

PREVENTING SELF-REGULATION FROM  
BECOMING SELF-STRANGULATION: THE  
APPLICATION OF DEREGULATION AND  
INDEPENDENT OVERSIGHT TO ALLOW THE  
US LEGAL SYSTEM TO ADAPT TO MARKET  
FORCES CURRENTLY THREATENING  
LAWYERS, LAW SCHOOLS AND ACCESS TO  
JUSTICE.

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## INTRODUCTION

In 2007, the United Kingdom’s England and Wales adopted the Legal Services Act (LSA).<sup>2</sup> To oversee deregulation, the LSA adopted the Legal Services Board (LSB), a regulatory body composed of mostly non-lawyers with the goal of promoting competition and the interests of consumers in the legal service market. The LSA “offer[s] more choice and better value for the public”<sup>3</sup> because it allows non-lawyers as well as lawyers to offer legal advice to consumers, thus introducing a level of competition into the market that did not exist before. Additionally, the LSA introduced Alternative Business Structures (ABS) into the legal market. Under the ABS model “lawyers will be able to work in mixed-practices offering financial, legal and other advice”<sup>4</sup> together, essentially offering one stop shopping for legal customers.

Although the ABS model seems like a distant reality in the United States, creating an executive agency regulatory board, composed of mostly non-lawyers, to oversee small changes in the United States legal services market could be a step towards deregulation. One of those small changes needs to be loosening the grip on the American Bar Association’s (ABA) entry barriers into the legal profession. The major flaw in the regulatory structure governing the US legal market is that it is in the hands

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2. Legal Services Act, 2007, c. 29 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2007/29/part/1>.

3. *Supermarket ‘law shops’ to sell legal services*, BBC NEWS UK, (Oct. 6, 2011), <http://www.bbc.co.uk/news/uk-15187154>.

4. *Id.*

of lawyers and judges. This raises problems of a conflict of interest. The legal profession is the only profession that makes its own rules and polices itself. With this kind of regulatory system the lawyer comes first, and the client (often the uninformed client) gets left behind.

Even if the client is informed enough to know he or she needs a lawyer, often a lawyer is financially out of reach. The US also has a major access to justice problem, as too many people cannot afford a lawyer. By limiting the practice of law to only licensed lawyers, the legal industry has created a monopoly that has resulted in limited outside competition within the industry. The monopoly has also increased prices for consumers. Therefore, consumers who would prefer cheaper services, but can afford to pay more, must either spend more than they would like on legal representation or go without said representation.<sup>5</sup> Put differently, in the US there is no *real choice* about where to go for legal services. Liberalizing the current restrictive entry barriers of the US legal services market is the first step toward deregulation and modernizing the industry.

Deregulation should involve creating new legal service providers. These new providers should not be lawyers in the traditional sense, but should be a mixture of low-cost lawyers, foreign lawyers, quasi-lawyers, and para-professionals. The current model with law schools mass producing lawyers cannot be sustained because there are not enough traditional lawyer employment opportunities available for the amount of graduates. However, a shrink in the demand for lawyers does not mean a reduction in the demand for legal services. There is evidence of a great unmet demand for legal services in the middle class.<sup>6</sup> The consumers who currently

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5. BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 145 (2011).

6. See George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 *FORDHAM L. REV.* 775, 777 (2001).

chose to go without legal services might decide to enter the market if there were cheaper services available.

The focus of this article is to advocate for deregulation of the legal services market in the US by creating new legal service providers that currently do not exist. Part 1 of this article summarizes the deregulation process in the UK. Part 2 addresses how the restrictive entry barriers into the US legal profession have affected access to justice and left a class of new and future lawyers drowning in law school tuition debt with very little hope of finding jobs within the legal profession. Part 3 suggests following London's lead and creating a US version of the LSB in order to regulate lawyers and implement deregulation in the US. Finally, Part 4 examines possible scenarios for deregulation and creating new legal service providers.

## I. THE CLEMENTI REPORT AND THE UK'S ROAD TO DEREGULATION

### A. History Behind the Change

The deregulation of the legal profession in the United Kingdom began in 2006 with the issuance of the Clementi<sup>7</sup> Report.<sup>8</sup> The Clementi report was commissioned after the

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7. Sir David Clementi is an accountant, a former deputy governor of the Bank of England, chairman of Prudential—one of the UK's largest insurance companies, and now chairman of a new bank, Virgin Money. In 2003, he was chosen by Lord Falconer, the Lord Chancellor, and given the following responsibilities: To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector. To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified. John Flood, *Will There Be Fallout From Clementi? The Repercussions for the Legal Profession After the Legal Services Act 2007*, 2012 MICH. ST. L. REV. 537, 538 (2012).

8. See generally SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: FINAL REPORT, (2004), available at [http://www.jambar.org/clement\\_report.pdf](http://www.jambar.org/clement_report.pdf).

