispute.[141] Luban finds these distinctions to be arbitrary and inaccurate.[142] Furthermore, though the Court has required counsel for criminal defendants facing imprisonment if their case is lost,[143] it has denied the right to counsel where the interest at stake was fundamental and the courts had a monopoly over dispute resolution.[144] It found a presumption in favor of counsel only when the litigant faces a deprivation of physical liberty rebuttable pursuant to the results of a balancing of private and state interests as well as the potential for incorrect judgment in the proceeding for which counsel is sought.[145] Luban finds it capricious to suggest that legal assistance is only necessary where physical liberty hangs in the balance.[146] Finally, Luban asserts that it is similarly arbitrary that the Court did not require counsel on a discretionary appeal from a criminal conviction after the assistance of one lawyer in the trial.[147] In sum, Luban takes the position that the Supreme Court has recognized the legitimation right of providing legal services to civil litigants, but has inexplicably limited the breadth of this right, obscuring its contours behind a haze of rhetoric and questionable logic.

It is important to note, at this point, that Luban reaches the conclusion that civil legal counsel is necessary for poor citizens to have effective access to justice. Although it is agreed that this should be our ultimate aspiration as a soci-

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[139] *Id.* at 253.

[140] *See id.* at 257-58 (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971)). *See supra* note 127 and accompanying text.

[141] *See id.* at 258 (citing U.S. v. Kras, 409 U.S. 371 (1973)). *See also* Ortwein v. Schwab, 410 U.S. 656 (1973) (applying *Kras* reasoning in upholding fees for obtaining administrative hearing regarding reduction in welfare disbursements).

[142] *See id.* at 258-61.

[143] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

[144] *See* Lassiter v. Dept. of Social Services of Durham, N.C., 452 U.S. 18 (1981) (woman convicted of second degree murder denied right to counsel in hearing to defend against petition to have her parental rights terminated post-sentencing).

[145] *See* LUBAN, *supra* note 2, at 261 (citing *id.*).

[146] *See id.* at 262.

[147] *See id.* (citing Ross v. Moffitt, 417 U.S. 600 (1974)).

ety, this proposal - social worker provision of basic legal services or referral to lawyers - is much less radical. It is, nonetheless, the result of similar logic tempered by the pragmatic concern of resource availability. Given this theoretical backdrop, a discussion of various appellate court decisions regarding lay law practice follows.

IV. COURTS' TREATMENT OF LAY LAW PRACTICE

In 1995, the ABA published a report regarding its opinions and recommendations on the nexus between unauthorized practice prohibitions and the unmet need for legal services among individuals with low incomes.[148] After acknowledging that "much remains to be done before all moderate and low-income persons will have effective access to affordable assistance with their legal and law-related needs," the report urges that

> with regard to the activities of all . . . nonlawyers [not given lawyerly authority by statute], states should adopt an analytical approach in assessing whether and how to regulate varied forms of nonlawyer activity that exist or are emerging in their respective jurisdictions. Criteria for this analysis should include the risk of harm these activities present, whether consumers can evaluate providers' qualifications, and whether the net effect of regulating the activities will be a benefit to the public.[149]

The bar's recommendation is not a significant stretch from current case law among the states. It is a shift in that it does not assume that licensing alone provides the protection that Akerlof's analysis necessitates. The bar recognizes the need for regulated nonlawyer practice, because the bar alone cannot provide all required legal services. Furthermore, the bar seems essentially to agree with Luban that legal assistance is an important part of access to justice. This section presents current case law relevant to the legality of the proposal regarding social workers. The intent is to present an argument refuting any notion that it is objectionable.

These cases exhibit flexible doctrine, considerate of policy concerns, when services are provided in the course of a non-legal professional's duties. This proposal expands the scope of duties of community center social workers, thereby making the preparation of forms and other activities potentially within the practice of law, incidental to the practice of social work. Nonetheless, it conforms to the policy concerns chronicled in the following case law.

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[148] *See* American Bar Association, *Nonlawyer Activity in Law-Related Situations: A Report With Recommendations* (visited October 1, 1997) <http://www.paralegals.org/Development/nonlawyer.html>.

[149] *Id.*

A. *The Incidental Services Test: Removing the Act from the Practice of Law*

A discussion of judicial doctrine regarding the practice of law by lay persons must begin with a definition of the practice of law. Because the focus of this article is on the provision of legal services by social workers where such services are incidental to effective social work service delivery, the definition used here is conscious of incidental services.[150] In *Agran v. Shapiro*[151] the California Superior Court heard an action for compensation of accounting services, including the preparation of income tax returns over a period of several years.[152] The defense argued that the plaintiff accountant, in the course of his accounting services, had performed acts that constituted the practice of law, and, since the plaintiff was not a member of the bar, his acts were illegal and not compensable.[153] The court stressed that merely preparing the tax returns did not constitute the practice of law, but Mr. Agran's conduct regarding defendants' application for a carry back adjustment and a refund of previously paid taxes was a more serious matter.[154]

The court began its analysis with a statement of a "generally accepted"[155]

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[150] A number of courts use an incidental test in determining whether the actions of a nonlawyer professional constitute the unauthorized practice of law. *See* Pope County Bar Ass'n Inc. v. Suggs, 624 S.W.2d 828, 831-32 (Ark. 1981); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998, 1007 (Colo. 1957); Chicago Bar Ass'n Inc. v. Quinlan & Tyson, 214 N.E.2d 771, 774 (Ill. 1966); Miller v. Vance, 463 N.E.2d 250, 253 (Ind. 1984); Petitions of Ingham Co. Bar Ass'n, 69 N.W.2d 713, 717 (Mich. 1955); Pulse v. North Am. Land Title Co. of Mont., 707 P.2d 1105, 1109-10 (Mont. 1985); Cain v. Merchant's Nat'l Bank & Trust Co. of Fargo, 268 N.W. 719, 723 (N.D. 1936); R.J. Edwards, Inc. v. Hert, 504 P.2d 407, 417 (Okla. 1972); Childs v. Smeltzer, 171 A. 883, 885-86 (Pa. 1934); Commonwealth v. Jones & Robins, 41 S.E.2d 720, 727 (Va. 1947). Other tests that have been used include:

