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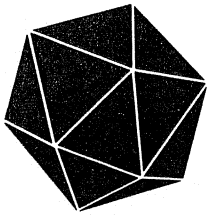

INSTITUTE FOR LEGAL STUDIES

Working Papers

LAWYER ADVERTISING:

"YES, BUT . . ."

by

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Working paper #2

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1986

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* This paper was given on May 23, 1985, at the European Workshop on Consumer Law held in Brussels. I want to thank Thierry Bourgoignie and Monique Goyens of the Centre de Droit de la Consommation, Universite Catholique de Louvain, for inviting me and for their kindness while I was in Belgium. My colleagues Stuart Gullickson, Neil Komesar, Jack Ladinsky, Theodore Schneyer, David Trubek, and Elizabeth Warren offered helpful comments on earlier drafts of the paper. Dr. Jacqueline Macaulay, PhD., J.D., read the manuscript critically and, as always, made it much better. Among her many qualifications for reworking this manuscript, she is a practicing lawyer who advertises in the Madison, Wisconsin telephone directory yellow pages. Anne Reilly edited the final draft and improved it. Kathy Kolstad compiled and Bill Ebbott edited Lawyer Advertising: A Bibliography of Articles about its Effects on Business for Attorneys, Consumer Costs for Legal Services, and Public Opinion of the Legal Profession (University of Wisconsin Law School Library, March 1985). This document made my task much easier. Marc Galanter gave me his file of clippings and articles on lawyer advertising which I merged with my own. Of course, even after all this help, mistakes are mine.

Abstract

Recently, in both the United States and Great Britain lawyers have been permitted to advertise. Reactions are mixed. Some see the change as an assault on professionalism and opening the door to misleading consumers of legal services. Others hail the change as opening the door to lower prices, efficiency and increased access to legal services. This article reviews the available data. While they are suggestive, they do not begin to chart the likely impact of lawyer advertising. Some studies are seriously misleading. The issues are complex and raise questions that are difficult to answer. More seriously, the whole debate about lawyer advertising may divert attention from more important issues concerning access to the legal system. Cases that should be resolved by other-than-legal means may be channelled to lawyers. Cases involving complex issues rather than procedures that can be standardized still may require expensive services beyond the reach of much of the population. Advertising may cost lawyers and the public some of the virtues of professionalism. It may, on the other hand, help make some services at reasonable prices available. However, we can wonder whether it will make much difference in the long run. In other words, our conclusion is likely to be, "yes, but . . ."

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Until recently, most lawyers everywhere assumed that advertising and the practice of law were incompatible. Over the past decade the rules in the United States changed, and lawyers began to advertise.[1] Many bought discrete notices in the yellow pages of the telephone directory, but a few hired sports stars to endorse them on television. Large corporate law firms hired public relations experts to fashion marketing strategies. Views about these changes differ sharply. United States Supreme Court Chief Justice Burger objected to lawyers "using the same modes of advertising as other commodities, from mustard, cosmetics and laxatives to used cars."[2] He said that his advice to the public

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1. In both the United States and the United Kingdom, the rules concerning lawyer advertising have been changed to allow greater freedom. In the United States, Bates and O'Steen v. State Bar of Arizona, 433 U.S. 350 (1977), found absolute prohibitions on lawyer advertising unconstitutional in 1977. In the UK, efforts to free solicitors to advertise began in 1976, and after reports favoring advertising by the Monopolies and Mergers Commission and the Royal Commission on Legal Services, the Law Society adopted rules allowing lawyer advertising in October 1984. See Attanasio, "Lawyer Advertising in England and the United States," 32 Am. J. of Comp. L. 493 (1984); Merricks, "Individual Advertising--At Last," 133 New L.J., Nov. 25, 1983, at 1028; Editorial, "Unrestricted Advertising," 134 New L. J., May 18, 1984, at 465; Merricks, "Publicity and Public Relations," 134 New L.J., May 18, 1984, at 467-8. For experience in Victoria, Australia, under changes that went into effect in September of 1982, see Law Report, "Few Solicitors Advertise, and Those Who Do Don't Spend Much on It," 58 Law Inst. J. 178-9 (1984). See, also, New South Wales, Law Reform Commission, Third Report on the Legal Profession: Advertising and Specialisation (1982). I will focus on the American experience since the change in the UK is so recent that it is too soon for anyone to study its full impact. I lack information about the nature and impact of the Australian change.

2. Chi. Daily L.Bull., Dec. 7, 1984, at 1, col. 4.

was "never, never, never, under any circumstances, engage the services of a lawyer who advertises."[3] The Chief Justice's statements reflect the views of many lawyers. On the other hand, members of the staff of the Federal Trade Commission, writers associated with a law and economics approach, and many consumer advocates see the new freedom for lawyer advertising as a great reform.

I will consider lawyer advertising, and what we know about its likely impact. I will review the literature and suggest that we need to learn a good deal more. Also, lawyer advertising is but a means to achieve various ends. While lawyer advertising is significant, advocates and opponents claim far more for its impact than seems likely. We must understand its impact, but, at the same time, we must ask whether attention is being diverted from more important questions. In short, the response to claims for and against lawyer advertising must be "yes, but . . ."

I. The Changes in Rule and Practice.

At the outset, we must recognize that it is impossible to state an American law of lawyer advertising. The Supreme Court's Bates decision said that a state could not ban all lawyer advertising. In re R.M.J.[4] involved a challenge to rules adopted by the Supreme Court of Missouri after the Bates case.

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3. Wash. Post, July 8, 1985, at 1, col. 3.

4. 455 U.S. 191 (1982).

These rules permitted lawyers only to publish in newspapers, periodicals and the telephone directory yellow pages. Their advertisements could contain only specified information such as areas of practice, schools attended, office hours, credit arrangements, and fixed fees for certain routine legal services. A lawyer tested the rule by advertising in a neighborhood newspaper in a form not approved by the rules and by sending announcements of the opening of his office to potential clients. The United States Supreme Court reversed a decision subjecting the lawyer to professional discipline. It emphasized that a state could regulate where the purpose was to curb false, deceptive or misleading advertising. However, there was no evidence that any of the lawyer's material was misleading.

In Zauderer v. Office of Disciplinary Counsel[5] the Supreme Court struck down Ohio's ban on solicitation of clients through advertisements containing advice and information about specific legal problems. The parties stipulated that the advertisement did not contain false, fraudulent, misleading or deceptive statements. The attorney had stated that his firm represented women injured by the Dalkon Shield contraceptive on a contingent fee basis. The advertisement invited women to call for "free information." The lawyer received over 200 inquiries, and he initiated suits on behalf of 106 of those who contacted him. The state's interest in preventing lawyers from "stirring up

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5. __U.S.__, 105 S.Ct. 2265 (1985).

litigation" did not justify the ban on such ads. "The State is not entitled to interfere with . . . access [to civil courts] by denying its citizens accurate information about their legal rights."[6] Obviously, many questions are left open by the Bates, In re R.J.M., and Zauderer decisions.[7]

There are other reasons why we cannot fashion an American rule on lawyer advertising. The United States is a federal system, and so potentially we could have fifty different rules as long as they pass constitutional review by the Supreme Court. Some states have allowed lawyers to advertise subject only to very few restrictions; others have attempted to limit lawyer advertising as much as they can in the face of the Supreme Court's opinions. On the other hand, the activities of the American Bar Association promote some degree of uniformity. Regulation of lawyers is one of the areas in which distinctions between public and private sectors are blurred. In many states regulation of lawyers is under the control of the state supreme court, but the state bar association, and often bar associations in the larger cities are influential in shaping and administering state rules. The American Bar Association is a private

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6. Id., 105 S.Ct. at 2278.

7. For discussion of the Bates, and In re R.J.M. cases, see Stoltenberg and Whitman, "Direct Mail Advertising by Lawyers," 45 U.Pitt.L.Rev. 381 (1984); Note, "Attorney Advertising Over the Broadcast Media," 32 Vand. L.Rev. 755 (1979); Student Project, "Attorney Advertising: Bates: Impact on Regulation," 29 S.C.L. Rev. 457 (1978).

organization representing only those lawyers who join it. Nevertheless, it has long issued model rules about legal ethics and many states have adopted them in whole or in part. At the very least, these proposals influence the agenda for debate in the various states.

The ABA drafted proposals in response to the Supreme Court's Bates decision which are likely to be influential. However, the Antitrust Division of the Department of Justice called the ABA's proposed rules "anticompetitive," and said that they would "restrict the flow of useful information from attorneys to consumers."[8] The staff of the Federal Trade Commission has drafted another model code far less restrictive than the ABA's proposals.[9] These comments and proposals, in light of the Supreme Court's opinions, might also influence the rules finally adopted in the various states.

Furthermore, whatever standards are enacted, the rules as applied could vary greatly in different sections of any one state--what is acceptable in New York City would not necessarily go unchallenged in Buffalo. On one hand, almost any set of rules creates a range within which judgments about what is permissible and prohibited can vary. On the other hand, someone must complain to trigger law enforcement, and lawyers in one part of a

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8. N.Y. Times, Sept. 25, 1984, at 34, cols. 2-6.

9. Staff of Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions On Truthful Advertising (November 1984).

state might be far more offended by advertising practices of their colleagues than those in other areas. Finally, we must note informal social sanctions also play a part in reinforcing customary norms about proper professional conduct. Many lawyers would not consider advertising because they think it is just not done by true professionals, and they care what other lawyers think of them.

We have seen a great increase in lawyer advertising in the United States since the Bates decision in 1977. Most discussions of the subject highlight again and again a few colorful examples which at least some lawyers see as atrocity stories.[10] For example, Ken Hur advertised his legal clinic in Madison, Wisconsin in several now classic television ads that have become known in professional circles throughout the United States.[11] In one, Hur emerges from a pool wearing a diver's mask and gear and asks whether the viewer is "in over your head" and needs help in dealing with debts. In another, Hur promised to give clients ten-speed bikes if they lost their driver's license after hiring his legal clinic to represent them in drunk driving cases. Most writers are unaware that both ads were parodies of others run by

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10. For the functions of "atrocity stories," see Dingwall, "Atrocity Stories and Professional Relationships," 4 Soc. Work & Occupations 371 (1977). A key point is that atrocity stories are not typical and often are misleading.

11. See Barker, "Ads: A Case of Contention," Advertising Age, April 23, 1984, at 3, col. 3, p. 119, cols. 1-3; N.Y. Times, July 8, 1979, at 28, cols. 1-2.

Madison merchants. While neither added to the dignity of the legal profession, most Madison television viewers probably understood the implicit references and appreciated Hur's sense of humor.

Other classic television advertisements for lawyers involve endorsements by famous athletes.[12] In one shown in the Washington, D.C. area, John Riggins, a star of the Washington Redskins football team who is noted for his aggressive play, says,

> I don't like to get hurt. And I don't like to lose. I don't imagine you do, either. But if you have been hurt on the job or by someone's carelessness or negligence . . . call the law firm of Ashcraft & Gerel.

Other advertisements on television are far more dignified. Milwaukee personal injury specialist Robert Habush created a successful campaign and then sold it to other lawyers.[13] He created 54 different 60 second question-and-answer commentaries about various legal issues, most of them related to personal injury law, contingent fees, types of accidents that are actionable and the like. He reportedly spent $150,000 to start

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12. See Middleton, "Ads Pay Off--In Image and Income," Nat'l L.J., Mar. 5, 1984, at 1, col. 4, p. 22, cols. 1-4, p. 24, cols. 1-4.

13. See Clarendon, "Advice from Some Who Have Tried Advertising," Fla. B.J. 19 (Feb. 1985).

the campaign and $10,000 a month to maintain it.[14] However, it increased his case filings and referrals by more than 30 percent.