Office of Fair Trade produced an account entitled *Competition in Professions*,<sup>9</sup> which recommended that unjustified restriction on competition be removed. The Government concluded that the current regulatory framework was outdated, inflexible, over-complex, and insufficiently accountable or transparent.<sup>10</sup> Additionally, according to University of Westminster Professor of Law and Sociology John Flood, the social climate that led to the Clementi report was one filled with distaste for the way lawyers were performing legal services.<sup>11</sup> The numerous complaints that the legal regulatory bodies were fielding were not being adequately handled.<sup>12</sup> Professor Flood noted, “the high number of complaints was accompanied by an inefficient and inept system of handling complaints which included three levels for the client to go up [through] before a final resolution might be achieved.”<sup>13</sup> Consequently, the backlog of complaints against lawyers in the UK had been rising year after year.<sup>14</sup>

As a result, in July 2003, Sir David Clementi was “appointed to carry out an independent review of the regulatory framework for legal services in England and Wales.”<sup>15</sup> Clementi was asked to consider what regulatory framework would best encourage competition, modernization of the public and consumer interest in an efficient, effective and independent legal sector. Secondly, he was tasked with discerning what type of legal services market would represent the public interests in the least restrictive and burdensome manner.<sup>16</sup>

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9. See generally DIRECTOR GENERAL OF FAIR TRADING, *COMPETITION IN PROFESSIONS*, (2001), available at [http://www.oft.gov.uk/shared\\_oft/reports/professional\\_bodies/oft328.pdf](http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf).

10. *Id.* at 5-7.

11. Flood, *supra* note 7, at 538.

12. *Id.*

13. *Id.* at 541.

14. *Id.* at 542.

15. LEGAL SERVICES BOARD, *supra* note 2 [http://www.legalservicesboard.org.uk/about\\_us/history\\_reforms/](http://www.legalservicesboard.org.uk/about_us/history_reforms/) (last visited Feb. 17, 2014).

16. *Id.*

## B. Clementi Report

The Clementi report, like the Office of Fair Trade's report, found the legal service market was unnecessarily restrictive.<sup>17</sup> The notion that only Barristers<sup>18</sup> could practice oral advocacy in a higher court was dated and no longer served the customer's best interest.<sup>19</sup> Likewise, restraining Solicitors<sup>20</sup> to solely transactional matters because it was tradition could not be a logical reason to continue a *passé* institution.<sup>21</sup> Clementi envisioned the legal services markets being opened up so that Solicitors, Barristers, and Legal Executives<sup>22</sup> could all practice in any area of the legal market, thus allowing the customer, or in US terminology, the client more options.<sup>23</sup> The most radical opinion set forth by Clementi was that non-lawyers should be able to practice and invest in the legal services market. Of course this notion created a fire storm amongst the legal community, with most lawyers voicing the opinion about styles and structures and maintaining the status quo.<sup>24</sup> Nevertheless, Clementi disregarded the lawyers' arguments and maintained that legal markets should be deregulated and opened up.<sup>25</sup>

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17. Flood, *supra* note 7, at 545.

18. "[A] counsel admitted to plead at the bar and undertake the public trial of causes in an English superior court." MERRIAM WEBSTER DICTIONARY, available at <http://www.merriam-webster.com/dictionary/barrister>.

19. See Flood, *supra* note 7, at 545.

20. "[A] British lawyer who advises clients, represents them in the lower courts, and prepares cases for barristers to try in higher courts." MERRIAM WEBSTER DICTIONARY, available at <http://www.merriam-webster.com/dictionary/solicitor?show=0&t=1356642723>.

21. See Flood, *supra* note 7, at 545.

22. Legal Executives would be called trained paralegals in the US. "Chartered legal executives are qualified lawyers, speciali[z]ing in particular areas of law, with at least five years' experience working under the supervision of a solicitor. This can be either in a legal practice or in the legal department of a private company, or local or national government." Chartered Legal Executive (England and Wales), PROSPECTS (Nov. 2013), [http://www.prospect.ac.uk/chartered\\_legal\\_executive\\_job\\_description.htm](http://www.prospect.ac.uk/chartered_legal_executive_job_description.htm).

23. See Flood, *supra* note 7, at 545.

24. *Id.*

25. *Id.*

In Clementi's new era the ABS model was to be the new normal. ABS models are composed of a collection of different types of lawyers combining to form "the emergence of legal disciplinary practices (LDP),"<sup>26</sup> The form the lawyers chose could be corporate, partnership, or otherwise. Lawyers, non-lawyers, and/or outside corporate or non-corporate investors could manage the ABS model as long as they passed a "fitness to own" test.<sup>27</sup> Additionally the ABS model could include multidisciplinary practices (MDP), "where lawyers and non-lawyers work together and share fees."<sup>28</sup> Put differently, Clementi proposed one stop shopping for users with legal services and other needs, putting the emphasis on the consumer's convenience.

### C. The Birth of the Legal Services Act

Although Clementi essentially promoted deregulation of the legal services market, in order to maintain professional standards of quality he proposed a new independent regulatory structure to govern the deregulation process and beyond.<sup>29</sup> The proposal that the UK ultimately adopted was entitled Model B+.<sup>30</sup> This model created a supervisory Legal Services Board that has oversight of frontline regulators and is composed of a majority of non-lawyers.<sup>31</sup> The result gives a level of independence from government control, and leaves regulation at the practitioner level.<sup>32</sup> "The motif behind the change was to be reform, not revolution in regulation."<sup>33</sup>

This model became known as 2007 Legal Services Act.<sup>34</sup> The LSA adopted Clementi's view that increased competition

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26. *Id.*

27. *Id.* at 545-546.

28. *Id.* at 546 (citing MODEL RULES OF PROF'L CONDUCT R. 5.4).

