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Cartel Control of Attorney Licensure and the Public Interest*

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ABSTRACT

The purpose of regulating any profession is to assure competent practitioners, particularly where its absence can cause irreparable harm. Regulatory "licensing" ideally achieves such assurance, while at the same time avoiding unnecessary supply constriction. The latter can mean much higher prices and an inadequate number of practitioners. Regrettably, the universal delegation to attorneys of the power to regulate themselves has led to a lose/lose system lacking protection from incompetent practice while also diminishing needed supply. The problem is manifest in four regulatory flaws:

First, state bars—in combination with the American Bar Association—require four years of largely irrelevant higher education for law school entry. Most of this coursework commonly has nothing to do with law.

Second, and related, these seven-years of mandatory higher education (that only the United States requires for attorney licensure) impose extraordinary costs. Those costs now reach from $190,000 to $380,000 in tuition and room and board per student—driven by shocking tuition levels lacking competitive check.

Third, attorney training focuses almost entirely on a few traditional subjects, with little attention paid to the development of useful skills in most of the 24 disparate areas of actual practice (e.g., administrative, bankruptcy, corporate, criminal, family, taxation, et al.). And schools often pay scant attention to legislation, administrative proceedings, or the distinct areas of law that will be relevant to a student's future practice.

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* The word "cartel" is used purely according to its economic definition—"a grouping of producers who work together to protect their interests." *See Cartels*, Economics Online, www.economicsonline.co.uk/Business_economics/Cartels.html.

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Fourth, state bars rely on supply-constricting bar examinations of questionable connection to competence assurance. In the largest state of California, the bar examination fails about 2/3 of its examinees. This system has fostered an opportunistic cottage industry of increasingly expensive preparatory courses that further raise the cost of becoming an attorney—even after 7 years of higher education.
Meanwhile, the bars regulating attorneys in the respective states:

a) Do not treat negligent acts as a normal basis for discipline (outside of extreme incapacity);
b) Do not require malpractice insurance—effectively denying consumer remedies for negligence;
c) Do not allow clients injured by malpractice to recover from "client security funds";
d) Do not require post-licensure "legal education" in the area of an attorney's practice;
e) Do not test attorneys in the area of practice relied upon by consumers—ever; and
f) Respond to cost-effective, technology-centric solutions to legal problems not by regulation to assure consumer benefit, but by attempts to categorically foreclose them in favor of total reliance on often unavailable/expensive counsel.

No area of state regulation has more openly violated federal antitrust law than has the legal profession. The United States Supreme Court held in 2015 that any state body controlled by "active market participants" in a profession regulated is not a sovereign entity for antitrust purposes without "active state supervision." Yet four years later, attorneys continue to regulate themselves without such supervision, overlooking the threat of criminal felony and civil treble damage liability.

KEYWORDS

Consumer Protection; Antitrust; Attorney Regulation; Legal Education; Student Debt

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I. Introduction

An incompetent or dishonest attorney can visit irreparable harm upon his or her clients, and lessen the fairness and efficacy of the judicial system that is central to our democracy. Attorneys and physicians have a more compelling justification for a licensure requirement to practice than do barbers or astrologers (which California once seriously considered licensing). But these supply constraints have their own negative effects. They mean higher prices and diminished availability of needed services. So how do we reconcile these two legitimate and somewhat conflicting features? The question raised here is how to accomplish that balance, and just as importantly who should be doing the balancing.

It is critical to recognize that existing systems of entry in the licensed professions are controlled by those currently practicing in the professions. Although current practitioners may have advantageous knowledge about needed performance, the professions' control of their own supply gives rise to the appearance of a serious conflict of interest. Our regulatory systems raise the proverbial drawbridge for the benefit of those already in the castle. Those with an occupational self-interest decide who will be allowed to offer services in the future. This article questions whether this process reflects functioning democracy—one in which the People control the state, not the special interests.

Two facts make this a timely legal and ethical issue.

First, supply control through licensure is a restraint of trade that artificially affects prices—a *per se* antitrust offense when performed by horizontal competitors.

Second, the U.S. Supreme Court in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S.___, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015), recently held that state regulatory boards controlled by "active market participants" in the trade or profession being regulated categorically lack sovereign status, and may not claim state action immunity for anticompetitive decisions made in the regulatory context unless an independent state body actively supervises all final decisions.

This profound legal circumstance raises particular questions as to the supply of attorneys in an era in which an increasing number of people in the U.S. report that they cannot afford a lawyer—and in which an estimated 75% of litigants in civil court are unrepresented.[1] It is time to revisit the wisdom and motivations behind deeply-engrained barriers to entering the legal profession. These barriers have been erected and maintained by attorney-dominated state bars across the country, with little-to-no supervision. Of specific and immediate concern are: 1) unprecedented student debt resulting from the skyrocketing costs of education (both undergraduate and at law schools); 2) unparalleled higher education prerequisites to licensure compared to other nations, without proof that seven years of higher education provides actual assurance of attorney competence; 3) declining bar exam pass rates nationwide, on an exam that has not been proven in content or cut score to correlate at all with competence assurance (especially given the evolution of legal practice in this technological age); and 4) un-redressed consumer harm resulting from failure to measure attorney competence at any point after the bar examination,

[1] William D. Henderson, *Legal Market Landscape Report Commissioned by the State Bar of California*, at 20 (July 2018).

and a profession-controlled system that generally does not provide a safety net to compensate victims who are injured by attorney error.

We ended the medieval guilds that controlled entry into occupations with good reason. Have we now resurrected them without proper checks?

This article seeks to measure and evaluate the performance of the legal profession in its own regulation, not based on our self-interested notions of public-spirited dedication to the common good, but based on what actually happens, what it costs, and how its justifications may not exist by any good faith measure.

It is possible to have both enhanced supply of attorneys and assured competence. Currently, we have neither. Here we propose ten reasonable corrections to the existing system that will bring about much–needed reform to the legal profession.

II. The Anticompetitive Underpinnings of Attorney Licensure in the United States

A. Attorney Self-Regulation and the State of the Legal Services Market

It has been well-documented for quite some time that indigent populations cannot access the legal services they need. According to a 2017 report, 86% of the civil legal problems reported by low-income Americans over the scope of one year received inadequate or no legal help.[2] And 71% of low-income households experienced at least one civil legal problem, including problems with domestic violence, veterans' benefits, disability access, housing conditions, and health care.[3] These problems are not limited to the indigent. More and more individuals across the U.S. report that they cannot afford a lawyer.[4] Indeed a recent report found that a full 76% of civil cases in state courts involve a self-represented party.[5]

The diminishing ability of a majority of people in the United States to access legal services calls for a careful reexamination, starting with the origins of our current system. We can no longer ignore that onerous barriers to enter the profession, and ethics rules preventing the delivery of legal services through less expensive means, are the direct result of regulatory capture. Indeed, all of these artificial barriers—from exorbitantly difficult bar examinations to outright prohibitions on providing less expensive and more accessible legal services despite clear market demand—have been erected under the guise of "public protection" by those who directly benefit from their exclusionary outcomes: attorneys themselves.[6]

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2 Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* at 6 (June 2017). Prepared by NORC at the University of Chicago for Legal Services Corporation, Washington, DC.

3 *Id.*

4 Henderson, *Legal Market Landscape Report, supra* note 1, at 19-21.

5 *See* Paula Hannaford-Agor JD, Scott Graves & Shelley Spacek Miller, *The Landscape of Civil Litigation in State Courts*, at iv (National Center for State Courts 2015).

6 Henderson, *Legal Market Landscape Report, supra* note 1, at 21.

How has this occurred? Attorneys are regulated on a state-by-state basis, in varying forms and with varying levels of oversight by the respective state supreme courts. But this state regulation necessarily involves state rules and practices that may violate federal antitrust law. By its very nature, licensing is a means of controlling supply; the profession is establishing through its admissions rules an artificial barrier to entering the legal profession. In doing so, it artificially affects prices. This is a form of price fixing, considered unreasonable "*per se*" under the Sherman Act.[7] State regulators, including state bars, may nevertheless impose otherwise anticompetitive policies if they qualify for "state action immunity." The problem is, the U.S. Supreme Court has made clear that regulatory boards controlled by "active participants" in the trade or profession being regulated (e.g., state bars comprised of a majority of attorneys, and all of them are) cannot qualify for this immunity unless they can show that they are being independently and actively supervised by the state.

As noted, this principle was cemented by the Supreme Court's holding in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.[8] In that holding, Justice Kennedy wrote for the majority as follows:

> Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.[9]

This is precisely what has been allowed to occur for decades with respect to the regulation of the legal profession, and the reason why the market for legal services is in desperate need of reform.

But state bars (and state supreme courts) across the country have been slow to recognize the anticompetitive implications of the landmark *North Carolina* holding on the existing regulatory structures for attorneys in every single state—structures that are obviously controlled by active market participants. Per the Supreme Court's decision, the only way to ensure that these state bars are not adopting anticompetitive policies is to ensure that their actions are "clearly articulated and affirmatively expressed as state policy," and that the state is independently and "actively" supervising them.[10] The Supreme Court, and the Federal Trade

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7 *U.S. v. Socony-Vacuum Oil*, 310 U.S. 150 (1940). Regulatory schemes also implicate a separate "*per se*" antitrust offense in the form of a horizontal "group boycott"—an exclusion of competitors by a group of professionals already in the field. *See Klor's, Inc. v. Broadway-Hale Stores, Inc*., 359 U.S. 207 (1959).

8 *N.C. State Bd. of Dental Exam'rs v. FTC,* 574 U.S ___, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015).

9 *Id.* at 1111. *See also id.* (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.").

10 *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1110 (citation omitted).

Commission in its subsequently-issued Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Active Market Participants,[11] have set forth clear minimum requirements for establishing active supervision to assure that public decisions are made by an entity other than one controlled by the regulated trade or profession.

The Court has identified only a few constant requirements of active supervision:

> The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the "mere potential for state supervision is not an adequate substitute for a decision by the State." Further, the state supervisor may not itself be an active market participant.[12]

State supreme courts—the state entities that are charged with "supervising" attorney regulation—are ill-equipped to actively supervise decisions by market participants. They are passive bodies, accustomed to resolving disputes brought before them. They lack the mechanisms for independent supervision, or for analysis as to the potential anticompetitive impacts of the policies adopted and implemented among the state bars.[13] To the authors' knowledge, no state Supreme Court has engaged in the type of supervision set forth in the *North Carolina* decision—with independent decisionmakers who do not participate in the market reviewing the substance of potentially anticompetitive decisions with veto power.[14]

Furthermore, such courts tend to embody confidence in their own profession and its membership, particularly where those persons are respected leaders, and may have been appointed to their state regulatory posts by the court itself. For example, as discussed *infra*, the California Supreme Court is currently, to its credit, investigating the bar exam cut score, and other entry restraint practices that

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11 https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf

12 *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1116–17 (citations omitted); *See also* FTC guidance, *supra* note 11, at 9.

13 Some have even questioned whether state Supreme Court justices themselves are "active market participants" since they are attorneys capable of returning to private practice and may stand to benefit from the protectionist policies adopted by the state bars. *See* Tom Gordon, *State Bar of California Governance in the Public Interest Task Force*, Responsive Law (Apr. 22, 2016), https://www.responsivelaw.org/uploads/1/0/8/6/108638213/responsive_law_comments_to_ca_governance_task_force.pdf

14 The *North Carolina* holding calls into question earlier Supreme Court precedent pertaining to anticompetitive conduct by State Bars. For example, *Bates v. Arizona*, 433 U.S. 350 (1977), held that the Arizona State Bar qualified for state action immunity from the antitrust laws, finding that the Arizona Supreme Court itself had adopted the rules in question and the Bar was merely enforcing those rules. *Id.* at 361. But this decision long preceded *North Carolina's* poignant discussion of precisely how a state must actively supervise "active participants" in a profession who are engaged in anticompetitive practices using the state regulatory apparatus. Nor did the *Bates* court consider the extent to which the Arizona Supreme Court had delegated its regulatory power to active market participants. *Hoover v. Ronwin*, 466 U.S. 558 (1984), which contained a similar holding pertaining to the Arizona Supreme Court, similarly lacks the active supervision analysis.

lead the majority of examination takers in California to flunk. But it is delegating the information gathering and consideration of alternatives to State Bar entities controlled by practicing attorneys. State supreme courts may qualify as independent supervisors for antitrust purposes. But they must be "active." It should go without saying that they must not delegate their supervisory role straight back to the very entities with an ulterior economic interest in the outcome.[15]

In the four years since the Supreme Court issued the *North Carolina* decision, state supreme courts have done little to supervise or curb protectionist behavior by state bars across the country. For example, in 2018, the Washington State Bar Association refused to add Limited License Legal Technicians (LLLT) and Limited Practice Officers (LPOs) to its Board of Governors, even despite the Washington Supreme Court's order that they do so.[16] In 2018, the Florida Bar sought an injunction against TIKD, an app which connects consumers to lawyers to represent them in traffic court, for the unauthorized practice of law.[17] The New Jersey Supreme Court declined to review a bar ethics opinion prohibiting lawyers from participating in fixed fee legal services platforms such as Avvo Advisor—an action which ultimately prompted Avvo to cease this service nationwide.[18] State supreme courts' practice of delegating competition-related decisions to their attorney-controlled state bars is prevalent across the nation. Their impact is acutely felt by those who cannot afford legal services as a result of the radical supply diminution and absence of alternative legal services from these cartel restrictions.