Instead of making price transparent to consumers, lawyers' advertising tends to offer an image of competent and dignified professionalism. As the National Law Journal[15] reported in 1984,

> Bar leaders who once thought legal advertising would bring out the hucksters now admit that most of it is professionally and responsibly done. Thomas S. Johnson of the Rockford, Ill., firm of Williams & McCarthy, P.C., who serves on an ABA committee on the delivery of legal services, admits that Bates threw him into an "apoplectic rage," and that he feared its consequences. But most of today's advertising, he says, "is dignified, non-misleading, effectively produced and high quality."

A large percentage of lawyer advertising tells the reader little or nothing about specific fees for services. Those advertisements that do quote prices deal with only a few routine matters. It is difficult to name a flat fee for all legal services needed in a complex matter where a lawyer must respond to hard-to-predict actions and reactions by an attorney on the other side. Lawyers could advertise that they would handle, for

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14. Much of the business in an office such as that run by Habush comes from referrals from other lawyers who pass on cases beyond their abilities. Firms specializing in major personal injury litigation want clients to be aware of their firms so that they will welcome having their own lawyers refer their cases to a particular personal injury firm and think well of their own lawyer for arranging such representation.

15. Nat'l L.J., Mar. 5, 1984, at 1, col. 4, p. 22, cols. 2-3.

example, any divorce for a specified sum and hope that those cases where the matter was easy would balance out those which were unexpectedly difficult and time consuming. So far, few lawyers have seen any need to accept these kinds of risks.

The Television Bureau of Advertising reported in March of 1984 that 414 lawyers and legal clinics spent more than $28 million on TV advertising. This sum was slightly below the amount spent by stockbrokers and investment firms. It was far less than the $577.5 million paid by restaurants and fast-food establishments, the group that spent the most on television in 1983. Hyatt Legal Services is a chain of 157 low-cost legal clinics in 24 television markets. It spent the most on legal advertising in 1984 of any law practice, some $4,475,000, which was an increase of 45% over its spending the previous year. However, Hyatt reported that its television ads attract 18,000 new clients a month.[16]

Lawyers who invest such sums advertising on television are hardly typical. In 1979, about two years after the Bates decision, a public opinion research firm polled a random sample of members of the American Bar Association. Only 7% had advertised; 91% had not. 64% of those who had advertised used the telephone directory yellow pages or newspapers while no one

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16. Nat'l L.J., Mar. 25, 1985, at 3, col. 1, p. 32, col. 4.

in the sample used television.[17] Linenberger & Murdock[18] studied a sample of Wyoming lawyers. 29% had advertised. 41.5% of these lawyers advertised in a law directory and the telephone directory yellow pages, but none spent money on television. In a similar poll of ABA members published in June of 1984, only 13% had tried advertising. This was the same percentage as in 1983, and bar officials speculated that the number of lawyers advertising was leveling off. About 60% of those who advertised were satisfied, but about 30% were not. 71% indicated that advertising brought in additional business, and two-thirds felt that it led to better recognition among the general public.[19]

How should we interpret these numbers? Peter Levin, a lawyer who chairs the ABA's committee on marketing legal services, said that he was not surprised that advertising had leveled off. Newspapers and telephone directories become cluttered with many small advertisements. Television campaigns appearing repeatedly over time may be effective, but only a very few lawyers can afford them. Levin thinks that in the future there will be "more television ads, but less lawyers doing it."[20]

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17. 65 A.B.A.J. 1014 (1979).

18. Linenberger & Murdock, "Legal Service Advertising: Wyoming Attorney Attitudes Compared With Consumer Attitudes," 17 Land & Water L. Rev. 209 (1982).

19. Reskin, "Lawyer Advertising Levels Off; P.R. Use Growing," 70 A.B.A.J. 48, 49 (1984).

20. L.A. Daily J., June 20, 1984, at 5, col. 1.

Also, we must remember that the bar in larger cities in the United States is highly stratified, and different types of lawyers serve distinct kinds of clients. Lawyers who are graduates of elite law schools usually work in large firms that handle complex problems of larger corporations and wealthy individuals. Those from less prestigious schools often practice alone or with one or two others and deal with the problems of individuals and their smaller businesses.[21] Most of their work is easier to reduce to routine and to standardize.

Hazard, Pearce and Stempel[22] argue that every law practice combines individualized and standardized production, and this combination determines the approach taken to advertising. For example, lawyers who handle approaches to problems of corporations and the wealthy will not take a shotgun approach to advertising. They must attract clients who need and can pay for time consuming professional activities. Mass media advertising would not target their potential clients. Firms that offer services to corporations and wealthy individuals, have begun to engage in what is called marketing as distinguished from advertising.[23] For example, expensive brochures are produced and

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21. John P. Heinz and Edward O. Laumann, Chicago Lawyers: The Social Structure of the Bar (New York, Basic Books, 1982).

22. Hazard, Pearce and Stempel, "Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services," 58 N.Y.U.L. Rev. 1084 (1983).

23. See, e.g., King, "What Works, What Doesn't in Advertising," 71 A.B.A.J. 54 (1985); Curtis & Akins, "Effective Marketing: How

distributed to likely clients and other lawyers who might refer business. Politically prominent lawyers with contacts in government join firms that deal with government regulation.[24] Members of the firm write articles about technical legal problems that are published in prestigious law reviews, and copies are distributed to lawyers who work for large corporations and hire outside law firms to provide particular services. Some of these larger firms have contributed to public television stations in return for credit on the air or supported programs of classical music on public broadcasting stations or FM stations that play this kind of music. Presumably this approach reaches an audience that might use their legal services.

In contrast, lawyers in large cities offering services such as simple wills, uncontested divorces, and routine personal

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Firms Can Improve Their Image," 20 Trial 54 (Dec. 1984); Smock & Heintz, "Attracting Clients with Marketing, 69 A.B.A.J. 1432 (1983); Taylor, "Law Firms Squirm, Then Turn to Public Relations," N.Y.Times, July 27, 1983, at 10, cols. 3-6; "The Blue-Chip Lawyers Discover Marketing," Bus.Week, April 25, 1983, pp. 89, 93-4; Goldstein, "Marketing Lawyers' Services into the 1980's," 54 N.Y.St.B.J. 202 (1982).

24. For example, Howard H. Baker, Jr. is the former Majority Leader in the United States Senate and a possible presidential candidate in 1988. When he retired from the Senate in January of 1985, he became the head of the Washington, D.C., office of a large law firm with an estimated salary of $750,000 a year. One lawyer explained that "[b]ecause of his name, the people he knows, good judgment, high respect, corporate clients would look at him and think he could give them access in the highest places." The New York Times notes that "Mr. Baker will not have to peddle his influence for it to be felt . . . When his partners make their rounds in the Administration and Congress, their powers of persuasion will be enhanced by association with a Republican powerhouse who could be the next President." N.Y. Times, Dec. 11, 1984, at 8, cols. 3-6.

injury negotiation depend on a high volume of work to make money. These firms attempt to attract a broad array of clients. All lawyers willing to handle problems for individuals and small businesses may find some sort of advertisement in the telephone directory yellow pages useful. However, only those who can standardize certain services needed by many people and organize their practice so they can mass process clients are likely to find that the extremely high price of an advertising campaign on television will pay.[25]

II. The Impact of the Changes.

A. Rhetoric and Politics.

What has been the impact of lawyer advertising, and what will the impact be in the future? On one hand, some leaders of the bar and judges offer a morality play, a simple but plausible story teaching that advertising leads to disaster. On the other hand, reformers, both in and outside the academy, counter with a picture of advertising leading us to the promised land. As we might expect, the rules governing lawyer advertising were not established and changed in a vacuum. As always, we must attend to the political context of these positions and predictions. Advocates of lawyer advertising come from both the consumer movement and the champions of deregulation who celebrate the virtues of the market. Motivations and positions are not always

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25. See Mitchell, "The Impact, Regulation and Efficacy of Lawyer Advertising," 20 Osgoode Hall L.J. 119 (1982).

clear.

Opponents of lawyer advertising paint a gloomy but easy to recognize picture. Lawyers will advertise, and the relationship between lawyers and clients will be transformed from a professional to a commercial one. Instead of an ethic of service, lawyers will march to the drum of the market and self interest. Advertising will stress low prices for basic legal needs. Lawyers can offer these prices only by standardization. This prompts the growth of large organizations that can afford the staff and equipment necessary to process large numbers of routine cases. Once they lose opportunities for creativity and responsibility, bored lawyers[26] will only put in their hours. The quality of the work will then decline to a mediocre level.

Advertising legal services, in this gloomy picture, also leads to misrepresentation. It is hard to evaluate legal services. There is no thing called a will or a divorce that is always the same. Low prices will be quoted for basic services, and lawyers will have to meet the competition. In order to offer services at prices driven down by competitive advertising, lawyers will cut the quality of the work they deliver. Clients

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26. Routine and boredom already are part of practice. A survey of ABA members in 1983 showed that only 59% said they would choose law again if given a second chance. "Fourteen percent, including many lawyers 30 or younger, indicated they would like to be doing work that was less routine in nature." See Smith, "A Profile of Lawyer Lifestyles," 70 A.B.A.J. 50, 54 (1984). The mass processing involved in highly advertised legal clinics may make practice even more boring.

will be fooled into thinking that they need only a standardized product when actually they need work that takes account of their special situation. Other lawyers may engage in "bait and switch" tactics, luring clients to their offices by advertising low prices but persuading them to buy costly but unneeded personalized services once they are there. In all of this, good ethical lawyers will be driven out by the bad who can successfully win over a gullible public responding to advertising tricks.[27]

Those advocating broad freedom for lawyers to advertise tell a very different story.[28] Informed consumers will compare prices and make judgments about the likely quality of services offered by various attorneys. This will spark competition among lawyers who will lower prices and increase quality. Lawyers will lower costs by increasing efficiency, turning to new technology, and substituting less skilled for more skilled workers wherever possible. Competition will drive untalented and inefficient lawyers from the practice or they will change their ways. Firms will strive to establish valuable trade names as part of

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27. Attanasio notes that Mr. Justice Powell's dissenting opinion in the Bates case states most of the arguments against advertising, 433 U.S. at 389-404, and this opinion is relied on by the Royal Commission on Legal Services in the United Kingdom. See Attanasio, supra n. 1, at 507-8.

28. This morality play can be found in a number of places. For relatively pure versions, uncluttered with qualifications, see Staff of Federal Trade Commission, supra n. 9; Greene, "Lawyers versus the Marketplace," Forbes, Jan. 16, 1984, at 73.

advertising their reputations, and this will induce them to avoid doing anything to harm their image. The market will thus police itself against misrepresentation and bait and switch tactics. In addition, advertising will expand the market by attracting new clients who have never used lawyers in the past. Advertising opens access to the legal system. Greater access itself will allow efficient lawyers to exploit economies of scale and further reduce costs.

These morality plays, of course, are rhetorical ploys in a political battle among partisans. Both stories seem plausible, reflecting simple common sense. However, both contain elements of truth well mixed with overstatement. Neither side is much troubled by data and complexity. Claims about lawyer advertising are not put forward as part of a neutral exercise, and much is at stake. If we are to appraise the positions, we need to understand the context of the battle.

Lawyer advertising once was accepted in the United States. Advocates note an advertisement placed in a newspaper in 1853 by Abraham Lincoln promising "all business . . . will be attended to with promptness and fidelity."[29] The ABA's 1908 Canons of Ethics, a model code which was adopted by many but not all states, introduced strong limitations on advertising. These Canons were part of an attempt to defend the "better element" in

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29. See Staff of Federal Trade Commission, supra, n. 9, at 20, where a copy of the advertisement is reproduced.

the bar from the inroads of a commercial spirit and the practices of those who were not gentlemen. Some writers have stressed that the elite of the bar were anti-Semitic.[30] They see past campaigns against commercialization and for professionalism in part as attempts to limit the upward mobility of Jews and other children of immigrants. Whatever the explanation, Gordon notes that the American bar has lamented a loss of professionalism and the rise of commercialism since the 19th century.[31] Pressure for tougher anticommercialism came in the depression of the 1930s when lawyers found "cut-throat competition" as distasteful as did many other business people in that era. The ABA in 1937 responded by tightening its model rules so that lawyers could only insert notices in approved law lists circulated to other lawyers and not to the public.[32]

Several social movements came together to advocate allowing

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30. See Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (1976).