29. *Id.* at 544.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Legal Services Act, *supra* note 1.

in the legal services industry was essential and an independent office for legal complaints was necessary.<sup>35</sup> The Regulatory objectives of the LSA include:

- A. Protecting and promoting the public interests;
- B. Supporting the constitutional principle of the rule of law;
- C. Improving access to justice;
- D. Protecting and promoting the interests of consumers;
- E. Promoting competition in the provision of services within subsection;
- F. Encouraging an independent, strong, diverse and effective legal profession;
- G. Increasing public understanding of the citizen's legal rights and duties;
- H. Promoting and maintaining adherence to the professional principles.

The “professional principles”<sup>36</sup> are—

- A. That authorized persons should act with independence and integrity,
- B. That authorized persons should maintain proper standards of work,
- C. That authorized persons should act in the best interests of their clients,
- D. That persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in

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35. LEGAL SERVICES BOARD, *supra* note 2.

36. Legal Services Act, *supra* note 2, ¶ (1)(a-h).



any court, by virtue of being authorized persons should comply with their duty to the court to act with independence in the interests of justice, and E. That the affairs of clients should be kept confidential.<sup>37</sup>

Post-LSA a UK resident can consult a Barrister, Solicitor, Legal Executive, or a non-lawyer for their legal needs. The UK government maintains that the goal of the new LSA is to “offer more choice and better value for the public.”<sup>38</sup>

#### D. The Legal Services Board

To further that goal the LSA created a Legal Service Board, whose statutory objectives include “promotion of the public and consumer interests.”<sup>39</sup> The LSB is the “ultra-regulator” charged with over-seeing deregulation and the implementation of the ABS system.<sup>40</sup> The front line bodies, also known as the Barristers regulatory body, *The Bar Council*<sup>41</sup>, the Solicitors regulatory body, *The Solicitor’s Regulation Authority (SRA)*,<sup>42</sup> and the Legal Executives regulatory body, *The Chartered Institute of Legal Executives (CILEX)*,<sup>43</sup> would report to the LSB.<sup>44</sup> Additionally, the LSA created an independent Office for Legal Complaints in order to monitor consumer complaints

37. *Id.* ¶ (3)(a-e).

38. BBC NEWS UK, *supra* note 3.

39. LEGAL SERVICES BOARD, *supra* note 2.

40. John Flood, Professor, Univ. of Westminster & Lisa Webley, Professor, Univ. of Westminster, Course at the 21st Century Law Practice Summer London Law Program: LSA 2007 (June 18, 2012).

41. THE BAR COUNCIL, <http://www.barcouncil.org.uk/> (last visited Feb. 17, 2014).

42. SOLIC’S. REG. AUTH., <http://www.sra.org.uk/home/home.page> (last visited Feb. 17, 2014).

43. CHARTERED INST. OF LEGAL EXECUTIVES, <http://www.cilex.org.uk> (last visited Feb. 8, 2014).

44. Flood & Webley, *supra* note 40; Flood, John Flood, *The re Landscaping of the Legal Profession: Large Law Firms and Professional Reregulation*, 59(4) *Current Soc.* 515-519 (2011) available at [http://www.johnflood.com/pdfs/507-529\\_CSI-402725.pdf](http://www.johnflood.com/pdfs/507-529_CSI-402725.pdf).

filed against individual members of front-line bodies, subject to oversight by the LSB.<sup>45</sup>

Under the LSA, each front-line body continues to observe the everyday activities of its members. This means the lesser regulators continue to monitor disciplinary measures against lawyers, address fees, monitor ethics, and the like. As the *ultimate regulator*, the LSB has the power to devolve regulatory functions to “front-line bodies,”<sup>46</sup> now called approved regulators, subject to their competence and governance arrangements.<sup>47</sup> Put differently, this essentially means the LSB has the power to do away with any of the lower regulatory bodies if it does not deem they are actively benefiting public interests.

The LSB is an eight member board composed of seven non-lawyers and one practicing solicitor.<sup>48</sup> All of the board members are appointed by Parliament under the Secretary of State for Justice<sup>49</sup> on behalf of the Lord Chancellor.<sup>50</sup> “The Lord Chancellor is a Cabinet<sup>51</sup> minister and currently a Member of Parliament in the House of Commons.”<sup>52</sup> This means that the Lord Chancellor has been subjected to the electoral process in that he was originally elected to Parliament by the people.

Having the board made up of members who were appointed by an elected official and having the majority of the LSB being made up with non-lawyers creates a form of legitimacy that

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45. LEGAL SERVICES BOARD, *supra* note 2.

46. Front Line Bodies are the SRA, Bar Council, and CILEX. *Id.*

47. LEGAL SERVICES BOARD, *supra* note 2.

48. *Our Board*, LEGAL SERVICES BOARD, [http://www.legalservicesboard.org.uk/about\\_us/our\\_board/index.htm](http://www.legalservicesboard.org.uk/about_us/our_board/index.htm) (last visited Feb. 8, 2014).

49. “On 9 May 2007, the Ministry of Justice was created. The Ministry of Justice is responsible for courts, prisons, probation and constitutional affairs. The Secretary of State for Justice and Lord Chancellor is the Rt Hon Chris Grayling MP.” *The Lord Chancellor*, PARLIAMENT, <http://www.parliament.uk/about/mps-and-lords/principal/lord-chancellor/> [hereinafter PARLIAMENT] (last visited Feb. 8, 2014).