B. The Role of the ABA as Cartel Overseer

Headquartered in Chicago, the American Bar Association ("ABA") is a horizontal trade group of attorneys.[19] It boasts 400,000 members across the country, and its law school accreditation process affects every member of the public who seeks out a lawyer. Nineteen states and four territories require a degree from an ABA-

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15 *See* http://www.cpil.org/download/4.4.17.letter.Supreme.Court.follow.up.pdf.

16 *See, e.g.,* Washington State Bar Association Bylaws VI. 2. c.; *In the matter of the approval of amendments to WSBA Bylaws regarding members of the Board of Governors*, Supreme Court of Washington, Case No. 25700-B-483 (January 4, 2018).

17 *TIKD Servs. LLC v. Fla. Bar*, No. 17-24103-CIV, 2018 WL 4521198 (S.D. Fla. Sept. 20, 2018).

18 ACPE Joint Opinion 732, CAA Joint Opinion 44, UPL Joint Opinion 54, https://www.judiciary.state.nj.us/notices/2017/n170621f.pdf.

19 American Bar Association, *About the American Bar Association*, https://www.americanbar.org/. Although much of this article focuses on the self-interested practices of the ABA and state bar organizations, a *caveat* is appropriate. The attorneys who are a part of these organizations engage in laudatory and admirable work that is in the public interest. They include, for example, just within the ABA, the Center for Professional Responsibility, the Commission on Homelessness and Poverty, the Center on Children and the Child Litigation Rights Committee, among others. The critique herein is not intended to impugn a large part of the work of the ABA or state bars. Far from it. But the incidence of self-interested regulatory practice remains a serious problem that functions apart from conscious intent, and separate from the admirable work of many of its leaders and members.

accredited law school in order to take their bar exams.[20] If a law school does not conform to the standards of the ABA and pay the fees associated with accreditation,[21] its graduates cannot sit for the bar in other states that require it.[22] Indeed, any law school administrator is likely to admit that a major concern is the ABA accreditation visit that involves inspections, interviews and critiques of law school governance and policies. Even though the ABA is not a government entity,[23] part of its function is so closely intertwined with attorney regulation that it effectively functions as one—albeit one run by lawyers and lacking democratic legitimacy. Its actions all but carry the force of law.[24] Although its officers and agents are well-intentioned and engage in many salutary projects, it stands as a substantial impediment to attorney licensure in the public interest.[25]

As this article will explore, many of the factors contributing to what can best be described as a "failed market" for legal services have at their origin policies that were developed, and in some cases enforced, by the ABA. From stringent standards for law school accreditation (including a minimum number of costly tenured faculty and a unique-to-the-U.S. bachelor's degree requirement for all entering law students), to its model rules of professional conduct (prohibiting multijurisdictional practice, corporate ownership of law firms, and "fee sharing" with non-lawyers), the ABA has played a significant role in erecting the barriers to entering the legal

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20 *See* Judith Gundersen and Claire Guback, *Comprehensive Guide to Bar Admission Requirements 2019* at 10 (ABA 2019), http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf.

21 American Bar Association, *Schedule of Law School Fees* (Mar. 18, 2019 11:00 AM), https://www.americanbar.org/groups/legal_education/accreditation/schedule-of-law-school-fees/. Annual fees range from $18,175 for schools with enrollment of fewer than 400 full-time JD students to $29,480 for schools with enrollment of 1,201 or more full-time JD students. *Id. See also* Letter from Hon. Solomon Oliver, Jr., Chairperson, & Barry Currier, Managing Director of the ABA Section of Legal Education and Admissions to the Bar, to ABA Law School Deans, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_memo_re_law_school_fees.authcheckdam.pdf (explaining a three-percent increase in annual fees and an increase in the fee to apply for provisional ABA approval from $30,000 to $80,000).

22 *Id.*

23 *See supra* note 20 ("The American Bar Association is one of the world's largest voluntary professional organizations, with nearly 400,000 members and more than 3,500 entities.").

24 Law schools are free to choose not to pursue ABA accreditation, but their graduates will be unable to practice in nearly a third of the states in the union. *See ABA Standards and Rules of Procedure for Approval of Law Schools 2018-2019*, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf; *see also ABA-Accredited Law School*, The Princeton Review, https://www.princetonreview.com/law-school-advice/law-school-accreditation ("Since passing the bar is a requirement for the practice of law almost everywhere, a degree from a school without ABA–accreditation is usually a ticket to nowhere.").

25 Notably, the antitrust division of the U.S Department of Justice has, on occasion, brought actions against the ABA. *See, e.g. U.S. v. American Bar Ass'n*, 135 F. Supp. 2d 28 (D.D.C. 2001) (challenging certain anticompetitive practices the ABA used in its law school accreditation process).

profession and the high costs of legal services.[26] On the other hand, if willing, it has the potential to implement sweeping positive changes to the profession.

III. Existing Barriers to Entering the Legal Profession

A. Law School Qualification: The Undergraduate Travail

Undergraduate College Education Costs

Undergraduate college education costs nationally continue to rise rapidly above inflation. In 1988, public college tuition cost an average of $3,360 per year.[27] That figure was $10,230 per year in 2018–19.[28] Over the same period, tuition and fees at private non-profit colleges climbed from $17,010 to $35,830 per year.[29] For all four years at private non-profit schools, the total has risen from $68,040 to $143,320 for tuition alone.[30]

Room and board has also increased. When including room and board with tuition those numbers jump from $9,480 per year in 1988 to $21,370 per year in 2018–19 for public schools and from $24,800 per year in 1988 to $48,510 in 2018–19 for private non-profits.[31] Including only basic tuition and room and board, the total cost of a four year undergraduate education is now $85,480 for in-state public college students, $149,720 for out-of-state public college students, and $194,040 for private school students.[32] And these figures exclude other often-substantial costs

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[26] The full time tenured faculty requirement for law schools noted above is a typical example of an ABA-facilitated restraint of trade as it prevents law schools from hiring more adjunct faculty. *See* https://www.americanbar.org/groups/legal_education/resources/standards/. Bringing adjuncts into law schools to teach practical skills has several advantages. These are practicing professionals with experience their tenured peers often lack. And a long-term rise in the number of adjuncts could allow for the hiring of fewer tenured faculty, thereby allowing for tuition reductions. However, the ABA's accreditation guidelines for law schools mandate a minimum size for full-time faculty. *See also* Deborah L. Cohen, *To Teach or Not to Teach: Adjunct Work Can Come with a Hefty Price*, ABA Journal (Aug. 1, 2012), http://www.abajournal.com/magazine/article/to_teach_or_not_to_teach_adjunct_work_can_come_with_a_hefty_price/; *see also* Debra Cassens Weiss, *Adjunct Law Prof: A Low-Paying Job, If You Can Get It*, A.B.A. J. (Sep. 30, 2010), http://www.abajournal.com/news/article/adjunct_law_prof_a_low-paying_job_if_you_can_get_it/.

[27] *See*https://trends.collegeboard.org/college-pricing/figures-tables/tuition-fees-room-and-board-over-time.

[28] *Id.*

[29] *Id.*

[30] *Id.* Note these figures use 2018 dollars to adjust for inflation.

[31] CollegeBoard, *Trends in College Pricing 2018*, at 9 (2018), https://trends.collegeboard.org/sites/default/files/2018-trends-in-college-pricing.pdf.

[32] Attendance at a public college for a non-resident of that state may be compelled based on limited facilities in a student's home state—particularly in the many states of small population. It may also be compelled due to family, spousal, military or employment changes or needs. Some states will allow a shift into resident tuition status prior to the completion of four or more years of college there. Such students may incur tuition/room and board charges in the $70,000 to $90,000 range while attending over four years.

that have also suffered major increases beyond inflation over the last thirty years, including transportation, communications, clothing, books, and food—all beyond what a college would provide.

College education today puts an unprecedented burden on families. Students and their parents are borrowing and sacrificing pensions to pay for education. In contrast to the dramatic rise of college costs, median family income in constant dollars nationally went up marginally from $51,973 in 1987 to $57,617 in 2016—the most recent Census Department figure. Basic college costs have increased from 20.4% of median income in 1971 to 51.8% today.[33]

Certainly there are benefits to a liberal arts education, including many of the courses discussed *infra*, but the evolving economy offers work in diverse, changing, and specialized fields increasingly unconnected to this lengthy and expensive precursor. The issue raised is not whether we must eliminate non-career-oriented courses altogether, but whether such courses need to include up to 40 three-unit subjects over four years, as opposed to a somewhat smaller number.

Four Years of Undergraduate Expense and Coursework as a Prerequisite to Law School

Throughout the United States, law school entry is essentially barred to anyone without a full undergraduate degree.[34] The crushing debt load on today's students, and the questionable relevance of many curricular choices, properly raises the following question: can four years of undergraduate education be conscionably justified as a mandatory prerequisite to law school? Virtually the entire world requires five years of total higher education to practice law. The United States generally requires seven. Is this burdensome prerequisite justified?

The United Kingdom teaches law as an undergraduate course of study lasting three years, followed by a one-year full-time practical skills training course, followed in turn by a one-year pupillage or apprenticeship in the case of barristers,[35]

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[33] https://college-education.procon.org/view.resource.php?resourceID=005532; note that these figures are gathered by gender and these are the median percentages as to males. The percentages as to females, with somewhat lower median income, are measurably higher.

[34] As part of its accreditation process, the ABA requires four years of undergraduate education as a prerequisite to law school entry. *See ABA Standards and Rules of Procedure for Approval of Law Schools 2018-2019*, *supra* note 24, at Standard 502(a). Note that the ABA does permit "three plus three" programs, where students enroll in three years of undergraduate study followed by three subsequent years of study at a law school to earn both a bachelor's degree and a JD. *Id.* at Standard 502(b); s*ee, e.g.*, *3 + 3 Law Program with Albany Law School*, University at Albany, State University of New York, http://www.albany.edu/advisement/albany_law_3+3.shtml *Prospective Students*, Tulane University Law School, http://www.law.tulane.edu/tlsadmissions/index.aspx?id=208. While certainly a step in the right direction to reduce student debt, these programs are rare and do not substantially address the mix of current problems, including the excessively irrelevant and costly undergraduate years.

[35] https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/becoming-a-barrister/, http://www.barcouncil.org.uk/becoming-a-barrister/how-to-become-a-barrister/. The three stages of training are known as the academic stage, the vocational stage, and the pupillage.

or two years of a practice-based training contract in the case of solicitors.[36] From the moment most law students begin university study, the education focuses on the practice of law. The doctrinal study in the first three years serves as a basis for future practical training.[37] For both solicitors and barristers, that practical training takes the form of a one-year course, designed to bridge the gap between the academics of the first few years and the apprenticeship to follow.[38] Thereafter, pupillage is a requirement before any student becomes a barrister,[39] as is two years of practice-based training for solicitors.[40]

In contrast to this British model, the pattern of most other nations,[41] or even the specialized undergraduate education undertaken (or necessitated) for graduate degrees in engineering or medicine (e.g., pre-med), American law schools do not require any particular type of prerequisite learning beyond a bachelor's degree.[42] As a result, some law students begin learning legal doctrine four years after their English counterparts.[43] By that point, middle or lower-class American law students have borrowed six figures to pay for four years of required university study in what is often unrelated subject matter.[44]

To be sure, there is value in a general liberal arts education and in courses separate and apart from a future occupation. But as time and expenses increase, more careful thought as to the connection between the required number of courses and an articulable end purpose is warranted. At some point, relevance becomes relevant. For example, a review of the undergraduate courses for recent applicants to the University of San Diego School of Law[45] includes one typical student with the following courses: Peace Theories, Intermediate Arabic, Physical Education, African Music, Human Sexual Behavior, Visual Design and Dress, Intermediate Poetry Writing, Motivation, Trigonometry, Living in Multi-Cultural Society,

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36 See https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/; https://www.barcouncil.org.uk/careers/general-information-and-faqs/faqs/.

37 https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/becoming-a-barrister/.

38 *Id.*

39 *Id.*

40 *See* https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/.

41 *See, e.g.,* University of Sydney's description of four-year bachelor of laws program, https://sydney.edu.au/law/study-law/our-law-degrees/bachelor-of-laws.html; Trinity College of Dublin (four year law program), https://www.tcd.ie/law/programmes/undergraduate/llb#Structure; University of Cambridge, UK (three year program), https://ba.law.cam.ac.uk/studying-law-at-cambridge/.

42 *See* Law School Admissions Council, *Statement on Prelaw Preparation*, it should be noted that the current British requirement for three years of study for a 'qualifying LLB' will shortly no longer apply and will be replaced by a requirement to pass the Solicitors' Qualifying Examination (SQE). *See* https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/sqe-overview/ ("The ABA does not recommend any undergraduate majors or group of courses to prepare for a legal education. Students are admitted to law school from almost every academic discipline.").