31. Gordon, "The Devil and Daniel Webster), 94 Yale L.J. 445 (1984); Gordon, "'The Ideal and the Actual in the Law': Fantasies and Practices of New York City Lawyers, 1870-1910," in Gerard W. Gawalt ed., The New High Priests: Lawyers in Post-Civil War America, pp. 53-74 (Greenwood Press 1984). See also Schudson, "Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles," 21 Am.J. Legal History 191 (1977). For a recent example written by a prominent lawyer, see Belin, "The Law Business," 82 Mich. L.Rev. 953, 954-5 (1984)("Indeed, one of the tragedies of our times is that law practice is becoming more and more of a business and less and less of a profession in the traditional sense of the word.").

32. See Taylor, "For Advertising by Lawyers, A Verdict is at Hand," Advertising Age, July 18, 1983, at M. 26-7.

lawyers to advertise. One was 1960s activism. Reformers saw access to law for those of modest means as a great cause. Minimum fee schedules and the ban on solicitation and advertising priced legal services and justice beyond the reach of many. Furthermore, advertising bans and similar restrictions were seen as control by the upper strata of the bar. Claims of dignity and professionalism were unpopular with the generation coming of age in the 1960s and 1970s. A body of academic writing exposing regulation by the regulated or the capture of administrative agencies by special interests set the stage for this reaction. The claims of the organized bar appeared as but special interest pleading.[33]

Another social movement served the cause of lawyer advertising. By the mid-1970s, many writers and political leaders called for deregulation of the economy to achieve efficiency. Big government and the welfare state could claim less and less legitimacy. This law and economics analysis was easily adapted to decry restraints on competition in professional services. The leaders of bar associations found themselves advocating regulation of their own profession but advocating deregulation elsewhere to benefit many of their corporate clients. However, they saw law as special and different--more than just a business.

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33. See, e.g., Comment, "Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available," 81 Yale L.J. 1181 (1972).

At the same time these groups were arguing for deregulation of lawyers in the name of access for those of limited means, others were attempting to limit the assertion of legal rights in the name of efficiency or social harmony. These critics attacked contingent fees in personal injury and products liability cases involving claims for large sums as damages.[34] Contingent fees are a triumph of the free market in legal services and have provided a great deal of access to the courts for people of modest means.[35] However, images of greedy lawyers making fortunes from the misery of others were widely circulated. Doctors and their malpractice insurers were joined by manufacturers of consumer products. They all championed less representation of the injured as a means of cutting the costs of doing business.

Still other critics attacked what they saw as a litigation explosion.[36] From the mid-1950s to the mid-1970s, American courts and legislatures created many legal rights for those dissatisfied with traditional practices. In the beginning reformers tried to supply subsidized lawyers to vindicate these

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34. See, e.g., Case, "Lawyers Often Are Grossly Overpaid," N.Y. Times, Dec. 2, 1984, §3, at 2, cols. 3-6.

35. See, e.g., Baldwin, "The Sure Way to Protect the Little Guy," N.Y. Times, Dec. 2, 1984, §3, at 2, cols. 3-6.

36. For a very critical review of the alleged litigation explosion, see Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society,) 31 U.C.L.A. L. Rev. 1 (1983).

rights. Conservatives have attacked this kind of public interest lawyering vigorously and successfully. The editors of the Yale Law Journal assert

> one suspects that an unvoiced reason for the animus against stirring up litigation is the fear that some of the litigation stirred up will involve socially unpopular causes--such as suits attacking segregation or those brought by tenants against landlords or consumers against corporations.[37]

Silberman, reflecting a very different political viewpoint, supports the Yale editors' suspicion, saying:

> [A]ttacks on legal profession entry limitations and advertising restrictions may be misguided. The economy as a whole may be better off if we considerably toughened bar examinations and thereby reduce the number of practicing lawyers, as well as tightened, rather than loosened, advertising restrictions. . . . Disdain for capitalism and capitalists, elitism couched in Naderite concern for consumers and the poor, impatience with the democratic process as an inadequate engine for social change--all follow from the power afforded those who join the ministers of the legal process. They respond to the prospect not of the rule of law, but of the rule of lawyers. . . .
>
> Unless our political institutions mount a virtual counterrevolution against the legal process, our only hope of preserving the vigor of democratic capitalism may be for the legal process to become so unwieldy that private and political decision-making gain a comparative advantage. But then the legal process would be less available for those matters for which it is truly needed.[38]

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37. Comment, supra n. 33, at 1189.

38. Silberman, "Will Lawyering Strangle Democratic Capitalism?" Regulation, at 20, n. 5, 44 (March/April 1978).

Hazard, Pearce & Stempel[39] argue that the opposition to advertising is both instrumental and symbolic. Those lawyers whose practices are undercut by legal clinics and other firms that advertise, play important roles in local, state and national bar associations. In addition, advertising suggests that legal assistance is a commodity clients buy and lawyers sell. Opposition is, in part, "a consequence of the inconsistency between providing legal services through the free market and realizing equal justice before the law." The legal profession does not want to acknowledge this tension between ideal and reality.[40]

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39. Hazard, Pearce & Stempel, "Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services," 58 N.Y.U.L. Rev. 1084, 1113 (1983).

40. Others championed informal alternatives to litigation where lawyers play little if any role. Rather than have lawyers compete to represent certain kinds of clients, people would settle matters by compromise and the establishment of harmony. Often the compromises and harmony seem produced by a kind of magic in the informalism rhetoric. Santos, "Law and Community: The Changing Nature of State Power in Late Capitalism," 8 Int'l J. Soc.L. 379 (1980), argues that informalism without lawyers is only a way to deflect the potential vindication of the new rights created in the reforms of the 1960s and 1970s rights and coopt social fields that might rival the state. Whether or not Santos' explanation covers everything that has happened, it fits much of the recent history in the fields of civil rights.

B. What Do We Know About the Impact of Lawyer Advertising?

Scholars from various fields have written about lawyer advertising. We can distinguish three kinds of studies: (1) surveys of attitudes of potential clients and lawyers toward attorney advertising; (2) applications of economic analysis; and (3) the Federal Trade Commission's staff's research about the impact of various kinds of regulation of advertising on prices and quality. We have some data and analysis, although far less than we need to resolve the issues these writers raise. We will in turn consider these types of studies critically.

A number of articles report research concerning attitudes about lawyer advertising.[41] Questionnaires administered to more or less random samples of lawyers and consumers can tell us who likes and who dislikes advertising. However, they cannot tell us how much weight to give such things as a lawyer's judgment that it will confuse and mislead consumers. These attitude studies reach predictable conclusions, suggesting that consumers favor lawyer advertising while lawyers do not.

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41. See, e.g., Kallis & Vanier, "Consumer Perceptions of Attorney and Legal Service Advertising: A Managerial Approach to the Delivery of Legal Services," 14 Akron Bus. & Econ. Rev. 42 (1983); Linenberger & Murdock, "Legal Service Advertising: Wyoming Attorney Attitudes Compared with Consumer Attitudes, 17 Land & Water L. Rev. 209 (1982); Smith & Meyer, "Attorney Advertising: A Consumer Perspective," 44 J. Marketing 56 (1980); Dyer & Shimp, "Reactions to Legal Advertising, 20 J. Ad. Research 43 (1980); Shimp & Dyer, How the Legal Profession Views Legal Service Advertising, 42 J. Marketing 74 (1978); Shimp, Ohio Lawyers' Attitudes Toward Legal Service Advertising," 4 Ohio N.L. Rev. 576 (1977).

Kallis and Vanier report that 75% of those in a quota sample of 361 adults in Southern California thought lawyers should be free to advertise; 62% did not think that lawyers who advertised did inferior work; and 76% wanted advertisements containing information about specific fees. However, 40% said that advertising would not influence their choice of a lawyer. Only 26% thought that advertising would give them an opportunity to make a better selection of one.

Shimp and Dyer said that the majority of the lawyers in two states answering a questionnaire survey in 1976 before the Bates decision believed that advertising would erode public confidence in the legal profession. These lawyers thought it would become deceptive and confuse rather than enlighten potential clients. Dyer and Shimp ran another study after the Bates case, questioning both lawyers and consumers. They asked both groups to react to sample advertisements. They found

> both lawyers' and consumers' evaluations improve as more information is contained in the ads, but lawyers are particularly skeptical of including fee information in their ads. The dilemma is that this is probably the kind of information that consumers most desire, but the least likely they will receive. Lawyers feel that fee information in ads is deceptive since many legal services are nonstandard.[42]

Linenberger and Murdock surveyed samples of Wyoming consumers and lawyers in 1981. They tell us that 56% of the lawyers agreed

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42. Dyer & Shimp, supra n. 41, at 50.

that advertising created a bad public image for the profession while nearly 80% of the consumers disagreed. 70% of the consumers thought that advertising would improve the quality of legal services while 67% of the lawyers disagreed. 57% of the lawyers thought existing sources of information about attorneys were adequate while 69% of the consumers thought they were inadequate.

Most of these surveys were conducted in the late 1970s or early 1980s, before the Bates decision had much impact. We cannot be sure of the continued validity of these earlier studies. Research conducted today or in the future could tap reactions based on actual experience.

A second type of study attempts to predict the impact of permitting lawyer advertising by applying economic theory and drawing analogies to what that body of work tells us about advertising in general.[43] Most simply, this theory tells us that if firm A offers to draft a will for $100 and firm B offers to draft the same will for $75, an informed consumer will become a client of firm B. Furthermore, we can expect firm A to learn of the situation and seek to find ways to cope. It can lower its price to $75, but, to do this, it must deal with the situation.

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43. See Attanasio, supra n. 1; Mitchell, supra n. 25; Hudec & Trebilcock, "Lawyer Advertising and the Supply of Information in the Market for Legal Services," 20 U.W.Ont. L. Rev. 53 (1982); Hazard, Pearce & Stempel, supra n. 22; Muris & McChesney, "Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics," 1979 A.B.Found. Research J. 179.

Firm A can cut costs. Firm A may seek greater efficiency in managing its business. On the other hand, it might seek to differentiate its product and offer a better will for $100 than firm B produces for $75. The consumer then could decide whether the added quality was worth the extra $25.

Mitchell points out that this model is too simple. Advertising works best when relatively little is at stake and buyers are not uncertain about the product. If we respond to an advertisement for a can of peaches and are disappointed, we lose little. Most of us feel fairly comfortable judging the quality of peaches. Our experience tells us there is little quality difference among brands of the same grade of canned fruit. If we are considering purchasing an expensive automobile, advertising will likely only supplement other sources of information. Often we rely on a trade name as a surrogate for our own quality judgment. For example, Sears stores in the United States sell products ranging from hardware to clothing. Sears advertises its trade name frequently. In particular situations, Sears' price may not be the lowest and its quality may not be the highest. However, consumers can be fairly sure that they will pay a reasonable price and receive reasonable quality. Their purchase may not be the best possible, but it will not be a bad one. In a sense, they hire Sears to serve as their purchasing agent to avoid making major mistakes.

How would lawyers' services fit into this picture? Mitchell argues that some legal services fit better than others. Usually

the stakes are high when people go to lawyers. However, few potential clients are in a good position to judge either a lawyer's reputation or the services provided. For example, a lawyer may handle a divorce matter successfully in that husband and wife legally are free to marry again. However, the lawyer may quickly negotiate issues of property division and child custody to get a settlement. He may leave his client far short of what lawyers could have arranged if more time had been put into planning and negotiating. The client may be satisfied but never recognize that the lawyer could have done better.[44] Other clients may worry that they cannot judge what they are getting, and they may go to the lawyer they think has the best reputation. They may be willing to pay large fees, assuming that you get only what you pay for. Indeed, if legal services are advertised at a low fee, some potential clients may assume that the services cannot be of high quality. Clients may be more willing to shop for legal services on the basis of price when they think they are buying something standardized such as a will or a simple divorce.