50. *Id.*

51. Cabinet Minister is similar to a head of an executive agency in the US.

52. PARLIAMENT, *supra* note 49.

the UK legal services market lacked before.<sup>53</sup> It also eliminated the power struggle that would have ensued between Barristers, Solicitors, and Legal Executives regarding which faction should be in power. A board with a majority made up of non-lawyers relieves the tension between the factions and ensures that lawyers are not investigating other lawyers, as was the case prior to the formation of the LSB and remains the case in US<sup>54</sup> legal regulatory framework.

Thinking about this in the context of the United States' regulatory setup, the LSB is the equivalent of an executive agency responsible for overseeing state bar associations. The SRA, Bar Council, and CILEX could easily be compared to state bar associations. If an LSB type regulator existed in the US it would certainly be an executive agency because if it was like the American Bar Association<sup>55</sup> it would not be independent. The ABA is run by volunteer lawyers<sup>56</sup>, which delegitimizes it. The ABA volunteers are not elected. They pay to be members of the ABA. If a lawyer can afford the membership dues, he or she can join the ABA. Thus, there is nothing independent about ABA membership. The genius of the LSB is its autonomy. We have nothing like it in the United States. The thought of an independent executive agency composed of mostly non-lawyers regulating lawyers in the US is not only non-existent, but simply laughable.

53. The legitimacy comes from the fact that the lawyers in the UK are no longer reporting purely to other lawyers.

54. "In the United States the legal profession is governed in all fifty states by state supreme courts. . . . These courts delegate the actual nuts and bolts of governing lawyers to bar associations." BARTON, *supra* note 5, at 145.

55. "The American Bar Association is the world's largest voluntary professional organization, with nearly 400,000 members and more than 3,500 entities. It is committed to doing what only a national association of attorneys can do: serving our members, improving the legal profession, eliminating bias and enhancing diversity, and advancing the rule of law throughout the United States and around the world." *About the American Bar Association*, AM. BAR ASS'N., [http://www.americanbar.org/utility/about\\_the\\_aba.html](http://www.americanbar.org/utility/about_the_aba.html) (last visited Feb. 8, 2014).

56. *Id.*

Even without the legitimacy issues associated with lawyers' self-regulation, the US is starved for a non-lawyer regulatory body because the US, at the same time, has too many lawyers, too few lawyers, and an access to justice problem. Too many Americans are not able to afford a lawyer and the current regulatory framework has not solved this problem. Introducing a non-lawyer ultra-regulator like the UK's LSB model into the United States system to oversee badly needed changes in the legal services market could be a solution to this dilemma.

## II. RESTRICTIVE ENTRY BARRIERS EFFECTS

### A. Access to Justice

Similar to the social climate in the UK at the time of the Clementi report, it is safe to say that most Americans think our system is broken.<sup>57</sup> The United States' system is supposed to be designed so that each side can have a lawyer who is a spokesperson and whose highest duty is to the client, not to the state or the lawyer's own notion of what is right. But what if one side is more powerful than the other? How does our system protect those who cannot afford a lawyer, which includes the majority of the public? How does our system inform people that they do in fact need a lawyer? The answer is that it does not.

Last year the New York Times ran an editorial entitled *Addressing the Justice Gap*.<sup>58</sup> The article particularly outlined that "[m]ost low-income Americans cannot afford a lawyer to defend their legal interests."<sup>59</sup> The Constitution requires that defendants in criminal cases be provided a lawyer<sup>60</sup>, but there is

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57. CAROL M. LANGFORD & RICHARD ZITRIN, *THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH JUSTICE, POWER, AND GREED* 231 (1999).

58. Editorial, *Addressing the Justice Gap*, N.Y. TIMES (Aug. 23, 2011), [http://www.nytimes.com/2011/08/24/opinion/addressing-the-justice-gap.html?scp=1&sq=justice%20gap&st=cse&\\_r=2&.&](http://www.nytimes.com/2011/08/24/opinion/addressing-the-justice-gap.html?scp=1&sq=justice%20gap&st=cse&_r=2&.&)

59. *Id.*

60. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

no such guarantee in civil cases. As a result, the problem goes beyond low-income Americans. Millions of Americans are in need of legal representation, but cannot afford to hire a lawyer.<sup>61</sup> Many Americans face the intimidating task of fighting court battles without a lawyer.<sup>62</sup> Despite not being able to afford a private attorney, those Americans who elect to go without a lawyer are too well off to qualify for free legal aid.<sup>63</sup> “The problem is growing for the middle class,” said Larry Tribe, who heads the US Justice Department’s Access to Justice Initiative.<sup>64</sup> The unfortunate reality is that lawyers are out of reach for most Americans, unless they have excessive affluence or subsist at poverty levels.<sup>65</sup>

According to Georgetown University law professor David Vladeck,<sup>66</sup> there are four basic facts that contribute to lawyers being financially out of reach for millions of Americans.<sup>67</sup> First, there are 728,000 lawyers in the workforce today, either

61. LINDA KLEIN, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS (PRELIMINARY) 3 (July 12, 2010), *available at* <http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.authcheckdam.pdf> (indicating that there are no comprehensive statistics on how many people represent themselves in court. However, nationwide 60% of state judges reported increases in the number of civil litigants who appeared in court last year without counsel and 62% of the surveyed judges said parties were hurt by not having a lawyer).

62. *See* Nathan Kopel, *More Strapped Litigants Skip Lawyers in Court*, WALL ST., (July 22, 2010) *available at* <http://online.wsj.com/article/SB10001424052748704229004575371341507943822.html>.