43 *See id.*; The Bar Council, *supra* note 35; The Law Society, *supra* note 36 at 6.

44 *See* American Bar Association, *Preparing for Law School*, http://www.americanbar.org/groups/legal_education/resources/pre_law.html.

45 Co-author Fellmeth has served on the University of San Diego School of Law Admissions Committee since 1993. These examples are from the transcripts of reasonably typical student applicants.

Human Osteology, Introduction to Archeology, Strategies in Stress Management, and Artist's Perspective: Drawing. Another student in this law school application pool took the following college classes: Keyboard Skills, Harmony, Jazz Combo, History of Rock Music, Instrumental Improvisation, Poetic Imagination, Comic and Tragic Vision, Wild Times, Prison Gangs, French Cinema, Juvenile Gangs, and Realism and Romance.

While many courses listed on some applicants' transcripts do suggest law school relevance, such as courses in economics, sociology, history, and even direct law content choices in constitutional or criminal law subjects, they tend not to be the majority or even a substantial percentage of courses undertaken by law school applicants.

In light of the dubious relevance of many undergraduate courses to the practice of law, we must consider the costs to students' families, the ever-growing burden of student debt,[46] and the supply reduction impact for those who would benefit from affordable legal services. Over the last two decades, burgeoning creativity of course ideas—ranging from a course on Beyoncé to two units for "bowling"—raise concerns over these factors in our regulation of entry into the legal profession.

B. Increasing Law School Costs and Debt

Increasing Costs of Law School

Adding to the sobering financial situation facing many of today's entering law students is an even more extreme upward trend—the cost of law school itself. Often starting out with debt from four years of mandatory undergraduate education, students without independent sources of funding must borrow three more years' worth of tuition and housing, in addition to other expenses. Law school is thus a substantial financial barrier to entry into remunerative attorney employment in the U.S.

The total cost of a legal education now approaches or exceeds the median cost of a home in the United States.[47] In terms of tuition alone, Columbia leads the pack at $69,916 per year.[48] The average private non-profit law school tuition nationally is $47,754 in 2018 dollars.[49] For public law schools the average tuition is $27,160. Tuition by itself is now at an expected sum of approximately $80,000 to $144,000 for the typical three-year term of law school attendance. This sum does not include housing, transportation, food, books, or bar exam review courses—or the opportunity costs of three years' foregone employment.

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46 Education loans are rarely dischargeable, even in bankruptcy, and can have a pervasive effect on the credit rating of delinquent borrowers, including employment, apartment rentals, and other needed borrowing.

47 As of December 2018, the median home price in the United States was $240,000. *Home Prices in the 100 Largest Metro Areas*, Kiplinger (March 10, 2019, 10:00 AM), https://www.kiplinger.com/tool/real-estate/T010-S003-home-prices-in-100-top-u-s-metro-areas/index.php.

48 https://data.lawschooltransparency.com/costs/tuition/?scope=schools.

49 https://data.lawschooltransparency.com/costs/tuition/?scope=national.

This tuition increase is not a product of inflation. A recent study concludes: "[L]aw school tuition increases exceed the inflation rate between 1985 and 2018. In 1985, the average private school tuition was $7,526 (1985 dollars), which would have cost a student $17,520 in 2018. Instead, average tuition was $47,754 (2018 dollars)."[50] Accordingly, private law school was 2.73 times as expensive in 2018 as it was in 1985 after adjusting for inflation.

> In 1985, the average public [law] school tuition was $2,006 (1985 dollars) for residents, which would have cost a student $4,670 in 2018 dollars. Instead, average tuition is $27,160 (2018 dollars) for residents. In other words, public [law] school [tuition for in-state students] was 5.82 times as expensive in 2018 as it was in 1985 after adjusting for inflation.[51]

In addition to law school tuition, students must find a way to pay for three years of living expenses. A survey of the 203 ABA-accredited law schools nationally from 2011–12 to 2018–19 found only 43 with small decreases in living expenses, whereas 153 had increases—104 of which exceeded the 11.4% cost of living (CPI) increase for this period.[52]

On average, a law student can expect to spend $20,000 to $24,000 per year on living expenses, with California school living expenses often between $30,000 and $37,000.[53] Assuming a conservative $20,000 figure, this adds $60,000 over three years to the total law school tuition figures discussed above, for a total of $140,000 for tuition and living expenses at a public law school, and $200,000 for a private non-profit law school. These figures are on top of the sums already paid for undergraduate tuition and housing of $50,000 to $188,000 for those previous four years.

In short, the seven-year cost of public education for attorney licensure, including only tuition and housing, is now an expected $190,000 at public schools for in-state students[54] and $388,000 at private non-profit—with these unprecedented numbers likely to continue to increase well above inflation.[55]

The Setting: Actual Law School Tuition and Market Dysfunction

Assuming a competitive market, how do prices of this type increase at levels largely disparate from cost factors? The adage "competition drives prices toward costs," with higher demand rewarding those who offer a comparable product at a lower price, does not seem to apply to this service market. Costs have increased somewhat

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50 *Id.*

51 *See id*. Tuition for out-of-state attendees is substantially higher—approximately $35,000.

52 https://data.lawschooltransparency.com/costs/living-expenses/.

53 *Id.*

54 As discussed *supra*, in the context of undergraduate costs, out-of-state students attending a public law school will pay somewhere between these two figures, likely in the $250,000 to $300,000 range.

55 These totals assume maintenance of low-cost room and board for undergraduate education and assume no further increases above inflation for tuition or law school living expenses. Both of these assumptions are unlikely. As noted above, these numbers do not include many other costs, including books, loan interest, clothes, or transportation.

for faculty salaries, but at no level close to tuition increases.[56] Nor are other cost increases apparent that explain them. One major factor in this competitive failure is what may be termed the "Cuisinart effect." *Cuisinart*[57] was a vertical price fixing case in which an appliance manufacturer cut off retailers who lowered prices below the suggested retail price of its products. The reason for insisting on higher prices than others rested on Cuisinart's public relations approach—that its products were "clearly superior" to others, and that its superiority was understandably reflected in its higher price. If its price were to be lowered to those of competitors, the public implication would be that others were of equal or higher quality. The same concern demarks the public persona of many trade names, from Mondavi Cabernet to Cadillac.

This perception, that comparative quality is manifested in price, is a core part of law school tuition increases. It is common for the administration and faculty of law schools to measure their tuition levels based on those of their competitors, with subjective quality of the school a major factor. Hence, when law school faculties consider increasing tuition by two-to-three times inflation levels, the discussion is invariably as follows: "We would note that our three rival law schools, not up to our caliber, have increased their tuition 3–5% and will be at a higher level than are we. We risk a public impression that we are of inferior quality if we fail to match or exceed their tuition levels." And the pattern of such effective "price leadership" increases suggests that this same conversation is hardly unusual.

The "Cuisinart effect" in its original application involved a vertical price fixing case, but its anticompetitive impact in the horizontal context has a much more deleterious impact. It allows these prices to be raised well above theoretically competitive levels through a pattern of price leadership and replication. Any one competitor who raises tuition then causes other law schools to move up in price by a similar degree. The normal drive of competition seeking to win customers through efficiencies or reducing costs—and hence prices—is not a predominant factor.[58] Recent trends in applications and admissions illustrate the market anomaly for law school education. Law school applications fell dramatically from 2010 to 2016—perhaps partly reflecting tuition increases, as well as other factors.[59]

With demand reduced, the typical competitive response would be to lower prices to generate additional business (applicants). This would be particularly true for any high fixed-cost enterprise, such as law schools.[60] But that did not and

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56 *See* Scott Jaschik, *What You Teach is What You Earn*, Inside Higher Ed, https://www.insidehighered.com/news/2016/03/28/study-finds-continued-large-gaps-faculty-salaries-based-discipline.

57 *See In re Grand Jury Investigation of Cuisinarts, Inc*., 516 F. Supp. 1008, 1010–11 (D. Conn.) (recounting the proceedings in the criminal case, which resulted in a *nolo contendere* plea and a $250,000 fine). The DOJ also brought a companion civil case that was resolved by consent decree. *See United States v. Cuisinarts, Inc*., Civ. No. H80-559, 1981-1 Trade Cas. (CCH) ¶ 63,979 (D. Conn. Mar. 27, 1981).

58 David Segal, *Law School Economics: Ka-Ching!*, N.Y. Times, July 16, 2011, https://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html.

59 Applicants per year fell from 100,000 in 2002 to 82,900 in 2009–10 to 56,500 in 2015–16. *See* https://data.lawschooltransparency.com/enrollment/demand-for-law-school/.

60 Law schools have a high percentage of fixed costs that do not vary with added students (e.g., real estate, staff and faculty with tenure who are not easily reduced in size

does not occur. One source summarizes the trend: "Compared to the peak in JD enrollment in 2010 (147,525 students), overall JD enrollment was down 24.3% in 2018."[61] But even this extraordinary demand reduction did not yield the normal market response in the form of enhanced price competition. Instead, law schools continue to eschew transparent price competition in favor of a burgeoning, but secretive means of competing, as reflected in the actual tuition charged to each student.[62]

A law school advertising $50,000 in annual tuition does not necessarily charge $50,000 per student. According to a 2017 study analyzing ABA grant and scholarship data, the median private law school discounted tuition by 28.3%, with an average scholarship of $20,129.[63] Few are aware that such discounts (and affordable law school opportunity, for many) are primarily driven by two numbers: Law School Admission Test (LSAT) scores and college grade point average (GPA).[64] While certainly important indicators, the disproportionate weight of these particular factors is driven by the pervasive influence of, and law school preoccupation with, the *U.S. News & World Report* law school rankings. [65] Indeed, law school

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notwithstanding fewer students). Indeed, when a law school's attendance drops 20% to 30%—as has occurred in many campuses after 2010—a natural response in an assumed competitive market would be to lower prices as necessary to fill the empty seats, each one of which involves little additional marginal cost. A tuition of just $5,000 would add significant net income to such an enterprise. Note that such reductions and bargains are part of the fabric of other high fixed cost service industries*, e.g.*, hotels and airlines among many others — all of which compete vigorously with discounts and bargains for customers to occupy otherwise empty rooms or seats. *See also* Segal, *supra* note 58.

61 https://data.lawschooltransparency.com/enrollment/all/. Although interestingly, law school enrollment increased slightly for the first time in nearly a decade in 2017-2018 in a phenomenon some experts deem the "Trump bump," this increase does not make up for the near decade of decline. *See* Staci Zaretsky, *Law School Enrollment Is Up for the First Time in Nearly a Decade*, Above the Law, Dec. 14, 2018, https://abovethelaw.com/2018/12/law-school-enrollment-is-up-for-the-first-time-in-nearly-a-decade/; Ilana Kowarski, *Law School Applicant Increased This Year*, U.S. News & World Report, Jan. 29, 2018, https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-01-29/law-school-applications-increased-during-president-trumps-first-year.

62 Law schools are convinced that price is not the factor that influences choice, and, in fact, its reduction is viewed as a competitive problem consistent with the *Cuisinart* scheme described *supra*. They would rather suffer serious customer shortfall than admit to lower price as a basis for consumer selection. *See also* Segal, *supra* note 58.

63 Tyler Roberts, *How Much Law Schools Are Discounting Tuition*, 21 preLaw, at 13 (Winter 2018); Tyler Roberts, *Which Schools Are Discounting Tuition the Most?*, 27 Nat'l Jurist, at 13 (Winter 2018).

64 *Id.*

65 The degree of influence of these rankings is extreme. Many law schools have staff and faculty focusing substantial time and resources to the ratings of this publication and believe that it is a major factor in school selection by students. The direct ranking *vis-à-vis* rival law schools has a major effect. Note that many elements of the *U.S. News* ranking have merit in judging quality. For example, it measures class size per faculty member, faculty publications and citations, ratings of faculty by peers, bar passage rates, and timely employment of graduates. But it also excludes aspects important to legal education—from assuring competent attorneys in areas of actual practice, to a curriculum that is directed to that purpose.

admissions offices meticulously calculate exact medians for a prospective entering class and offer tuition subsidies to those with the highest scores.[66]

The over-emphasis on two numbers distorts student evaluation and inhibits a more balanced judgment. But those two numbers make up 90% of the *U.S. News* rating of law school "selectivity."[67] Students lacking financial resources that might otherwise allow them to enroll in an LSAT prep course or pay for tutoring in college suffer financial barriers to law school entry and a legal career. Instead, they borrow to pay the "sticker price" tuition—often hundreds of thousands of dollars, on top of what they may have already had to borrow to go to college. In doing so, these individuals end up subsidizing tuition discounts for those with higher college GPAs and LSAT scores. [68]

Public Subsidy and Loans: Overall Student Debt

Law school graduates carry record debt into their bar examination crucible. Of the 181 law schools tracked by *U.S. News*, the percentage of 2018 students carrying substantial debt varied from 34% to 100%.[69] The amount of the debt of graduating students by school varied from $68,743 at University of North Dakota to $212,576 at Southwestern Law School.[70]

These education loans are rarely dischargeable—even in bankruptcy. Available and secured federal and non-federal loans for law students (and indeed all graduate

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66 Co-author Fellmeth has been on his Law School Admissions Committee since the 1990s and contends that there are many factors properly relevant apart from the GPA raw number. They commonly include obstacles: A student achieving a 3.3 GPA while having to work full time and/or take care of a child or ill grandparent might be more impressive than a 3.5 from a full time student at a school with a relatively liberal grading pattern. Another student may have suffered a major injury or disease and managed to overcome it, manifesting courage and tenacity. Or a student may have had a weak freshman year, a first year away from home, and then recover to sequentially increase the GPA every year thereafter to a 4.0 senior year performance. In addition, difficult courses may warrant more consideration, but the overall GPA is not so adjusted in the *U.S. News* rankings. Similar excluded variables compromise the accuracy of the LSAT test score. Take an immigrant from Bosnia whose family was forced to flee to Russia when she was 8, and then at age 16 immigrated to the United States, who achieved an LSAT score in the 60th percentile—in her third and newest language. Should she be dismissed in favor of a student from a wealthy family in the 70th percentile, who attended private schools and had access to tutors?