Mitchell suggests that extensive mass media advertising should be effective in densely populated markets for frequently

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44. The opposite often is true as well. The lawyer may have done as well as possible in light of what the client could invest in the case. However, the outcome may leave the client unhappy and unfairly blaming the lawyer for a poor job. Clients do scapegoat lawyers; often they need to blame someone for their situation and lawyers are handy.

required services which can be supplied by low cost, high volume production methods. Lawyers can advertise other kinds of services in relatively inexpensive telephone directory yellow pages or newspaper classified sections. This approach is likely to have a limited, but perhaps important, impact on practice. Some lawyers may be able to gain clients they otherwise would not have seen. Consumers who notice lawyer advertising will have some additional information. A potential client can discover, for example, that a particular lawyer is willing to take bankruptcy or divorce cases.

However, once lawyers begin to advertise in the telephone directory or newspapers, others are likely to be match their efforts. Consumers often face page after page of lawyer advertisements that say almost the same thing. There are no meaningful statistics such as a won and lost record, and critics do not publish reviews of lawyers as they review restaurants and films.[45] Those who can pay large fees often have better sources of information about lawyers than advertising. Hazard, Pearce

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45. Law directories rate lawyers, but the rating systems can offer only rough indicators of quality such as time in practice, representative clients, and some suggestion of general reputation in the local legal community. Sophisticated users of these directories often use the ratings to exclude some attorneys. Then they consider those left after seeking recommendations from people who know the local bar. Existing directories would be little help to individuals seeking legal assistance for personal matters. Consumer advocates could produce directories that would be helpful to individuals, but it is not clear that individuals would pay to get this information. Group legal services plans, such as those sponsored by unions and cooperatives, may serve to rate lawyers for members.

and Stempel point out that advertising is relatively ineffective compared with personal knowledge and reputation. Advertising must be brief, and it comes from an impersonal source. Often readers or viewers pay little attention to it.

Hudec and Trebilcock note that some law firms have tried to establish national trade names. They hope these names will attract potential clients who rely on the firm's reputation as a way of getting quality service. If the trade name were promoted by advertising, it might enable the firm to market complex and costly services. People could rely on getting reasonable quality and price from a firm concerned with its reputation. However, this reputational sanction may work better in long-term continuing relationships than in one-shot deals. A seller of goods and services always values repeat customers. Those who need a lawyer but once in their life may learn from the transaction that a firm that advertises offers poor service. Nevertheless, this information cannot affect their future behavior. They may talk to friends, but most of us can broadcast our opinions only to a limited number of people.

On the other hand, Hudec and Trebilcock speculate that highly advertised second-class lawyering may drive out good lawyering where clients cannot tell what they are getting. "[C]lients will not be able to verify advertised quality claims and lawyers providing better quality will be unable to recoup the high cost of providing higher quality service since clients will not be willing to pay a higher price for a feature of the service which

they cannot be sure that they are indeed receiving."[46] Attanasio suggests that the case for advertising usually assumes efforts at standardization so that a given product can be sold for a named price. He argues that the aggregate quality may increase, but standardization also "increases the potential to shortchange individuals whose problems stray far from the norm."[47]

These writers also theorize about the impact of advertising on the legal profession, an impact that ultimately could affect society as well. Hudec and Trebilcock think that the situation may be a zero sum game. Advertising "will principally have the effect of shifting around market shares amongst existing law firms."[48] Hazard, Pearce and Stempel disagree. They state that advertising will increase the total market for legal services by stimulating latent demand.[49] People will learn that they can afford a lawyer and that they need one in situations where they would not now use one. These people will talk about problems, lawyers and the quality of services they received in their social networks. Conversations at taverns or places of employment may pass along a new legal consciousness as well as suggestions about which lawyers to see.

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46. Hudek & Trebilcock, supra n. 43, at 74.

47. Attanasio, supra n. 1, at 527

48. Hudec & Trebilcock, supra n. 43, at 99

49. See Besharov & Hartle, "Here Come the Mediocre Lawyers," Wall St.J., Feb. 22, 1985, at 26, cols. 3-5.

Advertising appears to have helped the development of high volume, low cost modes of delivering relatively standardized services. This could affect existing modes of practice. Hazard Pearce and Strempel argue that law practices deliver: (1) primarily individualized services; (2) primarily standardized services, or (3) a mixture of individualized and standardized ones. Mixed practices, they say, cannot maximize profits. They are less efficient on individualized cases because they cannot invest the necessary time. They cannot charge as much as the true individualized law firm. They are less efficient on standardized cases because they do not gain the economies of scale that come from devotion to mass processing. Thus these firms cannot afford to invest in television advertising campaigns. These mixed practices today profit by charging inflated fees for standardized services or, alternatively, by using standardized services as loss leaders to attract individualized service business. Advertising will lead to large well known firms offering standardized services at low prices. Today's mixed service firms, these writers predict, will not be able to compete.

Advertising and commercialization may limit devoting time to cases that will not pay and recapturing the cost by charging other clients more. Hudec and Trebilcock say there "may be a legitimate concern that price discrimination is necessary to sustain viable practices in small communities, but this is not a situation in which advertising is likely to occur in any

event."[50] Abel[51] points out that activist lawyers representing progressive causes may finance their activities by covering their expenses through conventional work. Advertising may threaten to channel delivery of inexpensive legal services to middle class clients to legal clinics that advertise and merchandise services. Insofar as it does this, there may be less of a base on which to build legal service to various social causes or support engaging in politics. Price discrimination may be a form of progressive taxation necessary for lawyers to offer low or no fee services to those who cannot pay.

Mitchell, on the other hand, doubts whether advertising by legal clinics will drive many of the present firms from the market or force them to offer low cost standardized products. He points out that in choosing a lawyer, clients consider many factors other than price such as competency, honesty, special expertise and general reputation. Not everyone enjoys the clinic style of offering professional services; too often a major event in one's life is slotted into a category by a professional or a para-professional who will not listen and who tries to get through the encounter as quickly as possible.[52] Some clients

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50. Hudec & Trebilcock, supra n. 43, at 78

51. Abel, "Lawyers and the Power to Change," 7 Law & Pol'y 5, 8-9 (1985).

52. Muris & McChesney, supra n. 43, at 186-87, discuss using paralegals within a systems approach in a divorce case as an illustration of the possibilities of reducing costs. Essentially, a paralegal fills in the blanks on a form originally

seeking the kinds of legal services offered by clinics prefer to go to lawyers they know, even if they pay more. They value continuing relationships with professionals they know. As they build experience they can judge the intangibles such as empathy and really taking time to understand problems. They use recommendations from friends who have special relationships with lawyers. They hope the connection will distinguish their problem from the rest of the lawyer's cases and prompt understanding and action. This kind of service is worth something beyond the cost of the cheapest lawyer available.

When we consider the writing about lawyer advertising based on theories of information and competition, we must remember that not all stores in a community selling the same or similar products charge the same price. Often there is room in a city both for a discount retailer and a supplier who offers advice, service and convenience. People often invest little effort in

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drafted by a lawyer, and contact with the lawyer is minimized or absent until the proceeding in court. In footnote 25, the authors concede "if lawyers or clients prefer, some client contacts will involve lawyer time and thus not be delegated. Assuming that the lawyer could productively spend time elsewhere, the more time the lawyer spends with the client, the higher the fee will have to be to meet expenses." At least some people would judge the process described as service of very low quality. See, e.g., Feiner, Primavera, Farber & Bishop, "Attorneys as Caregivers During Divorce," 52 Am.J. Orthopsychiatry 323 (1982); Redmount, "Marriage Problems, Intervention and the Legal Professional," 50 Conn.B.J. 11 (1976); Redmount, "Attorney Personalities and Some Psychological Aspects of Legal Consultation," 109 U.Pa.L. Rev. 972 (1961). Of course, paralegal workers could listen to the clients' stories and offer support and counselling, but this does not seem to be what Muris & McChesney are suggesting.

shopping and investigation. They may decide that a product offered for less really is not as good as that offered by the retailer in the convenient location who gives advice and is willing to replace or repair troublesome products without question. There probably will be room for legal services sold in discount houses, boutiques, and stores for discriminating customers.

Most of the writing based on theories about economics, advertising and the practice of law is quite speculative. The authors predict the future impact of changing the rules concerning lawyer advertising by drawing on theoretical ideas. They are not describing what has happened in any systematic way. Often their analysis is based heavily on personal experiences with law practice, the newer legal clinics or stories about lawyers who advertised and increased their caseload by incredible amounts. Their analyses are plausible and often insightful. However, they may be wrong. They may have labelled as typical what is rare and unusual. They may have underestimated consumers' problems in gaining the information about lawyers' services and fees needed to make judgments. We must look for any better evidence we can find.

Instead of theorizing about the impact of lawyer advertising or relying on personal experience, we could hope for a systematic collection and analysis of data. As so often is true, little exists. The major empirical study of the impact of regulations limiting lawyer advertising was conducted by staff members of the

Cleveland Regional Office and the Bureau of Economics of the Federal Trade Commission[53] They measured the impact of restrictions on lawyer advertising imposed by different state laws on the prices charged for five routine legal services. The services were (1) a simple will, (2) a simple will with a trust provision, (3) a non-business bankruptcy, (4) an uncontested divorce, and (5) a personal injury where the driver of the other car admits responsibility and there is no permanent pain, disability or lost earning capacity. Lawyers in seventeen cities in different states were asked what they would charge for each service. The fees asked were transformed to reflect differences in the cost of living in each of the cities. The laws concerning lawyer advertising were classified for restrictiveness, and multiple linear regression analyses were applied to the data. The basic finding of the study was

> [g]enerally, . . . restrictions on advertising raise prices. Attorneys in the more restrictive states, on the average, charged higher prices for most simple legal services than those in the less restrictive states. The fact that stronger restrictions on advertising are associated with higher prices suggests that, in this type of market, the dominant effect of advertising is to enhance price competition by lowering consumer search costs. [Emphasis added.][54]

What are we to make of the FTC study? We should read it carefully because it is likely to play a role in debates about

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53. Staff of Federal Trade Commission, supra n. 9.

54. Id. at 79.

lawyer advertising. Its very title--"The Case For Removing Restrictions on Truthful Advertising"--suggests that it is a partisan brief in the form of a scientific study about the impact of restrictions on lawyer advertising on the price of basic legal services.[55] The study does offer evidence of the expected relationship between restriction and price. However, the case is not as clear as the study's conclusions and the press reports about them claim.[56] At the outset, the sample of cities studied seems strange. The largest cities in the country are omitted. The study does not deal with New York, Los Angeles, Chicago, Philadelphia, Dallas-Ft. Worth or Atlanta. The investigators

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55. We cannot treat the staff report as a scientific study in a refereed journal. We must read it carefully, remembering that its authors are not neutrals. The American Bar Association has tried to gain legislation or judicial decisions which would stop the FTC from regulating lawyers. The FTC, in turn, is very critical of what its staff sees as the ABA's attempt to ward off competition in the delivery of legal services. Nevertheless, while the report is a partisan document, some or all of it may be right.