63. *Id.*

64. *Id.*

65. *See* Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 2 (2012); *see also* RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES 235 (2008) (observing that “solving legal problems and resolving disputes is affordable, in practice, only to the very rich or those who are eligible for some kind of state support”).

66. David C. Vladeck, Director of Public Citizen Litigation Group in Washington, D.C., and Adjunct Professor of Law, Georgetown University Law Center.

67. David C. Vladeck, *Hard Choices: Thoughts for New Lawyers*, KAN. J.L. & PUB. POL’Y 351, 351 (Spring 2001).

practicing law or serving in some judicial capacity.<sup>68</sup> Second, a majority of lawyers in America now work in law firms that predominantly represent institutions, not people.<sup>69</sup> Third, according to the best estimates available, the number of lawyers who regularly represent the poor in civil cases is about 6,000.<sup>70</sup>

The final fact is really two facts. According to the Legal Services Corporation, nearly fifty million Americans (out of about three hundred and ten million) live in households that are so poor they are nominally eligible for free legal services.<sup>71</sup> This figure represents roughly twenty percent of the American population, meaning six thousand lawyers handle twenty percent of the US population's legal needs. As frightening as that figure is it does not include the middle class alluded to in the *New York Times* article. At least the lawyers not affiliated with corporate law firms and not affiliated with legal aid services are theoretically available to serve them. But the economics of the small firm law practice today make it difficult for the middle class to afford the services of small firm lawyers.<sup>72</sup> Professor Vladeck puts it this way:

Suppose your parents are average Americans; they work hard, they make \$50,000 between them, and because they are helping you through law school, and your siblings through college as well, they do not have a lot squirreled away in

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68. *Id.*

69. *Id.* at 352 (citing Marc Galanter, *Old and in the Way: The Coming Demographic Transformation of the Legal Profession and its Implication for the Provision of Legal Services*, 1999 WISC. L. REV. 1081, 1088-90).

70. Vladeck, *supra* note 67, at 352 (citing Marc Galanter, *Old and in the Way: The Coming Demographic Transformation of the Legal Profession and its Implication for the Provision of Legal Services*, 1999 WISC. L. REV. 1081, 1103).

71. Vladeck, *supra* note 67, at 352 (citing LEGAL SERVICES CORPORATION, *SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS: A SPECIAL REPORT TO CONGRESS 12* (April 30, 2000)).

72. ROBERT W. CRANDALL ET AL., *FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS* 95 (2011) (insinuating that the cost of a legal education today makes it all but impossible for a lawyer to charge much less than \$150 an hour for legal services with that being the low end).

savings. Suppose they encounter a serious legal problem. The house they purchased from a builder five years ago is falling apart, \$20,000 in repairs is needed, and they have what they believe to be a strong breach of warranty claim. Can they afford to hire a lawyer to help them? Probably not. Surely not on a fee-for-service basis. Even at a modest hourly rate of, say \$125 per hour, your parents would see their savings drained before their case was resolved. Unless a lawyer is willing to take the case on for a contingency fee — which is hardly a certainty given the complexity of the case and the modest size of the potential recovery — they might well be out of luck in finding a lawyer willing to help them. But they have at least a chance.<sup>73</sup>

Every day, thousands of Americans wrestle with serious legal problems that can result in the deprivation of critically important liberties we refer to, naively, as “rights” — rights to an education, a divorce, a roof over their head, a spousal protective order, a child’s health care insurance, or a disability payment — without any assistance at all. Why? In part, because the people who control the system refuse to deregulate.

The truth is that Americans have more choices and options of where to buy their coffee than where to purchase their legal services. A person could elect to purchase coffee beans and brew their coffee at home. Alternatively, he or she could just as easily purchase a cup of coffee from a gas station<sup>74</sup> for less than a dollar. Or if he or she wanted something more high end, he or she could go to Dunkin Donuts<sup>75</sup> or Tim Horton’s<sup>76</sup> and spend a buck fifty for coffee. Finally, if this same person was so inclined

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73. Vladeck, *supra* note 67, at 353.

74. *See Hot Beverages*, SPEEDWAY LLC, (last visited Feb. 26, 2014) <http://www.speedway.com/Thirsty/Pages/Hot.aspx#>; *See also 7-Eleven Coffee*, 7-ELEVEN, (last visited Feb. 26, 2014), <https://www.7-eleven.com/Thirsty/Hot-Drinks>.

75. *See Coffee*, DUNKIN’ DOUGHNUTS, (last visited Feb. 26, 2014), <http://www.dunkindonuts.com/content/dunkindonuts/en/coffee.html>.

76. *See Coffee*, TIM HORTONS, (last visited Feb. 26, 2014), <http://www.timhortons.com/us/en/menu/coffee.html>.

he or she could go to Starbucks<sup>77</sup> and spend between two to four dollars for specialty coffee. The point is this person has options ranging from relatively inexpensive coffee to outright expensive coffee. What types of options do people have when purchasing their legal services? Is there such a thing as the gas station version of legal services? Should there be? Another way to answer this question is to look at it from a health care standpoint.