> (1) acts customarily carried on by lawyers through the centuries, [State Bar of Arizona v.] Arizona Land Title [& Trust Co.], 366 P.2d [1,] 14[(Ariz. 1961)]; (2) acts affecting substantial legal rights and requiring legal skills, The Florida Bar v. Irizarry, 268 So.2d 377, 378-[7]9 (Fla. 1972) [citations omitted]; (3) acts requiring the exercise of informed discretion in informing another of legal rights and duties, [Oregon State Bar v.] Security Escrows, 377 P.2d [334,] 339 [(Or. 1962)]; and (4) acts involving the resolution of a difficult question of law, Cardinal v. Merrill Lynch Realty/Burnet [Inc.], 433 N.W.2d 864, 868 (Minn. 1988).

In re First Escrow, Inc., 840 S.W. 2d 839, 843 fn. 8 (Mo. 1992). The U.S. Supreme Court used the incidental test in determining that states may not bar nonlawyers from performing tasks incidental to their duties as patent officers before the U.S. Patent Office. *See* Sperry v. Florida, 373 U.S. 379 (1963). However, the gravamen of the high Court's argument was that regulations promulgated by the Patent Office did not include provisions that practice before it must be consistent with state law, and, thus, state law was preempted in this case. *See id.* at 385-87.

[151] 273 P.2d 619 (Cal. Ct. App. 1954).

[152] *See id.*

[153] *See id.* at 620.

[154] *See id.* at 623.

[155] *Id.* at 622.

definition of law practice:

> As the term is generally understood, the practice of the law is the doing and performing [*sic*] services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in court.[156]

The court found this distinction particularly difficult where, as in the principal case, "questions of law and accounting are frequently inextricably intermingled as a result of which doubt arises as to where the functions of one profession end and those of the other begin."[157]

In disputing the carry back adjustment and refund matters with a Treasury Department agent, Mr. Agran " 'cited him numerous cases' and 'spent five days in the county law library and in his office reading tax services, cases, reports and decisions . . . [as well as] four days in reading and reviewing over one hundred cases on the proposition of law involved.' "[158] This was the source of Mr. Agran's error. The court saw the determination of which assets should be carried back pursuant to the Internal Revenue Code as a difficult question of law: "[n]ot only was the question which arose here one of law but a difficult and doubtful one as well, as evidenced by the many occasions upon which the courts and the Treasury Department have had occasion to consider it."[159]

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[156] *Id.* at 622-23 (citing People v. Merchants' Protective Corp., 209 P. 363, 365 (Cal. 1922)). Presently, the state judiciaries determine what constitutes the practice of law. According to the Model Rules:

> A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
>
> Comment The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1995).

[157] 273 P.2d at 623.

[158] *Id.* at 622.

[159] *Id.* at 624. *See also* Zelkin v. Caruso Discount Corp., 186 Cal.App.2d 802, 806 (1960) (distinguishing *Agran* where accountant only used precedent to determine its consequences on his form preparation and not with regard to the questions of law decided

In finding that the plaintiff engaged in the unauthorized practice of law, the court rejected the test established by the New York Court of Appeals in *Application of New York County Lawyers Ass'n* ("*Bercu*"),[160] which found the determining factor in judging whether a tax matter involved the practice of law to be "whether or not [the legal advice] is given as an incident to accounting work."[161] The difficulty with this incidental rule was, for the court, the following:

> If we bear in mind that any choice of criterion must find its ultimate justification in the interest of the public and not in that of advantage for either lawyer or nonlawyer, we soon cease to look for an answer in any rule of thumb such as that based upon a distinction between the incidental and the primary [citations omitted]. Any rule which holds that a layman who prepares legal articles or furnishes other services of a legal nature is not practicing law when such services are incidental to another business or profession completely ignores the public welfare. A service performed by one individual for another, even though it be incidental to some other occupation, may entail a difficult question of law which requires a determination by a trained legal mind [citation omitted]. Are we to say that a real estate broker who examines an abstract of title and furnishes an opinion thereon may not be held to practice law merely because the examination of a title is ancillary to a sale and purchase of real estate? . . . The incidental test has no value except in the negative sense that if the furnishing of the legal service is the primary business of the actor such activity is the practice of law, even though such service is of an elementary nature. In other words, a layman's legal service activities are the practice of law unless they are incidental to his regular calling; but the mere fact that they are incidental is by no means decisive. In a positive sense, the incidental test ignores the interest of the public as the controlling determinant.[162]

In order to safeguard the public interest ignored by the *Bercu* rule, the court created the following rule applicable where a nonlawyer professional engages in acts within the definition of law practice as an incident to his professional duties:

> he is practicing law if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind. What is a difficult or doubtful question of law is not to be measured by the comprehension of a trained legal mind, but by the understanding thereof which is possessed by a reasonably intelligent layman who is reasonably familiar with similar transactions. A criterion which designates the determination of a difficult or complex question of law as law practice, and the application of an elementary or simple legal principle as not, may indeed be criticized for uncertainty if a rule of thumb is sought

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therein).

[160] 78 N.Y.S.2d 209 (N.Y. App. Div. 1948), *aff'd* 299 N.Y. 728, 87 N.E.2d 451 (N.Y. 1948).