67 *See Methodology: 2019 Best Law Schools Rankings*, https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology; *see also* Malcolm Gladwell, *The Order of Things*, The New Yorker, https://www.newyorker.com/magazine/2011/02/14/the-order-of-things.

68 This is not to say that equitable factors enjoy no consideration. For those with LSAT and GPA scores on "the bubble" (not as high as desired but close) there will be more particularized consideration. But the ranking based on the two numbers must be overcome with a burden not easily met. In contrast, unless there is a criminal or ethical issue, a high score will usually qualify an applicant for admission *ipso facto*, and usually with a generous tuition discount. *See also* Roberts, *supra* note 63 (*How Much Law Schools are Discounting Tuition*) at 13.

69 *See* https://www.usnews.com/best-graduate-schools/top-law-schools/grad-debt-rankings/page+4.

70 *Id.*

students) have declined markedly since 2010.[71] Total student loans grew to $125.6 billion in 2010, but have since declined to $105.5 billion in 2017–18, while tuition and living costs climbed substantially over the same period.[72]

C. Law School and the Education of Attorney Practitioners

Existing Law School Curriculum

As discussed above, undergraduate education does not necessarily have the same connection to law school as does the typical academic record of those seeking engineering, science or medical advanced degrees. Then, once a student is admitted, the law school curriculum itself lacks correlation to the actual practice of law.

Most law schools present a core of required courses that consume the first year and sometimes part of the second year. Traditionally, required courses include contracts, torts, property, civil procedure, constitutional law, legal ethics, and several other courses varying by school. But there are several deficiencies in most curricula. First, the courses tend to focus on the judicial branch, with most of them revolving around a "casebook" text. The adjustment of curricula to changes in society, including our political and legal systems, is glacial.[73] For example, a large portion of current law practice involves, in some way, the legislature and executive branch agencies. The former enacts the laws, and the latter implement the laws through important rulemaking and enforcement procedures. Attorneys must often interpret these laws in order to advise their clients on compliance, or litigate alleged violations. But few law schools include substantial curriculum offerings in those and other areas of burgeoning practice.

Second, the courses typically do not lead students into actual areas of practice in terms of functional knowledge. The era of Abraham Lincoln, where an attorney practices "law" and will draft a will, defend a client in criminal court, and then litigate a divorce, is no longer practical. We present 24 areas of law commonly practiced in the United States, as follows: (1) immigration law; (2) criminal law; (3) property law; (4) probate, trust and estate planning law; (5) general corporate, securities and commercial law; (6) family law; (7) environmental law; (8) civil rights law; (9) administrative and regulatory law; (10) antitrust and economic

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71 *See* https://trends.collegeboard.org/student-aid/figures-tables/total-federal-and-nonfederal-loans-over-time.

72 *Id*.; *see also* https://data.lawschooltransparency.com/costs/living-expenses/; https://data.lawschooltransparency.com/costs/tuition/?scope=national.

73 Law school administration and faculty are understandably influenced by their own experience. We all have a tendency to project our own model onto those we wish to teach. But practical legal experience is not common among tenured law faculty. Not many have conducted a trial, argued appellate cases or had to deal with a caseload of clients. Their concerns are with important ethical and philosophical issues, which do facilitate legal and citizen intelligence. But we are not educating large numbers of future appellate justices or law professors. Even for these latter functions, professors also specialize in only one or several subject areas themselves. The vast majority of graduates will be practitioners faced with client problems such as an unruly child, a fraudulent business partner, or a grandfather who wants to emigrate from South Korea. The skills to enable competent services in this latter domain of real world problems warrant high priority in law school education.

crime law; (11) personal injury and consumer law (including product liability, property damage, and class action law); (12) labor/employment law and worker compensation; (13) real estate and construction law; (14) insurance law; (15) admiralty law; (16) bankruptcy law; (17) elder law; (18) education law; (19) health care law; (20) medical malpractice; (21) legal malpractice; (22) military law; (23) patent and trademark law (IP); and (24) tax law.

It is possible for some attorneys to practice in two, or perhaps three, of these 24 areas. But each involves substantial differences. An attorney who practices as a criminal defense attorney (or prosecutor) follows very different precedents and procedures from one handling divorces in family court. An attorney in bankruptcy court will have little in common in terms of the "what" or the "how" of practice with one practicing in juvenile dependency court. Many of these areas involve entirely disparate courts, with their own complex rules and procedures: juvenile dependency or delinquency court, bankruptcy court, probate court, Offices of Administrative Hearings adjudicating regulatory cases, immigration courts, military JAG proceedings and others—have marked differences. Each requires substantial specialized knowledge and experience to practice competently.

The generality of law school coursework is based on a collegial ethic that the Socratic Method (the practice of challenging students in class with repeated and pointed questions) leads to a superior mind—one able to identify inconsistencies. It facilitates the ability to pierce shallow rhetoric and sophistry. It allows students to "think like a lawyer." These fundamentals are undoubtedly valuable. But they begin only in the fifth year of American legal education—after four years of potentially unrelated (but still mandatory) undergraduate coursework. The assumption that the Socratic Method alone constitutes an effective means of educating 21st century attorneys seems dubious. Skyrocketing education costs, increasing practice specialization, technology, and the need for attorneys who are ready to begin practicing upon licensure should prompt a reevaluation of the way our country teaches law. How should we balance doctrinal coursework and practical skills training?

Moreover, even after four years of potentially irrelevant college coursework, three years of substantive law classes, and life-altering debt, aspiring attorneys are not even finished with doctrinal work. For the vast majority of bar applicants, existing law school coursework is insufficient to prepare graduates to take and pass the required state bar examinations. As described *infra*, the esoteric and impractical nature of the exams has spawned a national cottage industry of "Bar Preparation" providers, which charge ever-increasing sums of thousands to teach—*after* law school has concluded—the 10 to 15 subject areas most states cover, including the standard Multistate Bar Examination (MBE) given as a part of the bar exam in all states.[74] This cottage industry (perhaps understandably) does not advocate for bar exam reform that might lessen demand for its services.

[74] A typical charge ranges from $1,000 to $4,200, with several months of study—including lectures, written material and practice examination. *See* https://abovethelaw.com/2013/05/which-bar-exam-prep-course-is-the-best-2/.

The Practical Skills Training Movement

In the spring of 2012, the State Bar of California created the Task Force for Admissions Regulation Reform ("TFARR"), to examine whether the State Bar should develop a regulatory requirement for a pre-admission practical skills training program. In finding that the Bar should adopt a new set of regulations to focus on competency and professionalism, TFARR's Phase I report observed that "the rapidly changing landscape of the legal profession, where, due to the economic climate and client demands for trained and sophisticated practitioners fresh out of law school, fewer and fewer opportunities are available for new lawyers to gain structured competency training early in their careers."[75] The Task Force identified three specific and interrelated sources of concern that prompted the need for its action, with crushing student debt burden as the common thread: 1) recent law graduates with no prospects are forced into solo practice to pay off loans before they may be competent to practice, at great risk to the clients they serve; 2) with fewer young attorneys in a financial position to perform *pro bono* or public service work, low-income access to the judicial system suffers; and 3) law school debt puts becoming an attorney beyond reach for those lacking pre-existing family wealth.[76]

Ultimately, TFARR recommended three new requirements to practice law in California: (1) fifteen units of practical coursework before bar admission;[77] (2) fifty hours of legal services to *pro bono* clients or clients of modest means (before or after admission); and (3) ten hours of Mandatory Continuing Legal Education focused on practical skills.[78] Phase II of the Task Force issued a second report with recommended implementation strategies for each of these three recommendations the following year.[79]

These recommendations superficially addressed some problem areas. But they left untouched a system that foists deeply indebted, brand-new market entrants with no experience onto the most vulnerable segments in our society—and only for brief stints, so they could avoid meaningful commitments to client service. Indeed, the new recommendations would make it even more difficult to become a lawyer,

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75 *See* Phase I Final Report at 14 (June 2013), http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_%28FINAL_AS_APPROVED_6_11_13%29_062413.pdf.

76 *Id.* at 1, 5.

77 Around the same time, the ABA adopted a new experiential learning requirement, requiring six hours of study for ABA-accredited law schools, as articulated in Standards 303 and 304. https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf.

78 *See* Phase I Final Report, *supra* note 75 at 1.

79 Phase II Report, (Sept. 2014), available at http://www.calbar.ca.gov/portals/0/documents/bog/ bot_ExecDir/2014_TFARRPhaseIIFinalReport_092514.pdf; http://www.calbar.ca.gov/Portals/0/documents/bog/ bot_ExecDir/2014_AttachmentA_ImplementingRulesfor15units.pdf; http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/2014_AttachmentB_ImplementingRulesfor50hoursprobono.pdf; http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/2014_AttachmentC_ImplementingRulesfor10hourscompetencytraining.pdf.

without addressing the root causes of harm to consumers as a result of the supply reduction imposed by the current regulatory framework.[80]

D. State Bar Examinations as Entry Barriers

Today, all 50 states require that applicants pass some version of a bar examination to qualify for attorney licensure.[81] This examination is a significant barrier to entering the legal profession, and at the same time is produced and administered by what the U.S. Supreme Court deems "active market participants" in the trade or profession involved—lawyers.[82] Nearly every state in the union delegates the regulation of lawyers to lawyers themselves, who then, in turn, often defer in matters of entry policy to the nationwide trade association they control—the American Bar Association—as discussed above.

The conflict of interest in our system of attorney regulation is apparent. When a profession is allowed to regulate itself—to gauge the appropriate incoming supply and the amount of competition it will encounter (i.e., the number of new attorneys admitted with each bar exam administration)—it runs afoul of both the Sherman Act and also fundamental principles of our democracy.[83] The state is supposed to make decisions in the interests of the people—*all* of the people—not only professionals with a vested interest in high entry barriers.

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[80] TFARR's final recommendations were released just as the Bar was facing a period of political and internal turmoil as the Board of Trustees voted to terminate the Bar's Executive Director, Joseph Dunn, just two months later. With long and protracted litigation pending, as well as new executive leadership and increased scrutiny from the legislature, these recommendations largely fell by the wayside for several years. Ultimately, the *pro bono* recommendation was opposed by the legal services sector, who did not have the resources to supervise the influx of attorneys under this recommended regime. And Governor Jerry Brown vetoed a 2016 bill, SB 1257 (Block), which would have imposed the 50 hour *pro bono* requirement, stating that a state mandate for *pro bono* service cannot be justified, as "[l]aw students in California are now contending with skyrocketing costs . . . and many struggle to find employment once they are admitted to the Bar." He further stated that, "it would be unfair to burden students with the [*pro bono*] requirements . . . [and] [i]nstead, we should focus on lowering the cost of legal education and devising alternative and less expensive ways to qualify for the Bar Exam. By doing so, we could actually expand the opportunity to serve the public interest." The 15 hours of practical coursework recommendation was never implemented either. The bar did, however, adopt the recommendation for ten hours of MCLE for new attorneys. *See* 23:1 Cal. Reg. L. Rep. 172 (2017).

[81] Four states (California, Vermont, Virginia, and Washington) permit individuals who have worked a designated period of time as an apprentice to a licensed attorney to skip law school all together and sit for the bar exam using their experience as a substitute for the law school experience. *See, e.g.,* Rules of State Bar of California, Rule 4.26; Rules of Admission to Bar of Vermont, Rule 7; Washington Courts Admission and Practice Rules, APR 6; Va. Code Ann. § 54.1-3926 (West). Very few applicants, however, are able to, or do, avail themselves of this unusual route. Additionally, Wisconsin admits students with diplomas from in-state law schools (University of Wisconsin and Marquette University) without taking the Wisconsin bar examination. *See* Wisconsin Supreme Court Rule 40.03 (Diploma Privilege).

[82] *See N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1114.

[83] *See supra*, Section II.