The medical profession is an interesting phenomenon. There are doctors, nurse practitioners, regular nurses, physician assistants, and medical assistants. All of these health care professionals are considered qualified to give medical advice. There is no such thing as the equivalent to a physician's assistant<sup>78</sup> in the United States legal profession. In the UK legal realm going to see a physician's assistant in the medical world might be thought of as going see to a Legal Executive for legal advice. Quite possibly a doctor (in the medical world) or a lawyer (in the legal services world) is preferable, but if the illness or legal problem is minor, the patient or client should be given the option to save money and time by going to the less expensive provider. In the US medical world the patient has that option. In the UK legal services world the client has that option.

Despite the precedent in the UK legal services industry and the US medical profession, no less expensive legal services provider exists in the US. In order to give legal advice in the United States you must have a license to practice law<sup>79</sup>, and it

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77. See *Drinks*, STARBUCKS, (last visited March 27, 2014), <http://www.starbucks.com/menu>.

78. *Definition of Physician's Assistant (PA)*, MEDICINE.NET, INC., (last updated Sept. 20, 2012), <http://www.medterms.com/script/main/art.asp?articlekey=8574> (stating that the term "physician assistant" applies to the mid-level practitioner who is able to practice medicine under the auspices of a licensed physician. PAs can practice in virtually all medical and surgical specialties, provided they are properly trained and supervised. Thus, PAs can assist in surgeries).

79. CRANDALL ET AL., *supra* note 72, at 1 (explaining that Lawyers are among the twenty percent of the U.S. labor force that is required to obtain a government license to practice the profession).



must be valid in the state where you are dispensing the legal advice. Thus, unlike the UK, every state in the US has some form of prohibition on non-lawyers practicing law.<sup>80</sup> Almost all states universally limit the practice of law to those who have been licensed by the government and admitted to a state's bar association after meeting certain requirements of education, examination, and moral character.<sup>81</sup> In addition, the members of the bar are subject to professional discipline, which is a form of peer review by other members of the bar. State courts are charged with enforcing the professional disciplinary outcomes.<sup>82</sup> As a result, in this century, the relationship between required bar admission and the states' ban on non-lawyer practice of law has created a lawyer monopoly.

The result of this monopoly means less competition for lawyers in the legal profession and increased prices for the consumer. Although the ABA rules on professional conduct do not explicitly ban non-lawyer practice of law, Model Rule ("MR") 5.5(b) prohibits lawyers from "assist[ing] a person who is not a member of the bar in the performance of activity that constitutes [non-lawyer practice of law]."<sup>83</sup> Additionally, all states have unauthorized practice of law statutes that restrict the practice of law to licensed attorneys<sup>84</sup>. Thus, even routine legal matters must be completed by an attorney. What this means is that "consumers who would prefer cheaper services, but can afford to pay more, must either spend more than they would

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80. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581 (1999).

81. *Id.*

82. *Id.*

83. MODEL RULES OF PROF'L CONDUCT R. 5.5(b) (2012), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_5\\_5\\_unauthorized\\_practice\\_of\\_law\\_multijurisdictional\\_practice\\_of\\_law/comment\\_on\\_rule\\_5\\_5\\_unauthorized\\_practice\\_of\\_law\\_multijurisdictional\\_practice\\_of\\_law.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/comment_on_rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law.html).

84. See Denckla, *supra* note 80, at 2587 (citing ABA Comm. on Lawyers' Responsibility for Client Protection, Survey and Related Materials on the Unauthorized Practice of Law/Nonlawyer Practice (1996) (analyzing statutory provisions in all fifty states)).

like on legal representation or go without.”<sup>85</sup> For the United States legal service consumer you either get a free cup of coffee based on a lawyer’s goodwill or you must drink Starbucks with an extra shot of foam, with whip!

There is no question that requiring all legal service providers to first obtain a license to practice law drives up the price of legal services. This is because obtaining such a license is very expensive. In all but a few states an attorney cannot obtain a license to practice law without first graduating from an accredited post graduate law school and passing a state bar examination.<sup>86</sup> Thus, in order to meet the demand for legal services for the middle class and lower income families, entry deregulation is necessary because these people cannot afford to pay the high costs associated with hiring a lawyer.

Like in the UK, deregulating American legal services would allow non-lawyers to offer a variety of legal services. Put differently, deregulation means allowing non-lawyers to give legal advice. If deregulation were to become a reality, the prices of the simplest services would indeed decline, allowing more middle class Americans to have access to a lawyer-like professional for help with their legal needs. 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.<sup>87</sup> Surely, three years of law school is not necessary for lawyers handling uncontested divorces, real estate transfers, or will drafting. For the most complicated of practices, however, lawyers would still need a substantial amount of education – perhaps three years or more – at a first-rate law school. The graduates of these law schools would still command large fees for their services. The main change would be more people would have

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85. BARTON, *supra* note 5, at 145.

86. ABAWebsite, *Bar Admissions Basic Overview*, available at, [http://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview.html](http://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html).

87. *Id.*

access to legal services and be employed in the legal services sector.

### B. Increased Law School Tuition

Everyday lawyering is, for the most part, what the low income and middle class Americans need, but currently do not have access to because the costs are too expensive. The *Addressing the Justice*<sup>88</sup> *Gap* New York Times article has many good ideas for how lawyers can help more low income and middle class people, but it falls short of suggesting deregulation. The New York Times and other media outlets suggest that lawyers should be doing more pro bono work to help address the justice gap.<sup>89</sup> What the editorial fails to address is that doing more pro bono work, although it sounds like a good idea, is not something that most lawyers have the time or the financial capability to do.