[161] *Agran*, 273 P.2d at 625.

[162] *Id.* at 625 (quoting Gardner v. Conway, 48 N.W.2d 788, 795 (Minn. 1951)).

> which can be applied with mechanical precision to all cases. Any rule of law which purports to reflect the needs of the public welfare in a changing society, by reason of its essential and inherent flexibility, will, however, be as variable in operation as the particular facts to which it is applied.[163]

This rule permits a nonlawyer professional to engage in acts typically reserved for lawyers if the questions are sufficiently simple in the reasonable opinion of an intelligent, similarly situated nonlawyer. Mr. Agran went too far, but the acts that should be taken by social workers fit precisely within the parameters of this test. A social worker, minimally a "reasonably intelligent layman,"[164] is making the determination of whether the legal matter presented by a community center client is difficult or complex. Under the proposal, the social worker will contact a lawyer if the matter is not simple or not within her training. Thus, the benefits are twofold. First, the social worker is not trained in, and hence will not attempt, complex legal matters that other professions, such as tax accountants, might feel competent to undertake. Second, any referral will be more descriptive and helpful to the lawyer, since it comes from a more educated source. In Subpart B, an alternative to *Agran*-type logic is explained.

B. *The Incidental Services Test: Allowing Limited Nonlawyer Practice*

A second approach to the issue of law practice incidental to the professional duties of nonlawyers was developed in *Cultum v. Heritage House Realtors, Inc.*[165] where the Supreme Court of Washington examined the propriety of earnest money agreements performed by realtors. The trial court had held that the preparation of such an agreement by a nonlawyer constituted the unauthorized practice of law by using a definition of the practice of law that included "the selection and completion of form legal documents, or the drafting of such documents, including deeds, mortgages, deeds of trust, promissory notes and agreements modifying those documents."[166]

The trial court reasoned that, since the agreements mentioned above "fix the legal rights and duties of both buyers and sellers of residential real estate,"[167] earnest money agreements, which also do such fixing, should be included within the practice of law.

In contrast to the approach taken in *Agran*, the *Cultum* court found some tasks within the definition of the practice of law that might be more practically completed by nonlawyers. Its reasoning in allowing realtors to prepare earnest money agreements was centered around a balancing test.

> For a long time suppression of the practice of law by nonlawyers has been proclaimed to be in the public interest, a necessary protection against

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[163] *Id.* at 626.

[164] *Id.*

[165] 694 P.2d 630 (Wash. 1985) (*en banc*).

[166] *Id.* at 633 (citing Bowers v. Transamerica Title Ins. Co., 675 P.2d 193 (Wash. 1983)).

[167] *Id.* at 633.

incompetence, divided loyalties, and other evils. It is now clear, however, as several other courts have concluded, that there are other important interests involved. *See Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998 (1957). These interests include:

1. The ready availability of legal services.

2. Using the full range of services that other professions and businesses can provide.

3. Limiting costs.

4. Public convenience.

5. Allowing licensed brokers and salespersons to participate in an activity in which they have special training and expertise.

6. The interest of brokers and salespersons in drafting form earnest money agreements which are incidental and necessary to the main business of brokers and salespersons.

We no longer believe that the supposed benefits to the public from the lawyers' monopoly on performing legal services justifies limiting the public's freedom of choice. The public has the right to use the full range of services that brokers and salespersons can provide. [Citation omitted] The fact that brokers and salespersons will complete these forms at no extra charge, whereas attorneys would charge an additional fee, weighs heavily toward allowing this choice.[168]

Any legal tasks performed by nonlawyers would remain within the definition of law practice; however, nonlawyers, in certain circumstances, can practice law.[169] In creating this framework, the court relied on its power and obligation "to protect the public from the activity of those who, because of the lack of professional skills, may cause injury whether they are members of the bar or persons never qualified for or admitted to the bar."[170] Though the court agreed that "the practice of law is within the sole province of the judiciary,"[171] it dismissed the notion that "attorney hegemony over the practice of law must be absolute."[172]

In real estate transactions, "the selection and filling in of standard simple forms by brokers and salespersons is an incidental service" of their positions, and cannot be disallowed as the unauthorized practice of law by application of the aforementioned balancing test.[173] However, the court held that since this is a part of the practice of law that it has seen fit to avail of lay persons, the standard of care for lay persons engaging in such practice must be that of a practicing attorney, with a cause of action in tort for failure to adhere to the

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[168] *Id.* at 633-34.

[169] *See id.* at 633.

[170] *Id.* (citing Washington State Bar Ass'n v. Great Western Union Fed. Sav. & Loan Ass'n, 586 P.2d 870 (Wash. 1978)).

[171] *Id.* (citing Hagan & Van Camp, P.S. v. Kassler Escrow, Inc., 635 P.2d 730 (Wash. 1981)).

[172] *Id.* at 633.

[173] *Id.* at 634.

standard.[174]

C. *Comparing Approaches to the Incidental Test*

The difference between the approaches discussed above is a simple one. In *Agran*-type decisions, courts begin with the logical premise that nonlawyers cannot practice law. Hence, any rule that allows a nonlawyer to do some act necessarily holds that the practice of law excludes that act. One rationale for such an approach is that in some states, the unauthorized practice of law by persons other than members of the state bar is criminalized.[175] Therefore, to allow a nonlawyer to engage in the business of law would be to permit activity that the people, through the legislature, consider criminal. Another possible pretense combines Akerlofian theory with an endorsement of the organized bar's certification mechanism. If the bar exam or its other measures of fitness for practice are to be seen as meaningful, then nonlawyers, who have not endured them, must not do the same job.