General Format of Existing Bar Examinations

Generally, bar exams are administered by each state twice a year for two days, and include the MBE, a 200-question multiple choice test developed by the National Committee of Bar Examiners (NCBE),[84] and an essay portion of the exam. The Uniform Bar Examination ("UBE"), now adopted by 33 states, is coordinated by NCBE and is composed of the Multistate Essay Examination, two Multistate Performance Test tasks, and the MBE.[85] It is uniformly administered, graded, and scored by user jurisdictions and results in a portable score that can be transferred to other UBE jurisdictions.[86] Other states, like California, develop their own essay portion of the exam.[87]

Even though the MBE and UBE are nationally-administered tests, each state sets its own "cut score" that will ultimately determine who passes the exam, and what the level of new attorney supply will be in that state.[88] And these cut scores vary wildly from state to state, from 144 and 145, respectively, in California and Delaware, to 129 in Wisconsin, with a national average around 135.[89] Not surprisingly, these variations yield varying pass rates among the states.

California's Ongoing Travail

California's pass rate, which has been consistently declining and hit a record low in July 2018 at 40.7% overall,[90] has driven California law schools in recent years to petition the Supreme Court, and the State Bar, to revisit its high cut score and take a closer look at the content of the exam itself.[91] Indeed, California's current cut score was set in 1986.[92] The Court ordered the Bar to study this issue, and the Bar underwent a series of studies in 2017 and 2018 on a compressed timeline at the Court's direction.[93] Over significant opposition from the Committee of Bar Examiners, which advocated for no change to the cut score, the Board of Trustees of the State Bar of California, after considering the results of the studies, and holding two public hearings, voted to present the Court with three options with respect to

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84 The MBE covers seven core subjects: civil procedure, constitutional law, contracts, criminal law, evidence, real property and torts. http://www.ncbex.org/exams/mbe/preparing/.

85 http://www.ncbex.org/exams/ube/.

86 *Id*.

87 http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination.

88 *See* National Committee of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 2018* at 33–34, http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html#p=44.

89 *Id.*

90 http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-releases-july-2018-bar-exam-results.

91 *See* State Bar of California Bar Exam Evaluations Results, March 15, 2018, http://www.calbar.ca.gov/Portals/0/2018BarExamReport.pdf.

92 *Id*. at 8.

93 For a detailed history of the controversy spurred by the July 2016 bar exam results, and the studies conducted during this period, *see* 23:1 Cal. Reg. L. Rep. 158-161 (2017). Note that co-author Gramme served as the Assembly Judiciary Committee's appointee subject matter expert on the Standard Setting and Content Validation studies in 2017.

the cut score: 1) maintain the status quo at 144 overall; 2) lower it to 141; 3) lower it to 139.[94] The Court ultimately declined to lower the cut score, instead ordering the Bar to conduct further study.[95]

While these studies were ongoing in 2017, the California legislature added section 6064.8 to the Business and Professions Code, directing the Bar to "oversee an evaluation of the bar examination to determine if it properly tests for minimally needed competence for entry-level attorneys" and mandating that it "shall make a determination, supported by findings, whether to adjust the examination or the passing score based on the evaluation" at least every seven years or more frequently if so directed by the California Supreme Court. The Supreme Court likewise added California Rule of Court 9.6, effective January 1, 2018, which also requires a regular evaluation of the bar examination's validity. The California State Bar announced that it was commencing a California-specific Attorney Practice Analysis in December 2018 to "ensure that the California Bar Exam is relevant and tests what is needed by entry-level California attorneys."[96]

Also in December 2018, the Bar released the results of its fourth study on the California Bar Examination, *Performance Changes on the California Bar Exam, Part Two*. Based on data from 11 ABA-accredited California law schools who volunteered to participate, the study was designed to examine the correlation between California's steadily declining pass rate and law school attendee credentials (both prior to and during law school).[97] The study concluded, unsurprisingly, that law school GPA was the single best indicator of predicting success on the California Bar Exam.[98] Interestingly, however, the study found that the slight decline in undergraduate GPA and LSAT scores for law school applicants admitted in the most recent five years could only be attributed to *some* (between 20–50%) of the decline in bar exam pass rates; with the remaining portion of the decline "unexplained."[99]

As these studies —which are likely to take years—continue, the Bar is continuing to administer the same exam, with the same cut score, with no imminent plans to make further changes.

Questions Pertaining to Bar Exam Efficiency

As noted at the outset above, the core purpose of public regulation of attorneys (and many other trades and professions) is to assure practitioner competence and honesty. This assurance is paramount for members of the public, who rely on the

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94 *See* State Bar of California Bar Exam Evaluation Results, *supra* note 91, at 3.

95 23:1 Cal. Reg. L. Rep., *supra* note 93, at 158-161; 23:2 Cal. Reg. L. Rep. 254-58 (2018).

96 *See* http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-launches-california-attorney-practice-analysis-to-continue-bar-exam-study. To the authors' knowledge, California is the only state that imposes this level of psychometric analysis and validity with respect to its bar exam.

97 Roger Bolus, PhD., *Performance Changes on the California Bar Examination: Part 2* (Research Solutions Group, State Bar Dec. 20, 2018), http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Bar-Exam-Report-Final.pdf.

98 *Id.* at ii.

99 *Id.* at viii. This finding was significant in that much of the public comment in support of maintaining California's high cut score has attributed declining pass rates to law schools' willingness to accept lesser qualified applicants in the face of widespread declines in law school enrollment since 2011.

state to keep incompetent and dishonest people—who may impose irreparable harm on unsuspecting clients—from practicing law.[100]

Consider the following questions in evaluating whether a single examination (in the present format of bar examinations across the country) is properly achieving that stated purpose:

1. While a bar examination may have some relevance to competence, to what extent does it actually measure the knowledge, skills, and abilities that new lawyers entering the profession actually need to competently practice? This is a central tenet in justifying occupational licensure, and requirements to regularly validate the content of licensing exams via psychometric evaluation have been in place for all other occupations—from physicians to architects—(at least in California) for decades.[101] The State Bar of California is now undergoing this process, beginning with its California-specific "Attorney Practice Analysis," discussed above, and the NCBE is also now undergoing a three year study of the examinations it administers.[102] Only when these studies have been completed can one properly evaluate whether the content of the exams are actually measuring for these skills.[103]

2. In determining their respective bar examination "cut scores," are state bars appropriately ensuring that they are only excluding from admission those who are not "minimally competent" to practice law? While this is the psychometrically appropriate standard by which to measure and set the cut score for a licensing exam, state bars across the country have not typically adhered to this "do no harm" standard of entry into our profession.[104] Can any other standard be justified under the antitrust laws?

3. What are the implications of a system of undergraduate and then law school education now extant, in which graduates must pay thousands of additional dollars and three months of intense study to pass a purported general competence examination? In addition, should law students be forced to choose between courses on subjects that will be tested on the bar and courses covering the subject matter in areas where they intend to practice?[105]

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100 *See, e.g.,* Cal. Bus. & Prof. Code § 6001.1 ("Protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. *Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.*") (emphasis added).

101 *See* Cal. Bus. & Prof. Code § 139; Center for Public Interest Law's Amicus Brief to Supreme Court of California dated October 2, 2017, discussing and attaching the California Department of Consumer Affairs' Licensure Examination Validation Policy, http://www.cpil.org/download/S244281_LB_CPIL.pdf.

102 The National Committee of Bar Examiners also established a "Testing Taskforce" in 2018, that will similarly conduct a three year comprehensive study of the bar exam. *See* https://www.testingtaskforce.org/about/.

103 *See* Michael T. Kane, *So Much Remains the Same: Conception and Status of Validation in Setting Standards* (2001), published in Setting Performance Standards: Concepts, Methods, and Perspectives 53–88 (Gregory J. Cizek & Robert J. Sternberg eds., 2001).

104 *See Standards for Educational and Psychological Testing* (AERA, APA, & NCME, 2014); R.K. Hambleton & M.J. Pitoniak, *Setting Performance Standards*, in Educational Management 433-70 (R.L. Brennan ed., 2005).

105 *See* February 1, 2017 letter from deans of 20 out of California's 21 ABA-accredited law schools to the California Supreme Court at 3 ("California's high cut scores generate

4. All practice areas are not equal in their potential to impose irreparable consumer harm. A criminal prosecutor is usually supervised by expert guides; a corporate contract attorney often has models and supervision, and sophisticated clients who are able to determine for themselves whether their attorney is performing competently. So which specialties deserve attention for competence assurance? Arguably, these would include areas where: (1) the client is not in a position to gauge competence; (2) the attorney is not subject to assured training and review before or during legal practice; and/or (3) counsel may engage in a single case or task that, standing alone, portends irreparable harm. What test for assurance of competence is provided for immigration law, juvenile law, family law, or landlord/tenant law—topics not tested on bar examinations, yet practice areas with enormous potential for consumer harm?

5. Do any states have any mechanism to ensure continuing competence in any given practice area over the entire 50-year career of an attorney? Do any require a minimum body of continuing legal education in the area of actual practice? Do any ever provide tests relevant to competence in such areas of practice relied upon by consumers?

6. Are supplemental tests designed for state certified "specializations" designed to protect consumers or do they serve as marketing tools enabling these specialists to charge higher prices to willing (and well-heeled) clients?[106] Does it matter that each of them is a label awarded by a group of practitioners currently practicing in that respective area of law?[107]

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pressure for California law schools to design their educational programs with even more focus on the bar exam itself than is required in other states. This may, in the margins, drive schools and students to additional emphasis on memorization, multiple-choice exam skills and overt test preparation rather than the full range of skills necessary for effective lawyering."), http://www.calbar.ca.gov/Portals/0/2018BarExamReport.pdf at 142–146.

106 Many states offer "certification" programs for practitioners in various legal specialties. Such specialization, with required examinations, work experience, etc. can contribute to market knowledge about a given practice area. However, that "label" is separate and apart from licensure, and is not required to practice in that area of law. Equally troubling is that the criteria for certification are overwhelmingly controlled by individuals who have already obtained these specializations—giving them a profit stake interest in raising the barriers for new market entrants. *See N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1114.While it may be useful to advertise skills to sophisticated clients, it does not protect average consumers who are most likely to be irreparably harmed by attorney misconduct.

107 By way of illustration, the following are specialties certified as such by the California State Bar or its recently devolved associations: 1. Admiralty and Maritime Law, 2. Appellate Law, 3. Bankruptcy Law, 4. Criminal Law, 5. Estate Planning, Trust and Probate Law, 6. Family Law, 7. Franchise and Distribution Law, 8. Immigration and Nationality Law, 9. Legal Malpractice Law, 10. Taxation Law. In addition, the Bar "accredits" private attorney associations to certify attorneys in 11 additional areas of specialization, including: 1. Business Bankruptcy Law, 2. Consumer Bankruptcy Law, 3. Creditors' Rights Law (American Board of Certification) 4. Civil Trial Advocacy, 5. Criminal Trial Advocacy, 6. Family Law Trial Advocacy, 7. Social Security Disability Law (National Board of Trial Advocacy), 8. Elder Law (National Elder Law Foundation), 9. Legal Malpractice, 10. Medical Malpractice (American Board of Professional Liability Attorneys), 11. Juvenile Law (Child Welfare) (National Association of Counsel for Children).

The answers to these questions at this time are not favorable to the public interest.

IV. The State of the Market for Legal Services Nationwide

A. The Current Supply of Attorneys in the United States: Categories and Trends

Analyses of attorney employment divide the market into three basic parts: (a) the "legal services market" offering legal services to the public directly, (b) "in-house" attorneys working directly for corporations or other entities, and (c) government lawyers.[108]

The first market, offering services to the public, primarily work in law offices (95.1%); only 1% work for non-profit legal aid entities.[109] The second category, that of "in-house" lawyers, has increased 203% from 1997–2017—almost seven times more than those providing direct legal services to the public.[110] These are lawyers working for "industries other than legal services or government," (e.g., counsel for corporations or trade associations or other commercial entities). The third major sector consists of government attorneys, up 49% over the same 20-year period. The largest proportion work for local governmental entities (county counsel, district attorneys, city attorneys, et al.) the next largest grouping for the state (legislative staff, agency counsel, attorney general, et al., and the smallest for the federal government.[111]

Of the 1.3 million practicing attorneys in the U.S. in 2018,[112] however, there is a noticeably declining number who are actually representing individuals in areas such as personal injury, family law, or housing matters (also known as the "PeopleLaw" sector), as opposed to attorneys representing corporate or other entities (the "Organizational Client" sector).[113] Indeed, for the most recently-reported year of 2012, U.S. Census Bureau Economic Census data indicate that the amount of money individual consumers spent on legal services declined substantially— $7 billion—over just a five year period.[114] By contrast, the Organizational Client sector

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[108] *See*, *e.g.,* Henderson, *supra* note 1 at 1–9. As discussed below, there is also so a small but increasing fourth category, "Alternative Legal Service Providers (ALSPs)" and legal technicians—using internet and artificial intelligence tools to provide law related assistance.

[109] U.S. Census Bureau 2012 Economic Census; Henderson, *supra* note 1 at 2.

[110] *Id.* at 4–5.

[111] *Id*.

[112] According to ABA statistics, there are 1,338,678 resident attorneys in the United States in 2018. *See* https://www.americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Population_1878-2018.authcheckdam.pdf.