56. Linda Greenhouse reported in the N.Y. Times, Dec. 25, 1984, at 22, col. 1, "[a] Federal Trade Commission staff report issued earlier this month was only the latest of numerous studies to conclude that advertising by lawyers brings increased competition and lower prices for legal services. . . . The researchers found that legal fees for the same services were lower, by 5 to 13 percent, in states with the fewest restrictions on advertising." As we will see, this misreports what the study actually found and ignores many important qualifications. James J. Kilpatrick, the conservative columnist said that the "significant evidence turned up by the FTC study is that prices for five familiar legal services are lower in the less-restrictive states." Kilpatrick, "Lawyer Advertising Drives Prices Down," Wis.St.J., Jan. 16, 1985, §1, at 9, col. 5. Data reported in the tables of the FTC study do not show this. Kilpatrick was misled by the text of the report.

wanted to match states with different kinds of restrictions on lawyer advertising. However, California is represented by Fresno and not San Francisco, Los Angeles or San Diego. Missouri is represented by Springfield and not St. Louis or Kansas City. A defender of the study could argue that we might expect freedom to advertise to have greater impact in the larger cities where there would be mass markets that could be reached. A critic could object that the study's sample is so far from ideal that its statistical results are suspect.[57]

With one exception,[58] less than a quarter of the lawyers in any city studied advertised at all.[59] Almost none of those who advertised used television or radio. Most used the yellow pages of the telephone directory, a means that is cheap but unlikely to have a powerful effect on fees. Very few of those who did advertise anything stated specific fees that would be charged for particular services. This casts doubt on whether, as the FTC Report asserts, the "dominant effect of advertising is to enhance price competition by lowering consumer search costs."[60] Indeed, we can ask how the nature of the state's rules on advertising

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57. See Berk and Ray, "Selection Biases in Sociological Data," 11 Soc.Sci. Research 352 (1982).

58. 37% of the lawyers in Albuquerque advertised.

59. In all but five of the seventeen cities, less than 20% of the lawyers advertised. In the five cities where more lawyers advertised the percentages were Milwaukee 20%, Baltimore 20%, Columbus 21%, Fresno 23% and Albuquerque 37%.

60. Staff of the Federal Trade Commission, supra n. 9, at 79.

caused differences in the cost of the five types of legal services studied if so few of the lawyers exercised their freedom to advertise.

Most of the results stressed in the text of the FTC report were based on averages. However, averages can be misleading and difficult to interpret. We often think of an average as typical, but extreme cases can make an average misleading. When we read the FTC study's tables carefully, we see that the presence or absence of advertising restrictions often does not produce the effect predicted by the investigators' theory. At the very least, we must recognize that limiting advertising is not always associated with higher prices for all kinds of work. For example, Table D of the study shows there is a statistically significant relationship between barring direct mail advertising and a lower price for a simple will but higher prices for divorces and personal injury work. There is also a statistically significant relationship between limiting the content of advertisements in any way and a lower price on simple wills but higher prices on personal injury work. Connecticut has very restrictive rules on lawyer advertising. However, the fees of Hartford lawyers for four out of the five services studied are lower than average while the fee for the fifth service is just average.

Furthermore, the lack of restrictions on advertising did not necessarily mean lower prices for all the legal services studied. This was true even where a relatively high percentage

of the lawyers advertised. California, Michigan and Wisconsin were classified by the FTC staff as the three least restrictive states. Fresno is the only California city included in the study. 23% of the lawyers surveyed in Fresno advertised, and this is the second highest percentage in the 17 cities surveyed. Nonetheless, Fresno has higher than average rates for each of the five routine legal services except personal injury. Also, in Detroit, Michigan, the average rates for wills with trusts, bankruptcy and divorces were lower than the average fees of the 17 cities in the study; however the average fees for simple wills and personal injury were higher. Milwaukee, Wisconsin has above average fees for simple wills and divorces but lower than average fees for a will with a trust and bankruptcy. The percentage of the award taken under contingent fees in personal injury was 1% lower than average.

The study also compared fees of attorneys in all 17 cities who advertised and fees of those who did not. Those who advertised a specific service provided it at a lower price than both those lawyers who did not advertise at all and those who advertised but did not mention that particular area of practice. However, personal injury was the exception. "In the three cities with statistically significant results for personal injury service, attorneys who advertised personal injury services appeared to charge about a 3 percent higher contingent fee if the case [was] settled before trial than those who did not advertise

personal injury services."[61] In a footnote, the report says

> we have been told by some legal clinics that they expect their other routine services to give them a client base for the more lucrative personal injury case. This would be consistent with advertising firms charging less for the other services to attract clients with personal injury cases.[62]

This statement, submerged below the text, undercuts much of the argument made in the body of the FTC report. Perhaps loss leaders do serve consumer interests, but this is a very different argument than that made in the report.

The FTC report argues that advertising allows informed consumers to compare prices and that this tends to push prices downward. However, exceptions to this axiom, found in the study's tables but not stressed in its text, show that it does not always work this way. The causal mechanism is not simple and direct. Competition and somewhat informed consumers may affect the behavior of those marketing any product or service, but suppliers have many options. For example, Americans came to believe that Japanese cars were of higher quality than American ones. American manufacturers could have responded by improving the quality of their cars or advertising so that the public would think that their quality was better. Of course, they did both, and some of us think they did more advertising than engineering.

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61. Staff of the Federal Trade Commission, supra n. 9, at 125.

62. Id. at 125, n. 267.

Lawyers, too, will be able to cope with more, but not fully, informed consumers in a number of ways. Lower prices for higher quality work is not necessarily the only option open to them. Indeed, it may be easier for lawyers to create the false impression of quality than it is for automobile manufacturers. Legal services are harder to judge than automobiles that will not operate.

The FTC study attempted to deal with the concern that lower prices would also lower the quality of service. The authors point out that quality is difficult to define since clients may be satisfied with poor service or unhappy with excellent technical lawyering. They speculate that advertising may compensate for any corner-cutting by pressing for new efficient techniques of delivering legal service. Then they rely on Muris and McChesney's[63] study of the Jacoby & Meyers Legal Clinic in Los Angeles.[64] The clinic advertised extensively, and took steps to control costs. The first part of the Muris and McChesney study compared clients' subjective reactions to Jacoby & Meyers' handling of several types of cases with the reactions of others who had used traditional firms for similar cases. Jacoby & Meyers did better than traditional firms on all seven ratings of lawyer quality used. Clients saw it as "more prompt, interested,

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63. Muris & McChesney, supra, n. 43.

64. See Sullivan, "The Upstart Lawyers Who Market the Law," N.Y.Times, Aug. 26, 1979, §3 at 1, cols. 1-2.

and honest; as better at explaining matters, keeping clients informed, and paying attention to customers; and, finally, as more fair and reasonable in its charges."[65] However, Muris and McChesney sent out 650 questionnaires but only 74 (52 from the traditional firms and 22 from Jacoby & Meyers) were returned in a form that was usable. The authors tell us nothing about the 576 clients who did not respond. While Muris and McChesney's results support their position, clearly we must be cautious about using this part of their study.

The second part of Muris and McChesney's study involved comparing the results obtained by Jacoby & Meyers and by traditional firms in cases where monthly child support payments were at issue. They used multiple regression analysis to estimate the degree to which representation by the clinic influenced the amount of the award as compared with other factors. They thought this was an objective measure of the quality of service. "'Better service' for the husband would be defined as a lower award of child support, all else being equal, and for the wife as a higher award of child support."[66] They found that clinic representation of the wife increased the per child award, a result significant at the .025 level. "Clinic representation of the husband reduced the monthly payment, though

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65. Id. at 198.

66. Id. at 202-203.

this figure is not significant at a level that statisticians would consider sufficient to conclude that the clinic provides better quality."[67]

The FTC staff recognized the limitations of Muris and McChesney's article. They point to the size of the data base, and they acknowledge that it is a case study of one clinic that had been in existence seven years. We cannot be sure that the positive outcomes were caused by the clinic form and its high volume approach based on advertising. Perhaps those who ran the clinic would have run a traditional law practice in such a way as to produce equally positive results. We do not know that Jacoby & Meyers continued what Muris and McChesney argue was its superior service when they conducted the study. We do not know whether other clinics or other lawyers who advertise but do not organize their practice in the clinic form would do as well. Some might want to debate the measures of quality. For example, we might want to appraise an entire divorce proceeding and not just child support. Child support often is but part of a total solution to the divorcing parties' and children's problems. Nonetheless, the FTC staff insist that the study shows at least that low prices and an elaborate advertising campaign do not necessarily reduce quality. They conclude "there are no other empirical studies of the legal services market which contradict

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67. Id. at 205.

these results."[68] However, since when the Report was written there were no other empirical studies at all, the absence of contradiction does not seem like overwhelming evidence of anything.

The search for better evidence about the impact of lawyer advertising yielded some suggestions. There still are many unanswered questions about what is taking place and what will take place in the future. Even if the FTC study clearly had established that advertising lowered the price of the five fairly

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68. Staff of the Federal Trade Commission, supra n. 9, at 141. In a study published after the FTC Report, Murdock and White dispute the argument that advertising has no impact on quality. They correlated the ratings of lawyers in the Martindale-Hubbell Directory with advertising in the yellow pages. They found that lower quality lawyers are more likely to place such advertisements. Murdock & White, "Does Legal Service Advertising Serve the Public's Interest? A Study of Lawyer Ratings and Advertising Practices," 8 J. Consumer Pol'y 153 (1985). However, Thomas points out that the study does not truly say much about the quality of service. The correlation may be spurious. "It does, however, tend to confirm the unsurprising view that successful, older, well established lawyers, who are respected and admired by their colleagues, are less likely to advertise. They do not need to advertise. The type of services which they provide -- and presumably their ability to charge premium fees -- are not particularly likely to be directed at the general public." Thomas, "Legal Service Advertising -- A Comment on the Paper by Murdock and White," Id. at 165, 166. Indeed, it is possible, if not likely, that many of the highly rated lawyers in the Martindale-Hubbel Directory would be incompetent to handle the legal problems of individuals. High ratings may reflect the high status practice involved in representing businesses and wealthy individuals. These lawyers are unlikely to have much experience in family or criminal law or representing individual debtors or plantiffs in personal injury work. This is not to say that reputation among the members of the bar is unrelated to quality of work, but, at best, it is only a surrogate for a hard-to-define concept.

simple services studied, we could not be sure that advertising would affect more complex legal practice. My review of the literature revealed a great deal of speculation and advocacy of partisan positions. Indeed, as I argue in the next sections, we may not even be asking all of the right questions.

III. Consumer Interest and Lawyer Advertising.

The leaders of the bar who resist advertising and the reformers who champion it agree about broad goals. People should have access to legal services. Consumers gain when quality services are available at reasonable prices. Consumers benefit from accurate and relevant information so they can make informed choices whether to seek a lawyer and which one to contact. On the other hand, consumers lose if advertising deceives them. They lose if the costs of advertising lower the quality of services. They also might lose if the cluster of ideals and attitudes associated with professionalism and fiduciary obligations were replaced by lawyer self-interest or by bureaucratic constraints in a standardized system geared for efficiency.[69]

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69. Many lawyers put more time into cases than they can bill clientss for. They want to do the job right, they think the client ought to win or they hope the work will pay off in the distant future. As law offices become more efficient and emphasize commercial rather than professional values, it may be harder to give away services in this manner. The decision may be moved from the lawyer handling the case to a manager. On the other hand, lawyers now may bill other clients more to compensate for putting too much into cases that do not pay. We may differ

Substantively, we must evaluate a difficult set of uncertain trade-offs to appraise lawyer advertising. For example, Sandy DeMent, Executive Director of the National Resource Center for Consumers of Legal Services, saw the balance this way:

> We all know the abuses (that plague advertising in other fields) are going to appear. It will be a miserable species of communication, but it will bring competition and it will harden consumers in a way they haven't been hardened before.[70]

Moreover, we have to compare lawyer advertising with the way lawyers established reputations before the restrictions on advertising were relaxed. We have to weigh the costs of lawyer advertising against the problems faced by consumers finding lawyers when they have little reliable information. Potential clients rely on recommendations by friends, neighbors and relatives. Choice often is influenced by reputation or notoriety. Writing about the early 19th century, Gordon notes

> if public life was no longer an attractive financial alternative to private practice, it remained an almost indispensable supplement. Despite the stingy salaries of public officers, even lawyers with no taste for politics were driven to seek office to advance their careers. To rise in practice, a lawyer needed clients and was one of the few ways for a lawyer to get public exposure. It produced occasions for oratory--campaign speeches, Fourth of July orations, legislative debates--that might capture the attention of potential clients, those merchants, bankers, and corporate directors who sought to cultivate young

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about whether this kind of progressive income tax is justified.