Alternatively, *Cultum*-type reasoning begins with an acknowledgment that the regulation of the practice of law is ultimately the province of the courts.[176] Such a premise gives the court control over the practice of law, rather than the legislature enacting the criminal code or the bar setting the admissions requirements. Thus, if the court feels that certain tasks within the definition of the practice of law are better completed by nonlawyers, it may permit, and subsequently regulate, the practice of these nonlawyers by the same authority with which it regulates members of the bar (for example, pursuant to its inherent power to regulate those who practice law in its tribunal).[177] Under either logical construction, a

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[174] *See id.* at 635.

[175] The Missouri Legislature, for example, has made it a misdemeanor for nonlawyers to perform the duties of "law business," such as drafting legal documents, for a fee. *See* In re First Escrow, 840 S.W.2d at 843, n.7 (citing MO. REV. STAT.§§ 484.010.2, 484.020 (1990)).

[176] "We have also made it clear that the practice of law is within the sole province of the judiciary and encroachment by the Legislature may violate the separation of powers doctrine (citation omitted)." Cultum, 694 P.2d at 633.

[177] *See id.* One commentator has deftly summarized the doctrine of inherent powers as follows:

> The doctrine of inherent powers is based on the doctrine of separation of powers, which some consider the 'dominant principle of the American political system.' Under the separation of powers doctrine, governmental powers are divided among three co-equal branches: the executive, the legislative, and the judicial. This separation of powers, however, is not absolute, and has been modified by the constitutional provisions for checks and balances. Each branch thus has limited control over the other two branches to avoid an improper concentration of power in any one branch. Legislative and judicial regulation of the practice of law have co-existed in many states, although judicial regulation has predominated. Few state constitutions specifically empower the judiciary to regulate attorney conduct and the practice of law, but a number of state supreme courts have asserted an 'inherent' judicial power to regulate the legal profession. This inherent power derives from the judiciary's status as a

court may permit nonlawyers to engage in certain activities typically reserved for licensed lawyers. This distinction is revisited in Part V, during a discussion of the standard of care for social workers under this proposal.

D. *Courts' Interpretation of Statutory Grants of Authority to Laypersons*

In cases where the legislature has granted lawyerly authority to laypersons, courts have been deferential. Despite their assumption that they possessed the inherent power to regulate those practicing before them, these courts found sound policy reasons to allow the nonlawyer activity. The opinions summarized below suggest a rationale for social worker representation in nonadversarial hearings as noted in the proposal.

Courts have also upheld legislative grants of authority to nonlawyers in certain administrative contexts. In *In re Welfare of M.T.*,[178] the Washington Court of Appeals rejected a claim that social workers employed by the Department of Social and Health Services were engaging in the unauthorized practice of law when they signed dependency petitions pursuant to statutory authority. The court, following *Cultum*-type reasoning, assumed that the signing of dependency petitions constituted the practice of law and that it could strike down the statutory grant of authority through its exclusive power to regulate the practice of law.[179] However, as implicit approval of the legislature's directive, the court cited a rule adopted by the Supreme Court of Washington stating that "[a]ny person may file a petition alleging dependency."[180]

The same court subsequently upheld a statute granting chemical dependency counselors the authority to file petitions for committing individuals to involun-

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separate branch of government. The advocates of inherent powers claim that this status implies the incidental powers necessary to ensure the courts' dignity, functioning, and survival. Some courts claim that the practice of law is closely tied to the judicial function and that members of the bar are 'officers of the court.' They conclude that it is the duty of the court to regulate their conduct.

Other courts, however, have recognized that the close relation between lawyers and courts does not exempt the practice of law from legislative scrutiny. These courts have deferred to the legislative assessment of public interest on grounds of comity. They view legislative regulation of the legal profession either as an aid to the judiciary's attempt to define the boundaries of legal practice, or as a valid exercise of police power.

Jayanne A. Hino, *Recent Development: Unauthorized Practice Of Law—Limited Practice Of Law For Real EstateClosing Officers? Hagan & Van Kamp, P.S. V. Kassler Escrow, Inc., 96 Wn.2d 443, 635 P.2d 730 (1981)*, 57 WASH. L. REV. 781, 782-84 (1982). In this proposal, pursuant to its inherent power, the court may revoke a license to practice social work in the event of misconduct. Beyond that, as noted, the ethics code to which social workers are subject includes prohibitions on advice on matters outside a practitioner's knowledge base and a detailed confidentiality rule. *See id.*

[178] 848 P.2d 1302 (Wash. Ct. App. 1993).

[179] *See id.* at 1303 (citing Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash.2d 697, 699, 251 P.2d 619 (1952)).

[180] *See id.* at 1304 (quoting Washington Judicial Court Rule 3.2(a)).

tary treatment for alcoholism.[181] In doing so, the Court applied the reasoning and holding of *Welfare of M.T.*[182] Moreover, it balanced practical considerations against the duty of the public to protect citizens "against incompetence, divided loyalties, and other evils" as noted by the *Cultum* court.[183]

The Supreme Court of Ohio reviewed the issue of statutory grants of lawyerly authority to nonlawyers in *Heinze v. Giles*.[184] The court found that it was appropriate for a nonlawyer to represent an employer in an unemployment benefits hearing. This case differs from *Welfare of M.T.* and *In re Treatment of L.G.* in that the task of nonlawyers in Ohio unemployment benefits hearings was one of representation and not merely of preparation and filing of documents. The court was not troubled by lay representation in such nonadversarial proceedings as those before the Unemployment Compensation Board of Review:

> claimants are traditionally accompanied by friends, coworkers, family, and union representatives, or are assisted by legal aid societies which may provide paralegals without charge . . . . The role of such lay participants, as we perceive it, is not to render legal advice, nor to otherwise practice law by providing interpretations of board orders. Rather, the purpose of their participation is to facilitate the hearing process by serving as an adjunct to the claimant or employer in the sharing of their respective versions of the circumstances attendant to the claim.[185]

The current advocacy role of social workers, discussed above, serves a facilitating function akin to that described by the *Heinze* court when advocacy brings social workers to the legal system. Therefore, the court's analysis is instructive in determining the legality of such work. Most importantly, social work advocacy is to be distinguished from the adversarial posture of lawyers as advocates. The present proposal does not purport to change, or in any way merge, these roles. No social worker acting in the role suggested here will advocate for a client before a court or adversary tribunal. Her duties will be limited to representation such as that seen in *Heinze*, where her role was to facilitate a smooth resolution of an administrative matter. Settings in which evidentiary rules are strictly followed, or where counsel for an opposing party makes an appearance, are not included in the proposal.

The court noted that the "prohibition of non-attorney representation by union representatives and legal aid employees in these cases could seriously impair meaningful access to the system on the part of claimants and undermine their right to a fair hearing."[186] Both the low level of statutory attorney's fees permitted in cases before the board and the "limited economic interest" of the parties were considered in determining that the advantages of lay representation out-

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[181] *See* In re Treatment of L.G., 897 P.2d 1275 (Wash. Ct. App. 1995).

[182] *See id.* at 1278.

[183] *Id.* at 1279 (citing *Cultum,* 694 P.2d at 633-34).

[184] 490 N.E.2d 585 (Ohio 1986).

[185] *Id.* at 588.

[186] *Id.* at n.8.

weighed potential public harm.[187] Moreover, the court agreed with the U.S. Supreme Court that "[t]he result of mandating representation exclusively by attorneys may be to turn what might have been a short conference leading to an amicable result into a protracted controversy."[188] This reasoning supports the proposed restriction of the role of social workers to matters where legal representation is not likely to be available, such as nonadversarial hearings.

The instant proposal makes some legal services incidental to the practice of social work in community centers, but these services do not harm the public. In fact, they enhance both the accessibility of justice for the poor on simple legal matters and the effectiveness of lawyers dealing with more complicated matters. Part V presents a more detailed discussion of the proposal with regard to concerns raised in previous sections and a response to potential criticisms of the proposal from both social work and legal perspectives.

V. CONSIDERATIONS AND RESPONSES TO POTENTIAL CRITICISMS

A. *Informational Asymmetry*

The main component of any public protection argument is the notion of informational asymmetry. As Akerlof observed, consumers do not have the same information about the quality of services offered as do producers.[189] The proposed role of social workers in this context is to disseminate information, making the public more cognizant of the types of procedures and services available, and to provide routine legal assistance. One option for the social worker would be to refer his client to a fee-for-services lawyer when this would be an appropriate strategy (for example, in the event that potential damages or other aspects of the case are sufficient to attract a private lawyer working on a contingency fee, or when legal aid does not deal with the type of problem confronting the client). It is not difficult to teach social workers how to find, for example, the Martindale-Hubble listings and quality ratings for lawyers in the neighborhood and its environs.[190] Moreover, a relationship with a community center might greatly assist a local solo practitioner or small firm in developing or improving a client base, while concomitantly providing a check on quality standards in such firms, since social workers would not refer clients to incompetent attorneys. Given the current fierce competition for clients among such lawyers, community centers might provide a steady stream of referrals that participating lawyers in their communities would not otherwise have. This proposal serves the latent function[191] of cre-

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[187] *See id.* at 590 n.10.

[188] *Id.* (quoting Walters v. National Ass'n of Radiation Survivors, 473 U.S. 205 (1985)).

[189] *See generally* text accompanying notes 89-112.

[190] Most community centers do not presently utilize private legal services. *See supra* Part II.C. Part of the training these persons would receive would include information on choosing qualified counsel with good reputations in a variety of subject areas.

[191] In this case, it is a beneficial unintended consequence. *See* ROBERT MERTON, ON THEORETICAL SOCIOLOGY 117 (1967).

ating better neighborhood-oriented legal services. The community center, as a place for assistance, is a starting point. This proposal makes it a more robust and effective one by including legal services in its repertoire.

B. *Accessibility of Justice*

Luban's ethical argument presupposes that persons regulated by a system of justice must find it accessible.[192] The *Heinze* and *Cultum* courts, among others, explicitly agree.[193] Moreover, the level of services that must ethically be provided is the minimum necessary to participate in the system.[194] This is precisely what this proposal gives to the poor. For Luban, the answer is counsel.[195] Although in instances of adversary proceedings such a counsel requirement is valid, it exceeds the minimum requirement in simple legal cases. This proposal provides the minimum ethical allotment of services, such as assistance by a person familiar with the system for purposes of filling out forms or accompaniment to a nonadversarial hearing, in a way which exploits existing social services (namely community centers). Beyond that, as previously discussed, both social workers and lawyers have a place in the political structure of the nation. This proposal helps lawyers to fulfill their duties more effectively, and social workers to fill, at least partially, a need among poor residents that is not currently being met.

Luban's conception of implicit rights, or "rights granted by the rules of the game,"[196] is an important one for social workers. In their attempts to reduce the fundamental distinctions between the poor and higher socioeconomic groups in areas such as access to public assistance programs, they must advocate for the recognition of such rights. If a poor person cannot participate in society at a certain basic level, then society, by virtue of the social contract, must enable such participation. In the case of income, for example, one theory is that subsistence represents a minimal allotment. Following that logic, there must be an implicit right to a subsistence income level, and advocates for entitlement to such an income, are urging the enforcement of an implicit right. With respect to justice, at least some legal assistance, not merely the right to proceed *pro se* in civil cases, is mandatory. This proposal assists the poor in exercising a meaningful right to justice through the recognition of an implicit right to minimal legal assistance.

