Simple Justice
A New York Criminal Defense Blog

The Day Lawyers Died

While lawyers were busy representing clients, fighting fights and cutting deals, making sense of the mess people make of things, taking relatively easy problems and turning them into monumental fiascos, a bunch of lawprofs held a virtual symposium directed toward one goal: the end of lawyers.

At Truth on the Market, a group of lawprofs (with a notable non-lawprof, Walter Olson of Overlawyered) discussed "*Unlocking the Law: Deregulating the Legal Profession*." The scope of discussion was broad, venturing from the elimination of law school entirely to the elimination of the monopoly entirely. The scope was explained:

Welcome to "*Unlocking the Law: Deregulating the Legal Profession*."

Licensing and regulation of lawyers, long questioned by scholars, is emerging as an important public issue. Legal costs are rising for individuals and firms with increases in litigation and regulation. These costs tax business growth and entrepreneurship and impede ordinary Americans' access to the civil justice system. Meanwhile, the development of new business structures and technologies and significant regulatory moves toward opening up competition for legal services in the UK and elsewhere are forcing policymakers to address lawyer licensing and regulation. The U.S. is certainly not immune from the economic and other institutional forces nudging toward a reconsideration of existing licensing and regulation regimes. It is an excellent time to reexamine the costs and benefits of existing and alternative regimes in light of these changes.

The Head Mortician was Larry Ribstein, who opened and closed the show. His rhetoric of death aside, his approach was cautiously limited.

It's unlikely that lawyer licensing will completely die. It will be hard to reconcile complete deregulation of law practice with continued licensing of doctors, tour guides and horse dentists. But there's an important difference between lawyers and these other professions: the prodigiously powerful lawyer interest group has managed to restrict access to the extremely broad field of human activity called the "practice of law." This regulatory monolith is bound to fracture.

Ribstein goes on to suggest that the barrister/solicitor distinction may prevail, or that lawyers be given "drivers licenses" that ends the jurisdictional distinctions. Nothing earth shattering, and frankly rather modest proposals given the tendency to scream about falling sky.

Others, however, have grander schemes. Brookings Senior Fellow Robert Crandall, for example, decried the lack of lawyers, proven to his conclusive satisfaction by the salaries earned.

Were the practice of law deregulated, allowing anyone to offer a variety of legal services, the prices of the simplest services would surely decline. Equally important, the amount of legal training received would vary across the legal services field. At present, everyone sitting for a bar exam in most states must obtain the equivalent of three years of instruction at an ABA-accredited law school. Surely, three years of law school are not necessary for lawyers handling simple divorces, real estate transfers, or traffic violations.

Has Crandall ever handled a traffic violation?

Under current ABA-sponsored state rules, only lawyers can own law firms. Such a restriction obviously excludes entrepreneurs who might find innovative new ways to deliver legal services, perhaps as complements to other services, such as accounting or business consulting. There is no good reason why lawyers should only work for lawyers in delivering legal services to third parties. More diversity in legal services firms would likely promote innovation and provide consumers of legal services with more options and potentially lower prices.

There are some damn good reasons why only lawyers should own law firms, such as the competing profit motive versus ethical obligations dilemma, but Crandall merely waves his hand to make them disappear. The obvious argument for occupational licensure in any profession is that it sorts out incompetent and unscrupulous practitioners. In the practice of law, surely the road to competence is not only through three years of an ABA-accredited law school. At the very least, prospective lawyers could be freed to pursue their legal training wherever they choose and then to sit for a bar exam. And the bar exam could have several variants, depending on the sitter's intended specialty. Why, for example, should those intending to handle domestic disputes be well versed in all of the technicalities involving complex financial transactions?

Everything old is new again, and don't call me Shirley. Back to the apprentice days, and a push for specialization at the earliest years, meaning the death of lawyer as generalist. Or could Crandall be suggesting the down-sizing of lawyer to Legal Practitioner?

The voices of reason in this symposium turn out to be Walter Olson and Gillian Hadfield, a lawprof who has long been a forceful advocate for affordable legal representation.