Increases in law school tuition are burdening law graduates with large debts and inducing them to pursue higher-paying positions.<sup>90</sup> Private law school tuition quadrupled “in real, inflation-adjusted terms between 1971 and 2011, while resident tuition at public law schools has nearly quadrupled in real terms over just the past two decades.”<sup>91</sup> “According to the Law School Survey of Student Engagement, 19 percent of law students surveyed in 2006 expected to owe more \$120,000 at graduation, while roughly 30 percent of law students surveyed in 2009 expected to owe that level of debt at graduation,”<sup>92</sup> and in 2011 half of expected law graduates anticipated leaving school with more than \$100,000 in debt.<sup>93</sup> The problem arises because

88. Editorial, *supra* note 58.

89. *Id.*

90. CRANDALL ET AL., *supra* note 72, at 90.

91. Paul Campos, *The Crisis of the American Law School*, SELECTED WORKS at 3-7, available at <https://polisci.as.uky.edu/sites/default/files/The%20Crisis%20of%20the%20American%20Law%20School.pdf>.

92. *Id.*

93. Steven J. Harper, *Debt Loading*, THE BELLY OF THE BEAST, (Apr. 25, 2011), <http://thelawyerbubble.com/2011/04/>.

according to the Bureau of Labor Statistics, the median salary for all lawyers nine months after graduation is \$68,500.<sup>94</sup> Servicing that much tuition debt on such a low salary while being expected to perform an increased amount of pro bono services to low income or middle class clients is an unrealistic economic reality for new law graduates.

University of Southern California law and economics Professor Gillian Hadfield points out that very few lawyers actually provide free legal services to low income or middle class Americans.<sup>95</sup> Because they cannot afford legal services and lawyers are either unable or unwilling to give their services away, “many Americans in need of such aid give up in the face of legal difficulties.”<sup>96</sup> If non-lawyers were allowed to perform every day lawyering, it would give these low-income or middle class families the option of hiring an independent paralegal or another non-lawyer practitioner for many common, routine, or every day legal procedures like drawing up divorce papers, drafting wills, counseling on the eviction process, and the like.

Eliminating the requirement that in order to practice law a person must have passed a state bar examination and attended a three-year post graduate law school would allow consumers to choose amongst non-lawyers and lawyers. Put differently, they would be able to choose whether they want Starbucks Coffee, Dunkin Donuts Coffee, or gas station coffee. The fact that one might be better than the other is irrelevant. What matters is that they had a realistic choice. The choice that most low income or middle class Americans currently possess is not a real choice because they cannot afford it, so they go without.

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94. *Id.*

95. See Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 129-156 (2010).

96. CRANDALL ET AL., *supra* note 72, at 92.

### C. Jobless Lawyers

Entry deregulation could also address the reality that the supply and demand for lawyers with a three-year legal degree do not match. The Bureau of Labor and Statistics projects that for the entire ten-year period from years 2012 to 2022, net US attorney employment will increase by only 74,900 jobs.<sup>97</sup> This is a problem because law schools across the United States are graduating approximately 45,000 new law graduates per year.<sup>98</sup> University of Colorado Law School Professor Paul Campos suggests that current employment rates for recent law graduates nine months post-graduation (reported by schools to be around 90 percent) include part-time, temporary jobs, and non-law jobs.<sup>99</sup> Actual full-time legal employment figures likely do not even break 50 percent.<sup>100</sup>

This trend even affects the top 20 law schools in the country. As of February 2012 Yale Law School had 18.4% percent of its 2011 graduating class reporting undesirable employment outcomes.<sup>101</sup> Other top schools also reported undesirable employment outcomes: Harvard Law School 17.9 percent, University of Michigan Law School 26.5 percent, Northwestern Law School 22.8 percent, and University of California-Los Angeles reported 47.7 percent undesirable employment outcomes nine months after graduation.<sup>102</sup> These statistics suggest that for the “90 [percent] of ABA law schools which are ranked lower [than the top 20 law schools], a large majority of graduates [from these tier two law schools] are failing to obtain outcomes that justify the direct and opportunity

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97. Harper, *supra* note 93.

98. Steven Harper, *Improving Prospects – For Who?*, THE AM L. DAILY, (May 13, 2011), <http://amlawdaily.typepad.com/amlawdaily/2011/05/harper0513.html>.

99. Paul Campos, *Served*, NEW REPUBLIC, (Apr. 11, 2011), <http://www.newrepublic.com/article/87251/law-school-employment-harvard-yale-georgetown>.

100. *Id.*

101. Campos, *supra* 91, at 28.

102. *Id.*

costs graduates incurred in the course of getting their law degrees.”<sup>103</sup> Whether it is at the top law schools, tier two, or bottom tier law schools, Professor Campos notes that the economy has been projecting a downward trend in the market for attorney’s services since the late 1970s.<sup>104</sup>

What this means is that the US economy will not and currently cannot sustain the amount of lawyers that are graduating from law school. Law 21 blogger Jordan Furlong calls the current US legal market a “bubble just waiting to pop, or a system on the verge of a crash.”<sup>105</sup> Like Professor Campos, Furlong notes that “[t]his is not about the recession or the financial crisis anymore; this is about a serious misalignment between the industry that trains new lawyers and the marketplace that employs them.”<sup>106</sup> The US market is essentially telling all law schools that it does not need all of these new lawyers because it cannot support them.