70. Falk, "Lawyers Are Facing Surge in Competition as Courts Drop Curbs," Wall St.J., Oct. 18, 1978, at 1, col. 1, p. 15, cols. 1-2.

politicians for their own purposes.[71]

Recently the number of lawyers in American state legislatures has declined. One explanation is that lawyers no longer need to run and campaign to gain publicity now that they can advertise.[72] Some of this decline began to occur before the Bates decision, and so advertising is not a complete explanation for it. Nonetheless, whether we see a gain or loss from this change, we must consider it in thinking about the possible impact of relaxing the rules against advertising. We also can ask whether fewer or different kinds of lawyers are willing to run for the office of prosecutor or to be judges since these kinds of campaigns may be less necessary to build a reputation than when lawyers cannot advertise directly.

Two writers further sharpen the issues by adding institutional or structural dimensions to the problem of regulating lawyer advertising. Komesar[73] suggests comparative institutional analysis. He says that legal decisions involve a choice among imperfect alternative decision-making institutions. Consider the most obvious possibilities in the case of lawyer

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71. Gordon, supra n. 31, at 453.

72. Barlas, "Where Have All the Lawyers Gone?" Nat'l L.J., Jan. 19, 1981, at 13, cols. 1-4.

73. Komesar, "In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative," 79 Mich. L. Rev. 1350 (1981); Komesar, "Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis," 51 U.Chi. L. Rev. 366 (1984).

advertising. It could be: (1) left to be policed by "the market"; (2) regulated by state supreme courts together with bar associations; (3) regulated by the Federal Trade Commission and state regulatory agencies that deal with trade and consumer protection; or (4) regulated by courts and juries using doctrines of misrepresentation, fiduciary duty, undue influence, unconscionability, warranty and malpractice. Of course, combinations of these four approaches are possible. We could rely, for example, on the market backed up with varying degrees of court and jury determinations of misrepresentation, malpractice and the like. The amount of regulation, and its costs, would turn on the nature of the substantive rules adopted, the defenses recognized, and the procedural and evidentiary rules imposed.

The impact of legal regulation of advertising is further complicated. Friedman[74] suggests that in fashioning an approach to any problem the nature of the rules themselves is important. He argues that a vital part of the legal system depends on "well settled" rules that are actually free of doubt as a matter of ordinary, patterned human behavior. Discretionary rules "are tolerable as operational realities only in those areas of law where the social order or the economy can afford the luxury of slow, individuated justice. If there is a social interest in

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74. Friedman, "Legal Rules and the Process of Social Change," 19 Stan. L. Rev. 786 (1967).

mass handling of transactions, a clear-cut framework of nondiscretionary rules is vital."[75] Of course, lawmakers can state formal rules in discretionary form, but the rules actually may be nondiscretionary at the point of application. For example, the stated rules concerning sentencing of those convicted of a crime may call for a qualitative weighing and balancing of factors. The working rules of prosecutors, defense lawyers, social workers doing pre-sentence investigations and judges are likely to be quantitative so that all involved will know the price for certain offenses given the number of prior convictions.

We can sketch an application of these ideas in the area of lawyer advertising that suggests the nature of the decisions that lawmakers must make. State supreme courts in the United States make decisions about lawyer advertising. However, in fashioning and applying rules the justices of these courts are influenced by state bar associations. These state associations, in turn, are influenced by standards written by the American Bar Association. A lawmaker must worry that people working in this structure will fashion a cartel favoring lawyers' interests while talking of protecting the public. Organized groups of lawyers will be concentrated. Potential and actual clients, however, are a diffuse group, almost impossible to organize. Other institutions must champion consumer interests. For example, all of this

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75. Id. at 792.

activity is evaluated by the Supreme Court of the United States as it applies the constitution. It is further influenced by the Antitrust Division of the Department of Justice and by the Federal Trade Commission. Both agencies challenge regulation of the profession. Both champion the ideal of competition as the universal solvent for social problems.

Many state bar associations have followed the ABA's lead and proposed strict regulations specifying where lawyers can advertise and what they may and may not say. These rules, whatever their defects, have the virtue of telling lawyers what they can and cannot do. The rules are justified in terms of avoiding misrepresentation or bait and switch tactics, and so speak to this consumer interest. However, certainty and avoiding misleading statements may cost consumers the benefits of competition. The Antitrust Division and the FTC raised this challenge, and the Supreme Court of the United States ultimately will draw the lines by applying the constitution. An antagonistic thrust and parry among these institutions might produce the best compromise we can hope for.

However, it is not clear that any flat rule dealing with where and how lawyers advertise could pass constitutional challenge. Perhaps only a qualitative standard--such as lawyers may advertise as long as the advertising does not contain material misrepresentations--will be upheld. If this is the case, we must ask who could challenge particular advertisements and what body would decide the matter. In many states, a

formally independent agency makes recommendations to the state supreme court in a proceeding concerning the suspension or revocation of a lawyer's license to practice. However, state and local bar associations play important roles in the process. They may bring complaints against particular lawyers, and they may be able to influence appointments to the agency and appropriations by the state legislature to support it. Given the organized bar's general hostility to price competition, advertising and new forms of practice, this institutional setting might severely limit advertising. Of course, a lawyer disciplined always could appeal on constitutional grounds. However, the burden of defending particular advertisements itself might be enough to discourage many from advertising in ways that bar officials might question. On the other hand, threats of constitutional challenge and antitrust prosecutions might curb the established bar's eagerness to battle advertising.

Alternatively, we could rely on market sanctions-- the risk of losing reputation and custom--backed by the same legal regulation faced by any advertiser of goods or services. Perhaps most lawyers care enough about their reputation with actual and potential clients and with judges and other lawyers as well, to curb advertising excesses. Perhaps clients want a lawyer who fits the conventional image of a professional rather than that of a used car dealer. We might expect only a very few to engage in deceptive advertising or to lower the quality of the service they

offer to recover the costs of advertising and mass marketing.[76] As to those few who were not deterred by other-than-legal sanctions, we could ask why conventional legal responses would be inadequate.

Even if there were no special restrictions imposed on lawyers, all sellers of services are subject to some regulation.[77] On one hand, federal and state agencies regulate deceptive trade practices. On the other hand, injured individuals can sue for misrepresentation, undue influence, breach of fiduciary duty and the like.

Consumer protection agencies are unlikely to have the

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76. My colleague, Neil Komesar, points out that we can question the bar groups' case against advertising insofar as it claims that ads lead to a lowering of quality. Lawyers who do not advertise also face pressures to cut costs by lowering quality so they can pay their bills and make more money. Perhaps some lawyers' professionalism would crumble under the added cost of an advertising campaign. However, the financial burden of an advertisement in the telephone directory yellow pages and a major campaign on television must be distinguished. It is unlikely that the cost of an advertisement in print would change the way any lawyer practiced. Moreover, a wealthy firm with an expanding business might find the added cost of a television campaign to offer little additional incentive for cutting quality than exists without advertising. The bar's argument rests on an image of advertising expense being the straw placed on a scale that tips the balance toward cutting the quality of services. There are many other straws being placed on that scale as well. We should suspect that advertising tips the balance, if at all, in a few limited situations.

77. In our society, total deregulation is rare. Usually, the real choice is leaving matters to the market supported by general regulation or turning to special regulation. Lawyers' advertising is subject to contract and tort limitations as well as consumer protection legislation. See, e.g., Blumenthal, "Wide Abuses Reported In Ads by Professionals," N.Y. Times, Feb. 12, 1979, at B-1, cols. 1-2. The question is whether more is needed.

interest or the resources to take on a new area and give it adequate attention, particularly in a time when government expenditures are being cut. Individuals will face difficulty financing private law suits complaining about lawyer advertising. If it were clear that lawyer advertising brought about significant problems of misrepresentation and poor quality work, courts might make suits easy to win so that lawyers would be deterred from unprofessional conduct. For example, the fiduciary duty doctrine could be expanded to hold lawyers to a high standard of honest disclosure in making representations to potential as well as actual clients.[78] A field of lawyer malpractice might develop, following the treatment of the medical profession. If courts allowed emotional distress or punitive damages, the sums involved could make it worth litigating claims for misleading advertising.[79] All of this likely would lead to the formal statement of highly qualitative rules--fiduciary

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78. Compare Frankel, "Fiduciary Law," 71 Calif. L. Rev. 795 (1983).

79. If an expanded liability for misrepresentation or malpractice developed, the price of lawyer's insurance probably would rise, the costs would have to be passed along, and the lower prices produced by competition might be pushed back up again. For a skeptical reaction to what he calls "the landlord will raise the rent and evict the grandmother" argument, see Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power," 41 Md. L.Rev. 563, 604 (1982). Kennedy says "it is not possible to predict a priori what consequences will follow when the decision maker imposes a nondisclaimable duty. It all depends on the particular conditions of the market for the commodity in question, and its relation to other related markets." Ibid.

duties and the standards for emotional distress and punitive damages are hard to reduce to simple and clear rules. We might want lawyers to be unsure as to how close to the line of misrepresentation, breach of fiduciary duty or malpractice they could come. Rules of thumb might develop as to what was safe, but they would require advertising that no one could question. On the other hand, even if such doctrinal developments took place, lawyers might not be eager to represent clients suing other lawyers who practiced in the same area. Perhaps enough deterrence would be produced if only a few marginal but competent lawyers were willing to represent such clients and accept whatever social sanctions other lawyers might use against them.

This sketch of a comparative institutional analysis applied to lawyer advertising is not complete. In Komesar's words, we are "choosing the best, or least imperfect, institution to implement a given social goal."[80] However, it is not easy to decide which institution is the least imperfect, and it will require a great deal of knowledge about interdependent systems in operation. It also will require some normative judgments. For example, serious problems of misrepresentation could slip past reputational sanctions backed up by administrative regulation or individual litigation. How could clients know they had received poor legal service? Perhaps it is enough if unaware clients are

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80. Komesar, "In Search of a General Approach to Legal Analysis," supra n. 73, at 1350.

happy with what they received, but at least some consumer advocates are unlikely to accept this solution as adequate.

However, conceding that some cases of deceptive advertising might not be remedied still leaves the question of what to do about it. If we thought that such cases were likely to be rare or trivial, we might accept the lack of remedy, recognizing that no realistic choice can be perfect. We might not be so complacent if we thought that such cases were common or serious. We face the difficulty of predicting how often clients will be fooled and of evaluating the seriousness of the likely injury. Comparative institutional analysis poses issues, but it does not guarantee that choices among flawed institutions will be easy.

IV. Lawyer Advertising and Problems of Access and Equality before the Law.

Up to this point, I have accepted the way leaders of the bar opposed to lawyer advertising and reformers who advocate it have framed the issues. However, their debate might divert our attention from important problems. Even if advertising leads to delivering conventional legal services that can be standardized to more clients at a reasonable price, major questions of access and equality before the law will remain.

Insofar as it is successful, lawyer advertising may bring the wrong people to attorneys. Some clients might better solve their problems in other ways. The studies talk about the simple will, the consent divorce where there are no children and no issues of property division, and routine personal injury work. But why

should lawyers handle these problems in most instances? Advertising legal clinics or cut-rate lawyers may hinder the development of even cheaper kinds of solutions to standardized problems. Today one can buy do-it-yourself books and forms to handle wills and divorces.[81] In a community where adjusters and lawyers settle automobile accidents on a routine basis, many victims could handle the negotiations themselves if information about the rules of the game were available.[82]

If self-help is not appropriate, counselling from non-lawyers might be all that most literate people need. In many nations a person can buy help in filling out forms and taking them to the right place from people lacking the formal training of lawyers.[83] These people charge far less. Legal advertising may work to keep simple matters in the hands of the bar rather than

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81. See, e.g., Mack, "For $59, a New Yorker Wins a Divorce Without Lawyers," N.Y. Times, Jan. 6, 1977, at 22, cols. 1-6; Nash, "Do-It-Yourself Bankruptcy," N.Y. Times, June 27, 1976, §III, at 9, cols. 1-4.