C. *Other Public Protections*

Social workers, like lawyers, owe a duty of confidentiality to their clients.[197] If they require more information than was previously necessary in order to deter-

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[192] *See generally* text accompanying notes 110-15.

[193] *See* Heinze v. Giles, 490 N.E.2d 585, 588 (Ohio 1986); Cultum v. Heritage House Realtors, Inc., 694 P.2d 630, 634 (Wash. 1985) (*en banc*).

[194] *See* LUBAN, *supra* note 2, at 240.

[195] *See id.* at 262.

[196] *Id* at 249.

[197] *See* National Association of Social Workers, *supra* note 59.

mine whether a client has a legal issue, this information will be held confidential to the same extent as that which is currently requested. Moreover, the U.S. Supreme Court in *Jaffee v. Redmond*[198] extended the therapist-patient privilege to social workers employed as mental health counselors. There is no reason to suggest that licensed social workers at community centers are any less worthy of trust. Thus, the law and ethics of confidentiality can be extended to cover social workers in the role presently provided for them.

With certain policy exceptions, the notion of client confidentiality can be reduced to the simple idea that a professional should not divulge information revealed by a client in consultation, where the client reasonably expects that such information will not be revealed. Social workers presently have a detailed confidentiality rule that could be enforced by courts.[199] In their role under the present

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[198] 518 U.S. 1 (1996).

[199] National Association of Social Workers, NASW Code of Ethics 1.07: Privacy and Confidentiality. (a) Social workers should respect clients' right to privacy. Social workers should not solicit private information from clients unless it is essential to providing services or conducting social work evaluation or research. Once private information is shared, standards of confidentiality apply. (b) Social workers may disclose confidential information when appropriate with valid consent from a client or a person legally authorized to consent on behalf of a client. (c) Social workers should protect the confidentiality of all information obtained in the course of professional service, except for compelling professional reasons. The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person or when laws or regulations require disclosure without a client's consent. In all instances, social workers should disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose for which the disclosure is made should be revealed. (d) Social workers should inform clients, to the extent possible, about the disclosure of confidential information and the potential consequences, when feasible before the disclosure is made. This applies whether social workers disclose confidential information on the basis of a legal requirement or client consent. (e) Social workers should discuss with clients and other interested parties the nature of confidentiality and limitations of clients' right to confidentiality. Social workers should review with clients circumstances where confidential information may be requested and where disclosure of confidential information may be legally required. This discussion should occur as soon as possible in the socialworker–client relationship and as needed throughout the course of the relationship. (f) When social workers provide counseling services to families, couples, or groups, social workers should seek agreement among the parties involved concerning each individual's right to confidentiality and obligation to preserve the confidentiality of information shared by others. Social workers should inform participants in family, couples, or group counseling that social workers cannot guarantee that all participants will honor such agreements. (g) Social workers should inform clients involved in family, couples, marital, or group counseling of the social worker's, employer's, and agency's policy concerning the social worker's disclosure of confidential information among the parties involved in the counseling. (h) Social workers should not disclose confidential information to third-party payers unless clients have authorized such. (i) Social workers should not discuss confidential information in any setting unless privacy can be ensured.

proposal, social workers would keep client information confidential as they presently do. In the event of an alleged breach, a court can look to the NASW confidentiality rule for guidance.

The proposed role for social workers is a very limited one. The *Agran* standard requires an inquiry into the difficulty of the legal question addressed by the nonlawyer.[200] No social worker will deal with a difficult question of law under this proposal. If the problem is confusing or complex, it will be referred to a lawyer. An additional advantage of the more informed referral is the smaller investment of time and resources required by the lawyer. It may be difficult to find the law on the issue, but determining the factual background will be less of a hardship. The lawyer remains the most qualified individual to resolve difficult legal issues. In this regard the present proposal is distinguishable from the situation in *Cultum*. There the real estate broker replaced the lawyer in his duties, whereas in the present proposal social workers would supplement the services of lawyers, giving the poor an avenue for justice not presently available to them. Finally, since as the role of these social workers is limited, the requirements of state bar associations for admission to the legal profession remain meaningful.

Social workers should not discuss confidential information in public or semipublic areas such as hallways, waiting rooms, elevators, and restaurants. (j) Social workers should protect the confidentiality of clients during legal proceedings to the extent permitted by law. When a court of law or other legally authorized body orders social workers to disclose confidential or privileged information without a client's consent and such disclosure could cause harm to the client, social workers should request that the court withdraw the order or limit the order as narrowly as possible or maintain the records under seal, unavailable for public inspection. (k) Social workers should protect the confidentiality of clients when responding to requests from members of the media. (l) Social workers should protect the confidentiality of clients' written and electronic records and other sensitive information. Social workers should take reasonable steps to ensure that clients' records are stored in a secure location and that clients' records are not available to others who are not authorized to have access. (m) Social workers should take precautions to ensure and maintain the confidentiality of information transmitted to other parties through the use of computers, electronic mail, facsimile machines, telephones and telephone answering machines, and other electronic or computer technology. Disclosure of identifying information should be avoided whenever possible. (n) Social workers should transfer or dispose of clients' records in a manner that protects clients' confidentiality and is consistent with state statutes governing records and social work licensure. (o) Social workers should take reasonable precautions to protect client confidentiality in the event of the social worker's termination of practice, incapacitation, or death. (p) Social workers should not disclose identifying information when discussing clients for teaching or training purposes unless the client has consented to disclosure of confidential information. (q) Social workers should not disclose identifying information when discussing clients with consultants unless the client has consented to disclosure of confidential information or there is a compelling need for such disclosure. (r) Social workers should protect the confidentiality of deceased clients consistent with the preceding standards. National Association of Social Workers, *NASW Code of Ethics*, (visited January 3, 1998) <http://www.naswdc.org/Code/CDSTAN1.HTM>.