Although it has the zing of a slogan that I myself have often used, the call to 'deregulate' the legal profession is misleading. Yes, most of us who argue that the legal profession is excessively closed to competition—in a way that hampers both access and innovation, as I have argued in recent papers—think that the entry barriers are too high. But the legal profession is not only over-regulated, it is also under-regulated. The regulatory regime lawyers and judges have put in place is overly protective of lawyers' interests and insufficiently protective of the public's interest in an accessible, innovative, and efficient legal system. So the goal should not be 'deregulation' but 'right-regulation.'

Hadfield's challenge isn't to dismantle legal education and regulation, but to take it out of the exclusive hands of lawyers and introduce others into the mix of crafting legal economic policy. For this, Crandall immediately takes her to task:

Gillian Hadfield argues that "right-regulation," not deregulation, is the right palliative for what ails the legal-services industry. But how are we to know what regulation is "right"? Nothing in her posting suggests that three years at an ABA-accredited law school is necessary for the execution of many of the tasks that we now confine to lawyers. Her plea for subjecting the legal services market to the general laws governing coinsumer protection, professional negligence, or antitrust does not translate into the necessity of retaining the current entry barriers for the practice of law. She also argues for transferring the regulation of the legal profession from lawyers and judges to other institutions without explaining why industry-specific regulation is necessary or could could possibly be welfare enhancing.

Anything short of rape and pillage, apparently, is cause for a fight among academics. Always a bright spot when reading their posts.

Olson's vision is far more pragmatic than the academics. The only thing worse than the regulation of litigators would be the deregulation of litigators.

As a libertarian, I mostly concur in the critique of occupational licensure made famous by (among others) Milton Friedman. For the most part, licensure is a consumer-unfriendly affair that protects incumbent practitioners from competition, locks out promising new methods of service provision, and interferes with voluntary dealings between professional and client. It is dubious enough as applied to occupational groups such as doctors and plumbers, and downright ridiculous (as the Institute for Justice keeps reminding us) as applied to groups like cosmetologists, florists and interior designers.

But lawyers are different. No, seriously — they are.

Bet you didn't see that coming.

I am not convinced that deregulating the power to commence this sort of civil process and demand money from an opponent for calling it off — in effect, to widen the existing pro se exemption so as to allow anyone to proceed pro se on behalf of anyone else they can get to sign up — would reduce the amount of unjustified legal aggression in a system that already has plenty of it and to spare.

Wally throws the cold water of reality on the theoretical happy faces, that while deregulation offers the promise of a lawyer for everyone (if not everyone being a lawyer), it comes with a side of insanity and incompetence that can't be ignored. Not surprisingly, the scholars paid no heed.

In the wrap-up, Tom Crandall takes note of what shockingly happens when you put a bunch of like-minded people in the same virtual room.

As we approach the end of this Symposium, I am struck by how much consensus exists on this subject. Of course, we are not conducting this exercise under the auspices of the ABA. Nevertheless, there is sufficient intellectual backing for a major push to begin the deregulation of legal services.

It's always heartwarming to know that scholars think sufficiently highly of their views of things other people do to demand change. While this recap, obviously and necessarily, scratches the surface of this symposium, and is open to every person involves parsing my omissions at painful length and in excruciating detail (because their words and ideas demand a full airing to appreciate their brilliance), it struck me as worthwhile to point out to lawyers that this was happening off in some ivy covered tower where lawyers never tread.

The discussions were largely superficial, with old arguments rehashed without much scrutiny or recognition of the flaws. Still, most of the revolutionary changes were neither, but rather the same modest proposals that lawyers have been pushing for a while now, and lawprofs have been resisting tooth and nail because, well, law school is absolutely perfect.

But the rhetoric of a failed profession is something to fear, as it gives rise to such irrational and disjointed pronouncements as the death of law schools, which will be seized upon by the shallow and ignorant as a justification for ignoring the ethical and professional obligations as commerce is elevated to the only thing that matters.

I wonder if that's what the scholars had in mind?