82. People regularly settle many of these cases without lawyers now. See Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustments (1970). Generally, plaintiffs get better settlements when they have a lawyer. The text suggests that individuals might be able to do better than they do now with something less expensive than legal services. Insurance adjusters typically are not lawyers. Injured plaintiffs also might be able to play the game with less expensive help as long as the threat of bringing in a personal injury specialist was in the background.

83. In the United States, we can buy help in filling out our income tax forms from firms staffed with non-lawyers. Real estate brokers and bankers regularly help fill out the forms needed to transfer property interests although lawyers often are used in this area.

fostering the development of less highly trained people who could handle routine work more cheaply. Law firms and legal clinics delegate more and more work to paralegal workers. This suggests that they are cutting costs by moving problems out of the hands of lawyers and into those of people paid less. But even in these instances, clients probably are paying more than if lawyers were involved only minimally or not at all. Some of the "law store" approaches that have developed in the United States involve kits for such things as divorces or changes of names plus the chance to get advice from lawyers about how to fill out the papers and where to file them.[84]

Lawyers have responded in different ways to proposals calling for limiting or ending their role. Often the bar fights deprofessionalization unsupervised by an attorney.[85] Usually, lawyers argue that qualified professionals should see that the standardized product fits the situation. They offer images of "do-it-yourself brain surgery." Lawyers, unlike others, are licensed and responsible for the advice they give.

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84. See N.Y. Times, July 25, 1978, at B2, col. 2; N.Y. Times, Sept. 21, 1979, at D4, cols. 1-3; Wall St.J., Oct. 16, 1979, at 40, cols. 1-3; Nat'l L.J., May 14, 1979, at 7, cols. 1-2;; "Legal Services Offered in N.Y. Department Store," 65 A.B.A.J. 548 (1979).

85. Compare the effort to stop a legal secretary from selling and filling out legal forms. See "Challenge Facing the Legal System," N.Y. Times, Aug. 12, 1984, at A16, col. 1. See also Rothman, "Deprofessionalization: The Case of Law in America," 11 Work & Occupations 183 (1984); Immel, "Crossing the Bar: Attorneys Try to Stop Do-It-Yourself Trend in Some Areas of Law," Wall St.J., Sept. 3, 1976, at 1, col. 1.

On the other hand, some lawyers welcome and promote do-it-yourself approaches. Well designed books, check-lists and forms could minimize the risks by telling lay people "if X, Y or Z is the case, do not use this form but see a lawyer." Good self-help forms please lawyers because they can offer something to those who cannot pay large enough fees to justify a lawyer's time. Others see delegalization of routine transactions as necessary to protect the image of the bar. The President of the Florida Bar Association, for example, stated

> The Bar must "delegalize" matters that really do not require the services of a trained professional. In effect, routine and simple legal procedures that do not require the most important attribute of a professional, judgment, should be made available without the intervention of an attorney.
>
> Lawyers can . . . be employed for more important tasks where their services are truly needed and can be freed from mundane and repetitious tasks. The public as a whole would then have greater practical access to the legal system.[86]

Assuming clients understand that a routine service comes from someone who is not a lawyer, why should they be prohibited from making this choice? Undoubtedly, it is a good idea to have a professional check to see that a simple solution is appropriate. However, when we cannot afford to pay a professional, the choice often is between no help at all and help from someone without full professional training. It is not obvious that no help at

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86. Richman, "Consumerism and the Law: The Crisis in Communication and Understanding," 58 Fla. B.J. 5, 6 (1985).

all is always the best solution.

We also can ask what advertising standardized legal services does for people whose problems do not fit into routine patterns. How can we better deliver high quality legal services for the complex will, divorces where child custody and property settlement are in issue, personal injury or products liability cases involving large sums and the like? The legal problems of the poor and the lower middle class often can be exceedingly difficult. They can involve problems of proof, jurisdiction and procedure. Clients find these cases hard to deal with themselves, and the problems call for someone who knows how people usually resolve them. Discussions of lawyer advertising risk diverting attention from this issue, but advertising may have some indirect influence on its solution. For example, through advertising lawyers may be able to recruit clients who have suffered similar injuries for which there is a chance of gaining compensation.[87] In this way, the costs of legal work may be spread over many cases and minimize what any one client must pay.

Advertising may have some impact on access to justice. People may learn just enough to tip the balance and send them to a lawyer. Potential clients can gain at least a little additional information about the kind of person they might hire

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87. See, e.g., Moskowitz, "Lawyers Learn the Hard Sell--and Companies Shudder," Bus. Week, June 10, 1985, at 70-71.

from advertisements in the telephone directory yellow pages and a little more from television commercials. Sometimes they will sense that they should avoid the lawyer in question. They may learn that lawyers have different personalities and not all are stiff upper-class members of the elite. Advertising also may make the issue of legal advice salient and remind people there are many kinds of legal services available. Furthermore, if a simple divorce is widely advertised as available for $250, this may affect expectations and allow potential clients to make a rough estimate of what their more complex situation might cost. It could limit the fee for a complex divorce. At least, a lawyer who would charge a great deal more might have to convince a client that the increased price is justified by an added degree of complexity.

Given that advertising may have some effect, nonetheless we must recognize its limitations. Many of the studies jump quickly from the idea that lawyer advertising offers information to the conclusion that advertising will produce fully informed consumers able to shop for the best services at the lowest price. Ladinsky[88] points out that even rational consumers who know they need a lawyer face three problems: "(1) finding the right kind of lawyer (that is, one who will do divorce or criminal or real estate work); (2) finding one at the 'right' price; and (3)

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88. Ladinsky, "The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients," 11 Law & Soc'y Rev. 207, 216 (1976).

finding one who is 'good.'" Advertising conveys more useful information about the first, less about the second, and only almost nothing about the third.

It is hard to advertise effectively that one is a good lawyer. Claiming "I am the greatest," may help a professional boxer, but a lawyer who used the technique would risk offending many clients. It is difficult in a limited space or time to convey the kinds of things on which clients can make quality judgments. A lawyer could advertise that she was a graduate of a well known law school and had been in practice for ten years. However, this would be, at best, only a rough surrogate for information directly relating to quality. Even defining "good legal service" is not easy.[89] It is far easier to agree about what are poor legal services than what are acceptable or high quality ones.

What role can advertising play in access to justice and attempts to gain some measure of substantive equality in society? To answer this question we must consider how advertising fits into the process by which people turn to

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89. Bryant Garth notes that pressures for increased quality do not always serve the consumer interest. "A collective upgrading effort built on a uniform, high standard of performance will raise the cost of legal services, thus preventing access, and also will reduce the consumer's right to determine the appropriate level of investment in legal services. Individuals gain little when the exaltation of quality prevents the purchase of varying levels of services." Garth, "Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective," 1983 Wis. L.Rev. 639, 686.

lawyers. People will not pay much attention to advertising for legal services that they do not think they need now or in the future. Potential clients have a very limited understanding of what lawyers do and when a lawyer could help them. They know little about the price of legal services. Rick Abel argues

> clients tend to bring the kinds of cases that lawyers have taught them are justiciable--which generally means those involving enough property to warrant a substantial fee. If lawyers want to embark on a new era, they must educate their clientele to view the problem as susceptible to legal remediation.[90]

Insofar as lawyers teach what is justiciable,[91] we have to ask what part lawyer advertising plays in this education. We can guess that advertising plays only a limited role.

Felstiner, Abel, and Sarat[92] see three transformations they call "naming, blaming and claiming." One must perceive an experience as an injury, decide that he or she has a grievance against another, and then make a claim against the one blamed. Legal needs are not things that exist in society; rather they are social constructs. Mayhew[93] points out "we have a vast array of

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90. Abel, supra n. 51, at 9.

91. Lawyers may not be the most important teachers. We know little about where people learn what lawyers do.

92. Felstiner, Abel & Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . ." 15 Law & Soc'y Rev. 631 (1980-81).

93. Mayhew, "Institutions of Representation: Civil Justice and the Public," 9 Law & Soc'y Rev. 401, 404 (1975).

disputes, disorders, vulnerabilities, and wrongs which contain an enormous potential for generation of legal actions. But it is only a potential. Ideology and structure affect whether people define their situation as a problem and whether they see it as a problem for lawyers." Or, as Sally Lloyd-Bostock puts it,

> In a situation that is unfamiliar, . . . [a victim]. . . . lacks specific norms of his own and does not feel competent to generate them for himself from more general principles because there is a range of possibilities. What he feels is, therefore, often largely the results of what his lawyer, trades union, the police, friends and others have suggested to him since his accident.[94]

A person may not name, blame and claim because there are cultural norms and social sanctions against asserting rights through lawyers and courts, and these norms and sanctions may limit the impact of lawyer advertising. Merry and Silbey, for example, tell us

> [a] reluctance to take personal disputes to court is an important ingredient of respectability for working class and middle class families, but not for some segments of the poor. It may be that for those families already involved with welfare and other public agencies, the social meaning of turning to a public remedy agent is quite different."[95]

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94. Lloyd-Bostock, Fault and Liability for Accidents: The Accident Victim's Perspective 24 (1980).

95. Merry & Silbey, "What Do Plaintiffs Want? Reexamining the Concept of Dispute," 9 Just.Sys. J. 151, 176 (1984).

Engel[96] studied a small, predominantly rural county in Illinois undergoing social and economic change. He found

> [t]hose who sought to enforce personal injury claims in Sander County were characterized by their fellow residents as "very greedy," as "quick to sue," as "people looking for the easy buck," and as those who just "naturally sue and try to get something [for] . . . life's little accidents."[97]

Attitudes toward debt collection by merchants through legal action were different. In this culture "promises should be kept and people should be held responsible when they broke their word."[98]

Advertising might in the long run contribute to overcoming norms against asserting rights, but the process likely would be subtle and indirect. Perhaps an dignified educational approach would be more effective in doing this than a high pressure effort at salesmanship based on price cutting. The more advertising sells law the same way as used cars, the more the public may view seeking benefits as greedy. Perhaps all lawyer advertising taken together will make the idea of consulting lawyers more commonplace and less remarkable and in this way offset some of these norms prescribing asserting rights. Nonetheless, members

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96. Engel, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community," 18 Law & Soc'y Rev. 549 (1984).

97. Id. at 553.

98. Id. at 575.

of groups that honor self-help, keeping personal affairs out of the public view, and similar ideas will not necessarily be swayed by lawyer advertising. Sending out a message is one thing; its impact is something else.

There are a number of studies of how people recognize they need a lawyer and how they find the one they see. While these articles have yielded useful information, there are still many unanswered questions. Mayhew and Reiss[99] surveyed residents of Detroit, Michigan. They found an association between ownership of property and seeing lawyers because, they argue, the legal profession serves business and property. "The poor have fewer legal problems only in the narrow sense that they have fewer problems that the legal profession habitually serves."[100] They could use help in confronting various bureaucracies, but the effort seldom produces a fund of money from which a client could pay substantial fees. Ladinsky[101] obtained unpublished data from Mayhew and Reiss about the chain of intermediaries that channel clients to lawyers. They showed that a substantial number of people, "especially those at the top of the socioeconomic system, were informed about legal services through

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99. Mayhew & Reiss, "The Social Organization of Legal Contacts," 34 Am.Soc. Rev. 309 (1969).

100. Id. at 317.

101. Ladinsky, supra n. 88.

relatively close personal contacts with lawyers."[102] People were asked how they would find legal help if they needed it. 73% said they would contact a relative, friend or neighbor who was a lawyer or they would seek a referral from a relative, friend or neighbor who knew a lawyer.

Curran reported the American Bar Foundation study of legal needs. The sample represented the adult population of the United States.[103] Her findings paralleled those of Reiss and Mayhew in Detroit. Wills, purchase of real property and divorce were the problems most frequently taken to lawyers. People most often (45%) find lawyers through friends, relatives and neighbors, but about 15% found lawyers by reading the telephone directory yellow pages. 35% had never had any contact with a lawyer, and 28% have had but one contact.