[113] Henderson, *supra* note 1 at 12–16. *See also* John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (rev. ed. 1994) ("Chicago Lawyers I"); John P. Heinz et al., *Urban Lawyers: The New Social Structure of the Bar* at 6–7 (2005) ("Chicago Lawyers II").

[114] U.S. Census Bureau 2012 Economic Census; Henderson, *supra* note 1, at 13.

increased its spending by over $26 billion.[115] Put another way, individuals in the U.S. spent an average of $187 per capita on legal expenses, while government entities spent approximately $100,000 annually, and Fortune 500 companies spent $160 million.[116]

Meanwhile, the price of legal services has been increasing markedly. From 1987 to 2016, the cost of legal services rose nearly twice as fast as the overall Consumer Price Index-Urban.[117] Legal services are not alone in this phenomenon. Prices for other "human-intensive" services, such as medical expenses and college tuition, have likewise been increasing at a much higher rate than worker income.[118] While consumers are continuing to pay the higher prices for medical services and tuition, however, they are largely choosing to forego legal services, regardless of the need.[119]

In economic terms, the decline of the PeopleLaw sector of the legal services market can be attributed to higher relative cost, shrinking demand, and an emerging market of "substitutions" for traditional attorney services in the form of "legal tech" services.[120] At the same time, in the Organizational Client sector, profits have increased much faster than the nation's GDP or the Consumer Price Index.[121]

As of 2017, 12.3% of Americans lived below the federal poverty line.[122] Legal aid addresses only a small percentage of their legal needs and remains a very small public subsidy account. But the current supply shortfall, combined with a lack of price bargaining, reaches well beyond impoverished Americans. It is not merely children in family or dependency court, or the victimized elderly, or immigrants whose children are taken from them, who lack legal services. The problem reaches into the middle and upper-middle classes. At this point it undoubtedly includes not only most of the population, but the vast majority.

One manifestation of the attorney services collapse is the growth of unrepresented parties in court. This is one setting where most citizens would want some attorney representation. One study by the National Center for State Courts looked at 925,344 cases—a sample drawn from a variety of ten urban counties nationally and representing 5% of the total court cases during the one year surveyed. It found that 76% of those cases involved at least one party who was "self-represented"—appearing without counsel. The range of costs in most of these cases was $40,000 to $120,000. The median value of a judgment obtained was $2,441.[123] Were affordable counsel to be available and competently functioning,

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115 *Id.*

116 *Id.* at 14.

117 *Id.* at 17-18. Note that Consumer Price Index-Urban is the inflation measure used in relevant studies by the Bureau of Labor Statistics.

118 *Id*.

119 *Id.*; Bureau of Labor Statistics Consumer Expenditure and Income data, https://www.bls.gov/opub/hom/cex/ home.htm.

120 Henderson, *supra* note 1, at 19. Note that this market is currently being hampered by existing ethics rules nationwide pertaining to the "unauthorized practice of law," multijurisdictional practice, corporate ownership, fee sharing, and advertising. *Id.*

121 *Id.*

122 See *Income and Poverty in the United States: 2017*, United States Census Bureau, https://www.census.gov/library/publications/2018/demo/p60-263.html.

123 The time period of the study was July 1, 2012 to June 30, 2013, *see* Paula Hannaford-Agar JD, Scott Graves, and Shelley Spacey Miller, *The Landscape of Civil Litigation*

how many of those court cases would be resolved between counsel quickly and at lower cost?

What is the relationship between the current and increasing inability for most individuals in the U.S. to pay for and obtain legal representation and recent underlying trends? The data suggest three interacting dynamics: (a) a shift to high-profit organizational (predominantly corporate) representation, (b) the trend towards high-remuneration "partnership status" as the ambition and focus of attorneys, and (c) a failure to lower prices to generate demand—the normal market response where unmet demand remains. Underlying these factors is a setting of supply restriction—barriers to entry that are imposed by the current system of high and increasing tuition costs and time covering seven years of higher education, followed by a bar examination obstacle of unclear relevance to on-point competence.

B. Legal Tech and Prospective Supply of Needed Legal Services

One new grouping of legal services has not been included in the surveys discussed above. They are commonly referred to as alternative legal services providers ("ALSPs").[124] These involve a mix of attorneys and business executives, increasingly using the Internet and often new technology termed artificial intelligence ("AI") to deliver legal services to consumers (likely those who may be unwilling or unable to pay for a private attorney).[125] Their potential market is vast, for it includes the millions of people—now the majority of the nation—who are not being served by traditional attorneys. This grouping includes entities such as Axiom, Intergreon, Elevate, Quislex, and UnitedLex.[126] They are private corporations, often financed by venture capital and private equity funding. They have evolved to provide specialized help to corporate counsel or others where such specialization can be used. On the "PeopleLaw" side, several have arisen to provide help to the largest area of unmet demand, the need for routine legal services to draft a will or review a contract or even start a small corporation.[127] These and other new legal assistance ventures use attorneys and the Internet. Some jurisdictions, such as the British Columbia model, even engage in online mediation to minimize the need for expensive court proceedings.[128]

These efforts and many more potential ventures of this type are impeded by two ABA Model Rules of Professional Conduct adopted by virtually every state: Rule 5.4, prohibiting non-lawyer ownership of a law firm,[129] and Rule 5.5, prohibiting "unauthorized practice of law," i.e., attorney functions performed by a non-

in State Courts (National Center for State Courts, 2015); *see* related information, http://www.courtstatistics.org/; *see also* Henderson, *supra* note 1, at 19.

124 Thomas Reuters, *Alternate Legal Service Providers 2019* (Jan. 2019), https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/reports/alsp-report-final.pdf?cid=9008178&sfdccampaignid=7011B000002OF6AQAW&chl=pr.

125 *Id*.

126 *Id.*; *see* also Henderson, *supra* note 1, at 10-12.

127 *Id*.

128 *Id*. at 20. Additionally, the UK and Australia permit and regulate ALSPs. *Id.* at 26-27.

129 American Bar Association Model Rules of Professional Conduct, Rule 5.4 (professional independence of a lawyer), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer/.

attorney.[130] The rationale for these restrictions involves the preservation of "lawyer independence" and the prevention of "fee splitting" or financial arrangements providing funds to someone with a fiduciary duty to make the optimum referral—not influenced by a fee received from the beneficiary.[131]

There are some legitimate concerns related to these rules, but circumstances have made them largely disingenuous. In fact, private non-attorney ownership and control inhabits every corporation or other for-profit entity hiring an attorney as one of its officers or employees. If someone believes such persons are truly exercising "legal advice" separate from the profit-making purpose of the corporation, they are unfamiliar with the realities of law practice. Indeed, in the starkest example, the Big Four accounting firms employ attorneys providing legal services to all sorts of clients—individuals and entities. They are private corporations with investors and are not attorney-owned or controlled. They are in theory "under the supervision" of the client's other attorneys. Such other attorneys have the private interest of their client as a preeminent concern. And that reality is separate and apart from principles of legal ethics, which dictate attorneys' various duties to their clients.[132]

Three aspects of this new dimension for legal services warrant consideration. First, AI and the Internet are increasingly used for consumer benefit in many contexts, and across many professions, from automatic car braking to the reading of complex MRIs (possible for examinations 10,000 miles away). Second, given the extreme supply constriction from barriers to entry and the depletion of services for individuals discussed above, there is substantial unmet need likely reachable through modern technology.[133] Third, the costs of these services may be a fraction of the individualized attorney services option.

While it would make sense for those regulating the legal industry in the U.S. to recognize these overwhelming market signals and embrace new and innovative methods of increased access to legal services, the pattern thus far is to seek their

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[130] American Bar Association Rules of Professional Conduct, Rule 5.5 (unauthorized practice of law), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/.

[131] *See* Comments on American Bar Association Rules of Professional Conduct, Rule 5.4, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer/comment_on_rule_5_4/.

[132] *See, e.g.*, Rules 1.1–1.18 of the ABA Model Rules of Professional Conduct. Also note that even as to government attorneys, the notion that counsel operates with independent integrity is not an empirically verifiable proposition. *See* Fellmeth, *Walking the Line*, 15 CRLR 4 (Fall 1995) (reviewing judgments for violation of state Open Meeting, Public Records, and Administrative Procedure Acts and finding that even without the profit motive issue, government counsel have a cultural allegiance to the client to advance his or her or its interests provisions) *See* http://www.sandiego.edu/cpil/documents/Walking%20the%20Line.pdf.

[133] *See* Victoria Hudgins, *Survey: 69 percent of people would use online legal services over attorneys*, Law.com (Dec. 2018) (citing a Harris Poll where 82 percent of U.S. adults surveyed said they wanted alternatives to traditional lawyers when dealing with small legal matters, such as making a will and document review), https://www.law.com/legaltechnews/2018/12/12/survey-69-percent-of-people-would-use-online-legal-services-over-attorneys/.

limitation or elimination.[134] However, in 2018, the Board of Trustees of the State Bar of California formed the Task Force on Access Through Innovation of Legal Services, comprised of a mix of attorney and non-attorney members (a majority of whom are not attorneys), and charged with identifying possible regulatory changes to enhance the delivery of, and access to, legal services through the use of technology, including AI and online legal service delivery models.[135] It remains to be seen whether an attorney-dominated Board of Trustees will consider any recommended changes in this space.

Emerging developments in the legal technology space also raise issues with respect to attorney continuing competence and law school curriculum. With technology's increasing ability to replicate work that attorneys have traditionally performed (document review, contract drafting, legal research, etc.), regulators and law schools alike must reconsider the knowledge skills and abilities that lawyers as humans can uniquely deliver. Are existing continuing legal education models ensuring that attorneys are keeping up with this technology, and offering their clients the most efficient and accurate method of services?[136] Are attorneys incentivized to do so given the existing billable hour business model? Are law schools training law students about this emerging marketplace? Are "essential skills" such as empathy, technology, problem-solving, writing, time management, and client communication incorporated into law school core curricula?[137]

V. Ten Steps to a Lawful System of Attorney Entry and Regulation in the Public Interest

The data support increasing the supply of attorneys by multiple measures: the need for indigent representation, the lack of attorneys providing services to individual (as opposed to corporate) clients, and the high price of legal services—which now

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134 Daniel Conte, *Avvo Shuts Down its Legal Services Product in Wake of Ethics Opinions Warning Attorneys Not to Participate* (Aug. 14, 2018), https://www.hinshawlaw.com/newsroom-updates-avvo-shuts-down-its-legal-services-product-in-wake-of-ethics-opinions-warning-attorneys-not-to-participate.html; *see* New York State Bar Association, Opinion 1132 (Aug. 8, 2017), http://www.nysba.org/EthicsOpinion1132/; s*ee also* Tom Gordon, *ABA To Consider Proposed "Best Practices" for Online Document Preparers*, (Jan. 23, 2019), https://www.responsivelaw.org/blog/ny-bars-proposed-regulation-of-online-document-preparers-to-go-before-aba. *See also* Xiumei Dong, *Survey Finds Legal Industry in Last Place in AI, Machine Learning Adoption*, Law.com, (Nov. 19, 2018), https://www.law.com/therecorder/2018/11/19/survey-finds-legal-industry-in-last-place-in-ai-machine-learning-adoption/.

135 Co-author Gramme is serving as an attorney member of this task force, as well as the Association of Professional Responsibility Lawyers' Future of Lawyering Committee studying similar issues with respect to the ABA model rules.

136 *See* comment 8 to ABA Model Rule of Professional Conduct 1.1 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.").

137 *See* Catherine Sanders Reach, *Essential Tech Skills for the New Lawyer*, ABA for Law Students (November, 2017), https://abaforlawstudents.com/2017/11/02/essential-tech-skills-for-the-new-lawyer/.

often places quality (or any) legal representation out of the reach of even the middle class. The dilemma becomes "how do we increase the supply of attorneys to address increasingly unmet legal needs without compromising competence?"

It is beyond time for us to recognize that the existing cartel-controlled legal profession in the United States is ill-equipped to address this dilemma. It does not stimulate supply, competitive pricing, or any kind of competence assurance (or other consumer protections) in actual areas of attorney practice. A review of the problems and available cures commend the following ten major reforms in legal practice regulation.

A. Reform the Entire Socratic Tradition for Legal Education

As a rational issue examined *tabula rasa*, how would we arrange the years of college education to qualify persons for attorney licensure and consumer reliance in relevant areas of law? If we were fashioning one from scratch, would we require four years of often substantially unrelated courses with the delay and costs noted above, followed by three years of largely cerebral generality, often lacking connection to the future practice of those students?

Today, law schools do not accept applicants without bachelor's degrees, and the American Bar Association will not accredit schools that do.[138] A rational prescription to stimulate both supply and competence, and which relevant evidence commends, would include three reform elements:

Employ a Five-Year Total Higher Education Path for Bar Licensure

The first two years would include liberal arts or other courses of interest to students. But of these likely 16 to 20 courses, three to five would have some colorable relationship to law: political science, economics, legal history, et al. Such college students could be admitted to law school following their second year.