[200] *See* Agran v. Shapiro, 273 P.2d 619, 626 (Cal. Ct. App. 1954).

Though the *Cultum* court determined the appropriate standard of care for the broker preparing an earnest money agreement to be that of a practicing lawyer,[201] this need not be the case for social workers. Unlike the broker in *Cultum*, these individuals are not performing the functions of a lawyer. Under this proposal, if a social worker or other community center employee who has not received the aforementioned training completes an inappropriate form, then she is negligent. However, she is negligent not because a lawyer taking such action would be, but because the social worker, not having legal training, should not have completed the form in the first place. Moreover, a social worker who engages in misdeeds in her legal role would be subject to revocation of her license to practice social work.[202] It would also be negligent for a social worker to handle a difficult legal issue or to attempt representation of a client at an adversarial proceeding. The standard of care should be that of a social worker with the legal training required under the proposal. Futhermore, employing *Cultum*-type reasoning is efficient in that it places the regulation of social workers under the control of the courts. No external regulatory body, such as the NASW, is required, because a court has the inherent power to regulate those who practice law in its forum.[203] Alternatively, an *Agran*-type rule removes the services of social workers from the practice of law, thereby requiring the establishment of a separate body equipped to handle professional regulation. This would bifurcate the social work profession into legal and nonlegal components, a clumsy result, which should be avoided.

D. *Other Considerations*

The *Cultum* court specifically stated that one consideration to be balanced against public protection is "[l]imiting costs."[204] This proposal reduces the need for costly legal assistance on simple matters. Several other factors in the *Cultum* balance are well-served by the proposal; "[t]he ready availability of legal services," "[u]sing the full range of services that other professions . . . can provide," and "[p]ublic convenience."[205] As Part II.C suggests, each of these elements is served while the public is protected. Hence, within a popular balancing framework, the proposal stands meritorious.

As the decisions in *Welfare of M.T.*, *In re Treatment of L.G.*, and *Heinze* suggest, when a legal role for nonlawyers is created by the state legislature, courts generally do not remove such authority. When they do, it is for reasons of policy very similar to those stated in the *Cultum* balancing test. Additionally, the *Heinze* court expressed concern that disallowing nonlawyer representation in administrative hearings "could seriously impair meaningful access to the justice

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[201] *See* Cultum v. Heritage House Realtors, Inc., 694 P.2d 630, 633 (Wash. 1985) (*en banc*).

[202] This would have violated NASW rule 3.01 (a). *See supra* note 43.

[203] *See supra* note 177.

[204] *See Cultum*, 694 P.2d at 634.

[205] *Id.* at 633-34.

system on the part of claimants. . . ."[206] It also agreed with the U.S. Supreme Court that mandatory lawyer representation often complicates and protracts the resolution of simple matters of legal significance.[207] This proposal is an efficient remedy for many of these concerns.

The present proposal operates under the assumption that social workers can be trained to perform basic legal services. This is realistic, since social workers would have only a limited role. This proposal does not suggest that social workers unpack complicated matters involving disputed legal principles, or advance arguments with a complex web of terse case law. In clinical law school programs, supervising attorneys must teach client counseling skills to a group of students who understand the legal process. The program urged here requires the reverse: those familiar with client counseling techniques would receive instruction regarding some basic elements of the legal process. This is appropriate because social workers' commitment to the poor includes attention to legal problems, and social work text books encourage a working knowledge of the legal system.[208] Moreover, clients require a continuum of services, and both social workers and lawyers are providers on that continuum. This article argues that for reasons of public policy, especially more equitable access to legal assistance, the arbitrary line drawn by the bar through unauthorized practice restrictions should be somewhat relaxed. Social workers should develop a working understanding of routine problems in those legal areas most commonly encountered by the poor.

Even if a judicial social worker role can be created, that is better suited to current social worker duties, persons operating under this proposal would still play an important role. If judicial social workers were employed in courts and government agencies, community center employees trained in the manner suggested here would have valuable contacts within the legal system. Thus, the proposals do not conflict. Furthermore, proposals to increase the provision of *pro bono* services by lawyers would also assist social workers.

Although no existing program provides the magnitude of basic legal assistance possible under this proposal, three Chicago efforts jointly serve as examples of the proposed individual representation and social work education. First, the Northwestern University Children and Family Justice Center Community Law Clinic ("CLC") provides legal representation and social services in the West Town neighborhood. The CLC houses the Children's Law *Pro Bono* Program, a collaboration of private volunteer attorneys mainly representing children in delinquency proceedings. CLC attorneys also assist West Town residents in child abuse and neglect, child guardianship, adoption, special education, and miscellaneous family law matters. Juvenile law experts from Northwestern University direct the program, meeting regularly with CLC staff.

Recognizing the social context of juvenile legal issues, the CLC employs a community liaison to connect children with other neighborhood social services. As the CLC has its offices within the Northwestern University Settlement Asso-

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[206] *Heinze*, 490 N.E.2d at 588.

[207] *See id.* at 590.

[208] *See* SALTZMAN & PROCH, *supra* note 9, at 437-38.

ciation building, a full-service community center, many West Town social services are housed under the same roof and can easily be accessed by the community liaison. A CLC client gains more than legal representation. She establishes contact with a comprehensive network of services, including neighborhood schools, after-school programs, and recreational facilities. Additionally, West Town's Spanish- and Polish-speaking communities are assisted by several staff members who are fluent in those languages.