The staff of the Yale Law Journal[104] reanalyzed the ABF data, using regression analysis to measure the strength of seven common explanations for lawyer use in personal matters. Income, perceptions about lawyers' fees, awareness of the usefulness of lawyers to handle certain problems and attitudes towards lawyers all failed to account for much of the variance in actual use of lawyers. Experience with legal problems, property ownership and

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102. Id. at 219.

103. Curran, The Legal Needs of the Public: The Final Report of a National Survey (1977).

104. Project, "An Assessment of Alternative Strategies for Increasing Access to Legal Services," 90 Yale L.J. 122 (1980).

contact with lawyers were much more powerful factors. A cumulative regression equation indicated that experience with legal problems explained 20% of the variation in lawyer use as compared to only 1.8% for ownership of property, and 1.5% for contacts with lawyers. In short, people become accustomed to using lawyers for various things and their use increases.

Campbell and Talarico[105] measured attitudes about hiring lawyers by drawing samples in Atlanta, Macon and Americus, Georgia. They conducted 1,200 interviews. On the basis of their data, they report that the decision to hire a lawyer is a two stage process: first, people must recognize they need a lawyer or one would be helpful; second, having decided a lawyer might be useful, one must decide to contact one. They found that those who are poor, black, and poorly educated often think that lawyers do not offer solutions to their problems.[106] Once people decide they need a lawyer, socio-demographic factors are not as relevant to the decision to seek one. However, 94 people out of the sample of 1,200 saw the need for a lawyer but failed to take the next step. Even when they saw a possible need for a lawyer, blacks in this group wanted to handle matters for themselves. Poor whites and those with little education may use lawyers less because they know less about free or low fee services that are

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105. Campbell & Talarico, "Access to Legal Services: Examining Common Assumptions," 66 Judicature 313 (1983).

106. Those who are poor, black, and poorly educated may be right.

available. They also lack the social skills necessary to contact a lawyer. The authors concluded that psychological, rather than racial or economic, factors govern what Felstiner, Abel, and Sarat called "naming, blaming, and claiming."

How does lawyer advertising fit into this picture? Insofar as we accept the suggestions of these studies, advertising may affect naming, blaming and claiming in a limited way. Ladinsky points to the chain of relationships connecting potential clients with lawyers and says "surely we would not expect many of the 73 percent who used relatives, friends, or neighbors to prefer advertising media . . ."[107] He argues that lawyer-seeking behavior seems to involve communication networks where "influential intermediaries reinforce media messages."[108] This suggests "if mass media information about lawyers--type of work, fees, quality--is to have personal meaning as a basis for action, it must be grounded in a network of interpersonal relationships."[109] Writing in 1976 just before the Bates decision, he predicted that relaxation of the ban on advertising would do "very little to 'open up' information channels."[110]

However, at least some advertising might work together with these other communication networks and prompt people to think

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107. Ladinsky, supra n. 88, at 219.

108. Id. at 221.

109. Ibid.

110. Ibid.

about contacting associates for recommendations. Some advertising might remind people of lawyers they know in other contexts. Mayhew and Reiss suggest that law practice is structured to deal with property transactions or the kinds of disputes that those who own substantial amounts of property are likely to face. Following the Yale Law Journal reanalysis of the ABF data, we could conclude that those who own property may be more likely to encounter what they see as legal problems. They have "their lawyer," just as they have "their accountant," "their doctor," and "their dentist." Perhaps the institutional or educational kinds of advertising--sponsoring public radio or classical music or running commercials that discuss points of law--are the most likely reach people who are accustomed to continuing relationships with a group of professionals. They may be willing to accept a broad definition of lawyers' work.

Perhaps advertising standardized services might affect lower income people similarly, bringing them to legal clinics or lawyers who deal with individual problems. If these people were pleased with the experience, they too might establish a relationship with a lawyer. They might return when they encountered other problems. However, we still would face Abel's point--"clients tend to bring the kinds of cases that lawyers have taught them are justiciable--which generally means those involving enough property to warrant a substantial fee."[111] Or,

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111. Abel, supra n. 51 at 9.

again in Mayhew and Reiss' words, "[t]he poor have fewer legal problems only in the narrow sense that they have fewer problems that the legal profession habitually serves."[112]

Advertising and other sources of information might help lower income people learn that lawyers can do many kinds of things for rich or poor clients. Many people think lawyers only draft wills, handle the papers needed to transfer real estate or battle in court before juries. School, television and experience fail to communicate a picture of what most lawyers do. For example, some translate clients' wishes into legal forms such as wills or applications for licenses or government benefits. Some litigate cases and fight appeals to higher courts. Some help plan conduct to ward off or minimize problems. Others work out solutions to problems by knowing who to call and what to say or by drawing on contacts and relationships. Still others help in political action or test cases to change the rules.

A lawyer who knew the system in a particular community could offer a great deal of help dealing with the welfare bureaucracy, seeking unemployment compensation, or coping with a housing authority. Supervisors often treat employees poorly, hoping they will quit. A telephone call from a lawyer representing the employee may be enough to stop the mistreatment. The lawyer may be able to help a client collect evidence enough to support threatening to file a complaint for discrimination. A credible

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112. Mayhew & Reiss, supra n. 93, at 317.

threat may be enough to prompt redress. However, these legal services are not the neatly standardized ones discussed in the articles advocating lawyer advertising. It might be hard to get across in a 30 second television commercial or a small notice in the yellow pages that a lawyer knows the local political system and how to negotiate, bluff and threaten those who participate in it.

However, perhaps the real problem is less making lower income people aware that such lawyers exist as finding a way to finance the provision of these kinds of legal services. On one hand, lawyers can do only a limited amount for those who cannot pay adequately for legal services. Lawyer advertising might create expectations in lower-income people which would be frustrated when they respond and seek legal services. On the other hand, sometimes lawyers are available with skill in coping with the problems of lower-income people, and there are ways to purchase their services for an affordable price. When this is true, it is not that difficult to spread the word through various social networks. An advertisement might reinforce a favorable folk tale being circulated through the social networks of the people who could use such a lawyer. On the other hand, if there are cultural norms and social sanctions against asserting rights, advertisements and folk tales might be less effective against folk wisdom such as "you cannot fight city hall."

All of this is highly speculative because we do not know that much about naming, blaming and claiming and how advertising might

affect the process. The dynamics of the process probably are subtle, and questionnaires and correlations are unlikely to capture them. Mather and Yngvesson[113] point out that disputants, supporters, third parties, and relevant publics may seek to narrow disputes by rephrasing and transforming them through imposing established categories for classifying events and relationships. They may, on the other hand, seek to expand them by adding new issues, by enlarging the arena of discussion, or by increasing the number and type of active participants. We still have a great deal to learn about where lawyers, or even threats to call in lawyers, fit into this process. And it is clear that while lawyer advertising sometimes may be important, it can play only a limited part in the social rituals leading to these transformations.

We should not exaggerate what lawyers could offer if the poor and members of the lower middle class brought more of their problems to them. Silberman reminds us "the characteristic lawyers' response to the legal problems of the poor is not to attack those problems directly, but rather to provide lawyers at public expense."[114] Abel, reflecting a very different political stance, warns "the continuing emphasis on redistributing lawyers, or on other legal institutional reforms, contains the profound

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113. Mather & Yngvesson, "Language, Audience, and the Transformation of Disputes," 15 Law & Soc'y Rev. 775 (1980-81).

114. Silberman, supra n. 38, at 15, 19.

danger that by strengthening the liberal myth that substantive justice can be attained under capitalism we will be simultaneously lulled into a false optimism and discouraged from seeking alternatives [such as different social systems]."[115] These warnings have force. However, again in Abel's words, "any redistribution of lawyers has the potential to promote incremental gains in both formal and substantive justice."[116] We must look for real solutions to the problems of the poor and the lower middle class, and we cannot be content with merely providing lawyers. Nonetheless, lawyers can help these people, the problem of access is important, and lawyer advertising, even accepting its advocates' case, can solve only a very small part of this problem.

Indeed, the debate about lawyer advertising may draw our attention from the larger question of access and vindication of rights. Advocates for unrestricted lawyer advertising claim it will lower the prices for lawyers' services in the market. This will solve the problems of access without requiring public subsidy. However, the services made available by increased demand created by advertising will not be the time-consuming

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115. Abel, "Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?" 1 Law & Pol'y Q. 5, 41 (1979). Compare Bachmann, "Lawyers, Law, and Social Change," 13 N.Y.U. Rev. L. & Soc. Change 1 (1984-1985); Gabel and Harris, "Building Power and Breaking Images," 11 N.Y.U. Rev. L. & Soc. Change 369 (1983).

116. Id. at 39.

counselling and "bargaining in the shadow of the law" that lower-income clients need to cope with public and private bureaucracies. Assuming that lawyer advertising succeeds in delivering low cost wills, uncontested divorces and name changes, we can also ask its advocates to show us what it will do for vindicating the rights found in constitutions and reform legislation.

Some may be content to have the rights promised by the liberal welfare state remain unenforced and merely symbolic. Lawyer advertising may stir up litigation and trouble.[117] Silberman argued for limiting the number of lawyers and maintaining rules against advertising to control the adverse impact of litigation on capitalism. Galanter,[118] however, contends that contemporary litigation is not "an eruption of pathological contentiousness or a dangerous and unprecedented loosening of needed restraints or the breakdown either of a common ethos or of community regulation." Rather it is a

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117. Compare Epstein, "Settlement and Litigation: Of Vices Individual and Institutional," 30 [U.Chi.] Law Sch. Rec. 2, 7 (Spring 1984)("[A]s the costs of litigation are in themselves deadweight social losses, the improvement they make in the human condition must be very large to justify their expense."); Lee, "The American Courts as Public Goods: Who Should Pay the Costs of Litigation?" 34 Cath.U. L.Rev. 267 (1985); Editorial, "Settling Out of Court," Wall St. J., Aug. 22, 1985, at 20, col. 1("Why should the taxpayers have to support a civil court system?. . . Private disputes, unlike criminal proceedings, often have no social consequences. The full costs should fall on the litigants themselves.").

118. Galanter, supra n. 36, at 67-68.

conservative response to learning that we could prevent harms and to a situation "where more of the interactions in the lives of many are with remote entities over which there are few direct controls."[119] "If some litigation challenges accepted practice, it is an instrument for testing the quality of present consensus. It provides a forum for moving issues from the realm of unilateral power into a realm of public accountability."[120] In any event, in a society based on individual rights, it is hard to justify responding to social problems by keeping people unaware of their rights or blocking access to lawyers to prevent those rights from being vindicated.

V. Conclusion

Lawyer advertising has generated controversy. Some, such as Chief Justice Burger, worry that true professionalism based on fiduciary duties towards clients will be lost as hucksters sell legal services in tasteless and deceptive ways. On the contrary, reformers tell us, advertising will inform consumers so that they can shop for services. This will promote efficiency and quality while expanding access to those who could not afford representation before. Both positions are overstated and reflect symbolic stances by those who seek to defend professional ideology or champion the simplifications of deregulation as the

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119. Ibid.

120. Ibid.

cure for all problems.

Lawyer advertising may play some part in enlarging access to legal services. This may provoke more substantive equality in our society. We cannot be sure because we know so little about the transformations involved in processing disputes. We do not know how people decide they need a lawyer and which one to call. We are just beginning to study what happens between lawyer and client when they meet. Advertising may push lawyers to work cheaply rather than doing the job right. However, it is hard to see why advertising will add much to the pressures to cut corners that have long existed. Advertising alone is not likely to push the bar into crass commercialism or produce a nation of rational informed clients seeking to maximize utility. Recognizing this, we must be concerned that largely symbolic debates about lawyer advertising may divert us from concern with more pressing issues of access and equality.