Restructure Law School Curriculum

Law school would occupy the final three years, with the first year including Socratic Method teaching of fundamental subject areas (contracts, torts, civil procedure, constitutional law, property, legal ethics, evidence). Moreover, existing law school courses reflect an arcane mindset that elevates judicial precedents to the exclusion of other areas of legal practice. In particular, the legislative and executive branches are largely ignored, despite their obvious relevance to legal practice. Courses on legislation and on administrative law[139] are thus properly part of these first two

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138 American Bar Association, *ABA Standards and Rules of Procedure for Approval of Law Schools* 2018-19, at 32, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf

139 State regulatory agencies are particularly ignored, with few law schools teaching anything about a subject that determines the regulation of all trades and professions (including attorneys), the environment, education, and health. These agencies function primarily at the state level and knowledge of what they do and the procedural rules determining

years, as are courses involving newly emerging "essential skills," and elective courses related to areas of specialized interest: criminal, juvenile, environmental, or civil rights law. Of the typical eight to nine courses taken during the third year of law school, three could be follow-up courses in one of those separate areas of common practice explored in the second year, and the rest of the third year should consist of practical experience in an area of actual prospective practice. Hence, for the final year—and particularly the final semester—law schools would offer clinics, internships, externships and perhaps one semester of advanced placement in a particular area of practice.

Require "Concentrations" Pertaining To Desired Practice Area

The law school would formulate "majors" or areas of "concentration," consisting of collections of properly-sequenced courses and practical skills training relevant to an area of law.[140] Students who concentrate their studies develop a specific, heightened proficiency that is relevant to their future career. In addition, concentrations would be reflected on students' transcripts so that future employers may consider them in hiring. These features would facilitate student progress into a legal career, and ensure competence and readiness to practice in a specific practice area. Law schools should hire practicing attorneys in the relevant practice areas to serve as adjuncts, and provide contemporary skills-based training for law students.

B. Hold Law Schools Accountable for Tuition Pricing

The antitrust division of the U.S. Department of Justice should create a monitoring enforcement team to detect any and all indicia of price fixing in higher education, including law schools. This includes patterns of "price leadership," and other coordination by law schools, whether though the American Association of Law Schools, the American Bar Association, or any other mechanism.

Furthermore, law schools and other institutions of higher learning should be open and transparent to their prospective students about differential pricing options and data, including number and amounts of tuition "discounts" based on pre-admission statistics such as GPA or LSAT scores. These strategies, and the extent of their influence, must be disclosed to accomplish pricing information and tuition competition. Prospective students should know how much they are paying relative to other admitted students and the variables dictating those differences. Actual tuition, including net tuition amounts after "individual scholarship" reductions by the law school (not involving actual gifts or outside funded accounts) should be comparatively reported and published.

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their transparency, accountability, and legality should be a part of the curriculum of all schools.

140 An example is the University of San Diego, offering concentrations in: (1) Business and Corporate law, (2) Children's Rights, (3) Civil Litigation, (4) Criminal Litigation, (5) Employer and Labor Law, (6) Environmental and Energy Law, (7) Health Law, (8) Intellectual Property, (9) International Law, and (10) Public Interest Law. http://www.sandiego.edu/law/academics/jd-program/concentrations/. Each area has one or several required courses and a number of allowable electives. Completion of the requirements for such an area of concentration is part of the student's official transcript.

C. Establish Robust Loan Forgiveness and Legal Education Subsidy Programs

One way to ameliorate high education costs, while simultaneously addressing the widespread unmet legal needs in our country, is to provide loan forgiveness (also known as "loan repayment assistance programs") to attorneys who may be working to address those legal needs but earning a lower salary than they would if they chose to represent corporate clients.

Other professions have established systems for such assistance. Nationally, the Public Service Loan Forgiveness Program has been in effect since 2007, although its future is in doubt.[141]

More relevant, particularly for California, is the example provided by and for the medical profession: the California State Loan Repayment Program (SLRP).[142] It provides assistance to a broad array of health professionals, including doctors, dentists, nurses, social workers, therapists and pharmacists. The beneficiary must commit to practice in medically underserved areas for a minimum of two years and a maximum of four years, with $50,000 available the first year, $20,000 the second and third years and $10,000 the fourth year.[143]

Specifically, in 2002, the California Legislature established the Physician Corps Loan Repayment Program within the Medical Board of California.[144] In 2004, it was renamed the Steven M. Thompson Physician Corps Loan Repayment Program, and its administration was subsequently transferred to a foundation.[145] The Program is currently funded by an earmarked, mandatory surcharge on physician and osteopath licensing fees, an annual allocation of $1 million from the Managed Care Administrative Fines and Penalties Fund,[146] donations, grants,

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[141] The program allows people working for qualified organizations to repay some of their federal student loans based on a portion of their monthly income. After making 120 monthly payments, the remaining federal student loans are forgiven, with no cancellation-of-debt income tax consequences. Private loans are not eligible for PSLF. At this writing the program is still in effect, although there are competing bills pending in Congress to limit it (Promoting Real Opportunity, Success, and Prosperity through Education Reform Act (the "PROSPER Act"), 115th Congress (2017–2018), H.R. 4505, Rep. Foxx, https://www.congress.gov/bill/115th-congress/house-bill/4508/text#toc-H0DD0FF2E45414041A8FACE65B4BD4B73) and to expand it (Aim Higher Act, 116th Congress (2018-2019), H.R. 6543, Rep. Scott, https://www.congress.gov/bill/115th-congress/house-bill/6543.

[142] *See* https://oshpd.ca.gov/loans-scholarships-grants/loan-repayment/slrp/.

[143] https://oshpd.ca.gov/loans-scholarships-grants/loan-repayment/slrp/#provider-eligibility.

[144] AB 982 (Firebaugh) (Chapter 1131, Statutes of 2002).

[145] The Health Professions Education Foundation (HPEF) is a non-profit 501(c)(3) public benefit corporation housed within the Office of Statewide Health Planning and Development (OSHPD). Pursuant to Health & Safety Code sections 128330-128370, HPEF is required to submit an annual report to the California State Legislature documenting the performance of the Steven M. Thompson Physician Corps Loan Repayment Program (STLRP).

[146] This fund is administered by the Department of Managed Health Care in California and consists of administrative fines and penalties assessed in the process of licensing and regulating Health Care Service Plans. *See* Cal. Health & Safety Code § 1341.45(a).

voluntary contributions, and interest earned on surplus money investments.[147] The Program provides $105,000 in loan forgiveness for three years of service in designated "Medically Underserved Areas."[148] Although this and related programs do not create health care services for even a substantial part of the indigent, since 2013 this one program involving medical profession creation and contribution, has received 1,228 applications to 2018. The program has awarded more than $47 million and monitored the progress of 538 physicians providing direct patient care in 47 of California's 58 counties. Consistent with the intent of the program, 80 percent of the total recipients are certified in a primary care specialty.[149]

In contrast, attorney loan forgiveness has a very different record. Nationally, over 100 law schools do offer Loan Repayment Assistance Programs (LRAP) for graduates who pursue public interest work.[150] However, the number of recipients and the amounts involved are small and, although laudable, serve mostly as a symbolic commitment.[151] Aware of the problem of law school debt, some advocates in California attempted to create a credible system of repayment for those representing impoverished clients or doing public interest work for qualified 501(c)(3) charities. In 2001, Assemblymember Robert Hertzberg authored a bill to establish a "Public Interest Attorney Loan Repayment Program."[152] While the law has been on the books for over 18 years,[153] it has never been funded.

Subsidies for law school education should be enhanced from both public and charitable sources. Using the STLRP program as a model, the bars of every state should identify specific geographic and practice areas with the lowest rates of access to legal services and establish substantial loan forgiveness programs for attorneys who work to meet those needs. These programs should be funded with a

147 *See Steven M. Thompson Physician Corps Loan Repayment Program Annual Report to the Legislature*, at 3-4 (June 2017), https://oshpd.ca.gov/ml/v1/resources/document?rs:path=/Loan-Repayments-Scholarships-Grants/Documents/HPEF/Publications-Reports/HPEF-STLRP-Annual-Report-to-Legislature-2017.pdf. The total amount spent from all sources on this program from July 2015–November 2016 was $6 million. *Id*. at 4.

148 STLRP guidelines are in California Health and Safety Code Section 128550-128558 and the California Code of Regulations are in Title 22, sections 97931.01-97931.06.

149 *See Steven M. Thompson Physician Corps Loan Repayment Program Annual Report to the Legislature, supra* note 147.

150 See ABA description at https://www.americanbar.org/groups/legal_education/resources/student_loan_repayment_and_forgiveness/; *see also* https://www.psjd.org/getResourceFile.cfm?ID=112 for a discussion of the confluence of LRAPs with other potential assistance.

151 Based on the authors' survey of individual law school programs, amounts obtained in these programs vary under complicated formulae but are generally at or below $7,000 per year. These amounts here are generally less than one fifth the amount paid to physicians. Some LRAP programs may provide benefits for a longer period (many for up to five years and some for up to 10) where public interest law practice continues and with total income below $60,000 per year (with benefit reductions common where income is above $40,000). The average amounts provided are relatively small, particularly in relation to the over $140,000 in average accrued law school debt for graduates, and in relation to the benefits afforded by the professions. The percentage of a law school's graduates receiving assistance is typically less than 2%. They depend on law school created "funds" fed from charitable contributions and other limited sources.

152 AB 935 (Hertzberg) (Chapter 881, Statutes of 2001).

153 *See* Cal. Ed. Code § 69740, et seq.

mandatory surcharge on annual attorney licensing fees. They should also work with their respective state Attorneys General to earmark a percentage of civil penalties assessed to stabilize this fund, similar to the Managed Care Administrative Fines and Penalties Fund.

D. Rethink the Bar Examination

Each state should undertake, as California and the NCBE are now (and as other professions have done for decades), a regular psychometric evaluation of its licensing exam to ensure that the cut scores are properly evaluating minimum competence to practice law as it is currently being practiced.[154] Ideally, after completing law school, 80–90% of applicants should be passing the bar exam.

Specifically, the bar examination should test basic legal vocabulary and concepts, including the concept of judicial "precedents," and overarching legal principles pertinent to all practice areas: professional responsibility, contract law, torts, civil procedure, constitutional law, basic rules of evidence, and remedies. The additional competence assurance required for certain actual areas of practice requiring particular knowledge and where negligence will portend serious harm, should have additional qualification respectively, and regularly evaluated to ensure continuing competence.

Public protection, the purported justification for this arbitrary and notoriously difficult-to-pass examination, will be better achieved without an extreme barrier entry into the legal profession.

E. Require Law Schools to Achieve Minimum Bar Pass Rates

Once states have undertaken the appropriate analyses to ensure that the content and cut score of their respective bar exams are valid, they should then take measures to ensure that law schools within their jurisdictions are achieving a minimum pass rate.[155] For example, schools with less than 65% of their graduates passing the Bar within two years would be placed on probation, and ultimately be barred from access to the bar examination in their state, and required to return all tuition collected from the students who failed to meet that minimum and reasonable standard.

Such a standard is designed to ensure that schools not be tempted to admit students who do not have the skills necessary to pass the bar exam. The purpose of a law school is not to generate tuition, academic positions, law review articles, or conference gatherings. It is to prepare students for practice as ethical, competent attorneys serving the public. If their operation instead takes many thousands of dollars from youth and their families, incurs momentous debt, and yields little or no remunerative opportunity, that institution is not meeting the *raison d'etre* for its

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154 *See supra* Section III.D..

155 At this writing, the ABA has been engaged in a three-year debate as to whether to amend Standard 316 of its Standards and Rules of Procedure for Approval of Law Schools to require 75 percent of a school's bar exam takers to pass within two years of graduation, rather than the five years currently allowed. *See* Lyle Moran, *ABA Legal Ed Council Delays Decision on Stricter Bar Passage Standards*, ABA Journal, February 22, 2019, http://www.abajournal.com/web/article/aba-legal-education-council-delays-decision-on-stricter-bar-passage-standards.

existence. On the other hand, it does not make sense to impose such a standard until we can be sure that the exam itself, and the cut score, is designed to exclude only those who are not minimally competent to practice law.

F. Identify Specific Areas of Law Where Specialized Competence is Required

Rather than require a rigorous bar examination spanning multiple specialized practice areas as a requisite condition for all bar applicants, states should instead offer a basic examination (as described above), and then design a certification mechanism for attorneys who choose to practice in areas which pose the greatest risk of irreparable harm to the public. Indeed, some areas of law, such as immigration, juvenile dependency, criminal defense, landlord/tenant, and family law, are fields which may have devastating results on a client with just one case (i.e. deportation), and in which clients generally lack the ability to judge attorney competence for themselves (unlike corporate clients with general counsel who may more easily determine whether their attorneys are best serving their interests).