Second, the Advice Desk of the Illinois Institute of Technology, Chicago-Kent College of Law, assists indigent and working-poor *pro se* civil defendants. The majority of Advice Desk clients are tenants attempting to reenter their residences following a notice of eviction. These clients often face homelessness in the event that the landlord prevails in court. The remainder of the approximately 4,000 annual Advice Desk clients are defendants in contract and tort proceedings.

Local courts have responded favorably to this service. Eviction defendants are granted a one-week continuance if they wish to utilize the services of the Advice Desk. Moreover, its hours mirror those of the Office of the Clerk of Courts, and the desk is operated from the building housing that office and the relevant courtrooms.

Third, a course substantively similar to the continuing education component of the principal proposal is offered by the John Marshall Law School. The course brochure states that "[c]ommunity Developers and social workers will be trained to: (1) recognize the legal aspects of their clients' problems, (2) utilize the legal alternatives available, and (3) act as advocates for their clients before administrative agencies."[209] The substance of the course includes: an introduction to legal concepts and sources of law, housing law, criminal law, mental health law, juvenile law (as it relates to neglected, abused, and dependent children), rights of students to special education, rights of disabled adults, labor law, immigration law, transfer of property after death, family law, cash assistance programs, social security, supplemental security income, consumer protection, and advocacy techniques. The John Marshall Law School also produces a popular handbook covering these topics.

Though the emphasis and aspirations of these programs are similar to those of the present proposal, they can not provide equivalently extensive legal assistance. The Northwestern Settlement Association serves only one neighborhood with such extensive assistance. CLC staff attorneys provide on-site assistance to clients. Under this proposal, referrals would be made to external attorneys, but would also result in representation where necessary. The Advice Desk assists *pro se* clients, one group targeted by this proposal. However, unlike the CLC, it has only one location and caters almost exclusively to eviction matters. The John Marshall Law School course provides education on topics similar to those in-

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[209] John Marshall Law School, *Law Program for Community Developers and Social Workers.* <http://www.jmls.edu/conf/cd/97.html> [visited July 20, 1998].

cluded in the proposed continuing education program, but is the only such course in a metropolitan region of over eight million residents.

These three programs together embody the spirit of this proposal, but geographic reach and subject matter limit the services they offer. Consequently, any argument that the services available under this proposal are already being offered overlooks the proposal's ability to avail low-income persons of widespread, yet localized, services.

Finally, to increase the effectiveness of the educational element of the proposal, improved information about the complexity of legal needs among the poor should be gathered. Surveys commissioned by the American Bar Association[210] have as their goal an analysis of unmet need in both the low and moderate income populations, with an eye toward the fulfillment of any unmet need by increased numbers of more efficient lawyers. As such, they do an excellent job of determining where and how the unmet need for lawyer services occurs, but they do not distinguish between the levels of difficulty among problems encountered by interviewees. Such analysis is critical to the principal study, as its purpose is to involve nonlawyers with less formal legal experience. The program may proceed without such study, for it seems clear from currently available information that many simple needs exist and would be met. However, properly tailored surveys would help the program meet its long range goal of better continuing education and degree programs regarding legal services.

VI. CONCLUSION

The Akerlofian reasoning of the bar and of court opinions similar to *Brumbaugh* are cases in which Kant would have recognized the existence of "*not enough* theory."[211] Such reasoning may apply in the high and middle income contexts (though having substantially less relevance to the latter), but it fails miserably in creating a situation of adequate justice for the poor. This is as true with respect to Akerlof's analysis of cars as it is in reference to legal services: a poor person will purchase a "lemon," or go without a car, because there is nothing else sufficiently inexpensive on the market.[212] The situation is equally ineffective in the market for legal services. Poor persons will do nothing to remedy a legal situation because of the high service costs created by the lawyer monopoly. This proposal is an innovative way to augment free and low-cost legal services for the poor, and move toward meeting a greater portion of the unmet needs.

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[210] *See supra* note 23.

[211] KANT, *supra* note 1, at 41.

[212] Consider the example of Florida welfare recipient Linda Sexton: "These days she spends $3.40 a day to take a taxi to her 5 a.m. waitress job . . . Welfare reform allows recipients to own cars worth up to $8,500, [b]ut Sexton can't afford any car at this point." Jeff Kunerth, *To Needy, A Junker Looks Like Luxury Car; A Used-Car Dealer Gives Old Vehicles to Welfare Recipients So They Can Ride to Their Jobs*, ORLANDO SENTINEL, May 18, 1997, at A16.

The critical eye that Kant turned toward impractical theory was also guided by a concept of duty, in the present case, a duty to society.[213] Lawyers, Luban asserts, are charged with such a duty to the poor by virtue of their cardinal role in the justice system. Social work was founded upon a similar duty, which placed members of the profession in a critical political role with regard to social welfare. The concept of public protection emerges from the state as *parens patriae* for its citizens. A theory of public protection is only sufficient where it covers all persons governed by state law. The defect in the nexus between theory and practice here lies in the failure of the bar's Akerlofian reasoning to adequately provide for the particular needs of the poor in accessing justice.

This proposal adds some theory, but does not complete the nexus. It supplements other theoretical constructions currently debated, such as mandatory *pro bono*, student loan forgiveness for lawyers who pursue public interest careers, undergraduate advocacy programs, and the designation of judicial social workers. It is not in competition with these theories. If all are adopted, the poor will benefit from a comprehensive web of legal services that they can afford.

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[213] KANT, *supra* note 1, at 42.