The bars of each state should consider which practice areas have the potential to impose the greatest harm to consumers, and then require attorneys who choose to practice in one of these areas to demonstrate minimal competence in their chosen field. This could include a state-issued "certification," which attorneys may achieve by passing a psychometrically-sound, practice area-specific examination, and/or working under the direct supervision of a current practitioner for a specified number of hours as an apprentice.[156] Attorneys would then be required to renew these certifications at regular intervals (such as every seven to ten years) to demonstrate continued competence, including knowledge of contemporary legal precedents.[157] These measures need not be expensive, onerous, or time consuming, and elective law school courses covering these fields could be designed to prepare applicants for the desired certification.[158]

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[156] Note that these proposed certifications are different than the existing "specialization" models, which currently serve as marketing tools, enabling attorneys to charge higher prices to sophisticated clients for the privilege of being represented by a legal specialist. *See supra* Section III.D.. Instead, these certifications would be issued by the bar, subject to relevant antitrust laws, and psychometrically validated, in order to ensure public protection.

[157] Indeed, to maintain certification for Cardiopulmonary Resuscitation ("CPR"), one must take a refresher course every two years. Why do we not require the same for licensed professionals?

[158] Flexible standards for practice in the event that a longstanding practitioner fails the re-certification exam could be available; for example, a 90-day probationary period could be imposed to allow time for a retake. This flexibility can be important for the clients of practitioners who might be harmed by the interrupted practice of their attorney. If competence cannot be demonstrated at the end of 90 days, the specialized practice in that area would cease.

G. Reform Continuing Legal Education to Require Continuing Competence in the Substantive Areas of Actual Practice

Many state bars require that attorneys complete a certain number of hours of "continuing legal education" ("CLE") over a specified number of years as a condition of license renewal. However, many do not require that these courses coincide with an attorney's area of actual practice, nor do they typically require any kind of assessment demonstrating retention of the information.

Such CLE requirements should be amended to require that at least half of the CLE hours be taken in the attorney's designated area of actual legal practice. Additionally, state bars should administer a psychometrically-sound, basic test in an attorney's chosen practice area at least every ten years as a condition of license renewal. If the attorney cannot initially pass the exam, he or she may be placed on probation for 60 days to retake the test. If unable to pass such a test in that specialty area after repeated attempts, the attorney should move to another area of practice where client reliance will not have the same consequences or where relevant competence is demonstrated.

H. Revise Existing Ethics Rules to Permit New and Innovative Methods for Delivering Legal Services

The use of modern technology is growing and permeating many trades and professions, including legal practice. As discussed in Section IV.B. above, the challenge facing all state bars is how to embrace emerging technologies to benefit those in need of legal services. Two variables are at issue which must be appropriately balanced: the advantage of additional services meeting demand, and the danger of abuse or malpractice with consumer harm resulting.

It is important that those regulating attorneys not over-enforce the "unauthorized practice of law" mantra in order to protect attorneys' "turf" and preserve their ability to charge higher hourly fees.[159] On the other hand, one obligation of regulators is to protect consumers from abuse by commercial interests in areas legitimately a part of, or closely related to, legal services.

Each state should appoint a commission, including (and perhaps a comprised of a majority of) non-attorneys to revisit rules governing the unauthorized practice of law, multijurisdictional practice, advertising, fee sharing, corporate practice, etc. Specifically, the commission should assess the historical purpose and impetus behind these rules, determine whether existing rules are achieving the aforementioned balance of access to legal services and public protection, and assess whether these rules are stifling the innovative delivery of legal services to a public which is in great demand of these services. Moreover, such a commission should consider not only potential reforms to business structures and technological innovations, but also consider whether new categories of licensure (akin to nurse practitioners in the medical profession) may be implemented in order to maximize access to legal services.

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[159] The North Carolina State Board of Dental Examiners was seeking to sanction and halt the practice of teeth whitening as the unauthorized practice of dentistry and to confine such brightening to practicing dentists. *See N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1111; discussion in Section II.A, *supra*.

I. Consider Mandatory Liability Insurance

Another measure that would protect the public from incompetent and unethical attorneys—but has been largely opposed by attorney-dominated state bars—would be to require attorneys to carry liability insurance as a condition of licensure. Indeed, existing attorney discipline systems across the country generally do not police negligent acts that may cause harm to consumers, and consumers are generally unable to recover against attorneys who do not carry insurance.[160]

The result of a lack of coverage is effective immunity from damage or restitution assessment for the vast majority of such attorneys. Plaintiffs' malpractice attorneys will not normally pursue cases where payment of judgments obtained is unlikely or uncertain. Further, states do not generally assure payment of malpractice judgments. In the case of California, the State Bar has a Client Security Fund, but it deliberately includes only dishonesty or damages arising from disciplinary proceeding proof, and excludes negligence or malpractice judgments.[161]

While many countries require attorneys to carry liability insurance to protect clients from precisely these harms, only two states in the U.S., Idaho and Oregon, maintain the same requirement.[162] In 2018, California convened a malpractice insurance working group to study this issue pursuant to a statutory mandate.[163] On March 15, 2019, however, the working group submitted a report to the Board of Trustees of the State Bar reflecting a sharply divided group, and finding that more data is required prior to making a recommendation regarding whether mandatory malpractice insurance is necessary.[164]

J. Reformulate State Bar Governance Structures to Comply with Antitrust Laws

Antitrust policy and compliance is a major issue for all state regulatory agencies; licensure decisions directly control the supply of legal services, with *per se* federal Sherman Act unlawful implications.[165] Thus, decisionmaking by state bar entities controlled by attorneys—i.e. "active participants" in the legal market—cannot enjoy immunity from the antitrust laws by claiming they are a state agency.[166] To protect themselves from potential antitrust liability—and more importantly to ensure the

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160 *See* Leslie C. Levin*, Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281 (2016), http://scholarship.law.ufl.edu/flr/vol68/iss5/2; Testimony of Robert C. Fellmeth to the State Bar of California's Malpractice Insurance Working Group, July 9, 2018, http://www.sandiego.edu/cpil/ documents/20180709_RCF%20Testimony_Final.pdf; Illinois Attorney Registration & Disciplinary Commission Annual Report of 2016, https://www.iardc.org/AnnualReport2016.pdf at 16 (finding 41% of sole practitioners in Illinois reported they did not carry malpractice insurance).

161 *See* Cal. Bus. & Prof. Code § 6140.5; see also testimony of Robert Fellmeth, *supra* note 160.

162 *See* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid.authcheckdam.pdf.

163 *See* Cal. Bus. & Prof. Code § 6069.5; http://www.calbar.ca.gov/Portals/0/documents/702-Malpractice-Insurance-Working-Group.pdf.

164 http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000023886.pdf.

165 See detailed discussion in Section II, *supra*.

166 *N.C. State Bd. of Dental Exam'rs,* 135 S. Ct. at 1116.

adoption of policies that prioritize consumer (and not attorney) protection—state bar governance structures must be reformed in at least the following ways.

Eradicate Conflict of Interest Inherent in "Unified Bars"

Several bars across the country maintain a "unified" or "integrated" governance structure. Under this structure, a state bar serves as a trade association and also as a regulatory agency—in a single entity. This model gives rise to the appearance of impropriety. It poses an inherent conflict of interest between acting in the best interests of the legal profession and acting in the best interests of the public. This is a profound ethical problem. Recently, it has started to be addressed.

By way of example, in 2018, after 25 years of study and consideration of this proposition, the State Bar of California was statutorily required to "deunify," spinning off its 16 practice area-specific sections and other aspects that constitute direct trade association activities into a separate trade association, the California Lawyers Association.[167] The California Bar has been implementing this deunification in recent years, aiming to streamline what has expanded into a panoply of "sub-entities" operating under the umbrella of the Bar, and boasting 250 volunteers, even after the split of the sections.[168]

States that maintain an integrated structure should follow California's lead.

Comply with North Carolina State Board of Dental Examiners v. FTC

Ideally, governing boards charged with making decisions impacting the regulation of the legal profession should not be controlled by practicing attorneys who stand to benefit from the policies they adopt. Instead, boards should be comprised of a "public member" majority—who may consult attorneys for their expertise in the field, but whose ultimate allegiance is to public protection alone.[169]

If this option is not exercised, and the states opt to maintain an attorney-member majority, the only way to ensure that the boards are not acting anticompetitively and to guarantee state action immunity from federal antitrust laws is to establish a supervisory entity that reviews the board's decisions for anticompetitive effect. That review must explicitly not be symbolic or perfunctory, but must include analysis of anticompetitive impacts and have the clear authority to amend or reject all or any part of any decision being made.

For example, state supreme courts could appoint a body of experts, ideally including economists with antitrust expertise, educators, and others, to evaluate

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167 *See* SB 36 (Jackson) (Chapter 422, Statutes of 2017).

168 *See* Memo to the Board of Trustees from Richard Schauffler, Analyst of the Office of Research and Institutional Accountability, July 19, 2018 at 5, http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022371.pdf.

169 The landmark 2017 California legislation deunifying the State Bar of California also revised the composition of the State Bar Board of Trustees—eliminating six positions which were elected by California attorneys, and providing for more even distribution of attorneys (7) and non-attorneys (6). *See* SB 36 (Jackson), *supra* note 168. Although moving away from the extreme cartel structure of the past 80 years, the new governing body remains under the control of "active market participants." *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. 1101.

complaints, gather relevant evidence and advise the justices accordingly as to the potential anticompetitive impact of policies adopted by an attorney-controlled board.[170]

VI. Conclusion

The purpose of state licensure is to assure access to competent practitioners, especially when incompetence threatens irreparable harm. It is not to serve as a means for professions being regulated to artificially restrict supply so as to drive prices out of reach of the lower and middle classes.

As the 21st century ushers in a new era of technology and innovation, we find ourselves at a crossroads. Both the legal profession and the several states must choose whether they will continue to allow special interests to capture professional regulatory bodies and infect them with abject self-interest. Or, will they truly act in the best interests of the public?

As it stands, the fox guards the henhouse. There is little question that lawyers govern the legal profession for lawyers. The American Bar Association decides what law schools can and cannot do from sea to shining sea. This lawyer monolith all but decides how to become a lawyer, on behalf of lawyers, for the people of the United States.

And the cartel has acted exactly as one would expect—in line with its own interests. It has made it exorbitantly expensive to become a lawyer. A legal education takes seven years—four of which are unrelated to law. A law student must mortgage his or her future, at a total cost ranging from $190,000 and $380,000. And perhaps most disturbingly of all, the legal training that students do receive (in their final three years of those seven) often leaves them woefully unprepared. A student's textbook legal education is tangentially relevant at best to the one or two of 24 heavily specialized practice areas of modern law in which that student will eventually practice. Even the doctrinal classes are insufficient—students are almost universally funneled into expensive "bar preparation" classes to get them through licensing exams.

Those licensing exams have virtually nothing to do with the practice of law. They consist almost entirely of memorized subject matter that bears little resemblance to what lawyers do on a daily basis, scored by an arbitrary "cut score" to guarantee a high percentage of failures—in California, 60%.

Meanwhile, the state bars:

(a) Do not rank negligent acts as a normal basis for discipline (outside of extreme incapacity);

[170] There is little doubt that those involved in public regulation, including attorneys, generally believe that they serve the public interest, usually receiving little or no compensation. They subjectively believe that their mission is to serve the public interest. But the accumulation of persons into trade associations creates empathy lines that are rarely discussed openly. To illustrate, how often does a state bar discipline attorneys for over-billing? How often is the issue of knowing deceit in points and authorities, et al. subject to sanction or professional approbation? Or even discussed? How often do state bars study the impact of supply limitations *vis-à-vis* hourly prices?

(b) Do not require malpractice insurance—allowing attorneys to effectively escape sanctions or the obligation to pay for harm caused to their clients;
(c) Ensure that their "client security fund[s]" compensate injured clients for only theft, not malpractice (even where a judgment exists);
(d) Do not require continuing legal education to be in the areas in which attorneys practice;
(e) Most significantly, never test any attorney in any area of actual practice relied upon by consumers—ever, even in areas of law where clients are unable to gauge competence and a single case can mean ruination; and
(f) Confront and attempt to dismantle artificial intelligence and other technological solutions to legal problems, as an affront warranting elimination—even in situations when these solutions could be cheaper and more effective to clients than live lawyers.

The societal costs of lawyers regulating lawyers are dire. Legal services are so expensive that three quarters of legal cases involve an unrepresented party. The poor have token access to legal representation at best, and the situation is not much better for the middle class. At a certain point, it starts to look like the sticker price of legal education is rather the point of this endeavor—to drive up the cost of becoming a lawyer and to reduce competition for existing practitioners. The point of regulation should be to help the people who hire lawyers, not the lawyers themselves.

Critically, no area of state regulation more consistently overlooks the specter of federal antitrust liability than does the legal profession itself. The Supreme Court of the United States unambiguously held in 2015 that any state body controlled by "active participants" in the profession being regulated is not a sovereign entity for antitrust purposes. And yet the legal profession continues to use state machinery to regulate itself without active state supervision. Licensing without state action is supply control—price fixing, a *per se* Sherman Act violation. This poses an obvious problem, which should be a great motivator for change. State action immunity would be available if a state body without a conflict of interest actively supervised the attorney-run regulatory process. But so far, that has not happened.

The question remains. Will states seize upon the momentum of the 2015 *North Carolina State Board of Dental Examiners v. FTC* opinion and regulate in the interests of the people? Or will they continue to forsake their responsibility and allow special interests to grasp the reins?