However, a reduction in the demand for lawyers does not mean a shrink in the demand for legal services. There is evidence of a great unmet demand for legal services in the middle class.<sup>107</sup> Professor Renee Newman Knake<sup>108</sup> calls it a “delivery problem”<sup>109</sup> because the millions of Americans who cannot afford to pay lawyer prices go without legal representation. Thus, they could be considered an untapped market in the legal services industry. This demand is real. It can

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103. *Id.* at 29.

104. *Id.* at 3 (“[F]or more than 30 years now the percentage of the American economy devoted to legal services has been shrinking. In 1978 the legal sector accounted for 2.01% of the nation’s GDP; by 2009 that figure had shrunk to 1.37% -- a 32% decrease.”).

105. Jordan Furlong, *Law Schools and the Law of Supply and Demand*, LAW21, (May 17, 2011), <http://www.law21.ca/2011/05/law-schools-and-the-law-of-supply-and-demand/>.

106. *Id.*

107. *See* Harris & Foran, *supra* note 6 at 777.

108. Associate Professor of Law; Co-Director, Kelley Institute of Ethics and the Legal Profession; and Co-Founder, ReInvent Law, Michigan State University College of Law; J.D., University of Chicago School of Law.

109. Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 1 OHIO ST. L.J. 1, 1 (2012).

and should be met by producing new forms of “low-cost lawyers, foreign lawyers, quasi-lawyers, para-professionals, corporate providers, and automated systems.”<sup>110</sup>

At the moment, there is a relatively limited supply of these entities. Greater competition in the legal profession through entry deregulation could potentially benefit lawyers and their careers by reducing law school tuition and debt incurred from attending law school.<sup>111</sup> Entry deregulation would allow people with an interest in the legal profession to either forgo law school completely, chose an alternative legal education degree option, apprentice under a practicing lawyer, or stick with the traditional law degree. Either way, introducing new forms of legal service providers and alternative degree option would force law schools to lower their tuition in order to encourage attendance. Forgoing law school or choosing an alternative degree option would decrease future legal service provider’s debt load, thus allowing them to charge lower prices in order to accommodate this untapped market.

The problem is circular. Without deregulation law schools will keep graduating approximately 40,000 lawyers a year. More than half of these future law graduates will not be able to find work and thus, not be able to have a realistic chance of paying off their \$100,000 tuition debt load. At the same time, the lower and middle class families who are unable to afford a lawyer will continue to be unable to afford a lawyer. Further, the US market will continue to have too few legal service providers, meaning the untapped market will continue to go without legal representation.

The combination of a limited number of legal service providers and the very high costs associated with becoming a licensed attorney “means that an entire price category of the market—the less expensive category is eliminated.”<sup>112</sup> The demand for legal services no longer means the demand for traditional lawyers. What needs to change in the United States is

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110. Furlong, *supra* note 105.

111. CRANDALL ET AL., *supra* note 72, at 94.

112. BARTON, *supra* note 5, at 144-45.

the idea that there can be a legitimate legal service provider who is not a lawyer. By looking at the UK and the effects of the LSA, it is already apparent that the future for legal services can be met by a “greater diversity of providers with different training and new skills, crossing previously sacrosanct lines of status, geography and even technology.”<sup>113</sup> Put differently, “an old supply chain is breaking down,”<sup>114</sup> and a series of new ones must rise up to replace it. That new chain needs to be entry deregulation or the elimination of the three-year post undergraduate law degree with passing a state bar examination afterward in order to practice law. Only then will the millions of Americans who currently go without legal representation realistically be able to access the legal services market. Only then will there be enough legal service providers who can realistically afford to assist those millions of Americans with their legal troubles.

### III. LOOKING TO LONDON

#### A. Follow the Leader

Over the last 15 years the UK legal market has developed significantly and London is the leading international center for legal services activity.<sup>115</sup> Professor Daniel Katz<sup>116</sup> of Michigan State College of Law refers to London as the Silicon Valley of legal innovation. If that is the case, lawyers in the US should be watching with close anticipation what goes on with legal services across the pond. However, as Professor Flood notes, lawyers in the US look to Clementi and the changes in the UK

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113. Furlong, *supra* note 105.

114. *Id.*

115. *Research Note: The Legal Services Market*, LEGAL SERVICES BOARD, (August 21, 2011) at 21 [http://www.legalservicesboard.org.uk/news\\_publications/latest\\_news/pdf/research\\_note\\_on\\_the\\_legal\\_services\\_market.pdf](http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/research_note_on_the_legal_services_market.pdf) [hereinafter *Research Note*].

116. Daniel Martin Katz is an Associate Professor of Law at Michigan State University. He is also the Co-Founder & Co-Director of the Reinvent Law Laboratory.



legal service market “with both fear and awe.”<sup>117</sup> American lawyer’s fear of London’s legal modernization is irrational. The UK’s legal services industry has grown “from around £9.3 billion in 1995 to £ 25.6 billion in 2009.”<sup>118</sup> UK employment in the legal services market has also expanded.<sup>119</sup> Between 1999 and April 2011 the number of practicing solicitors rose from 79,503 to 119,641.<sup>120</sup> Deregulation of legal services has resulted in some increases in the numbers of employed non-lawyer professionals<sup>121</sup> with legal executives and other staff having risen from 98,522 in 1999 to 129,000 in 2009.<sup>122</sup> Looking at these figures, despite the global recession, the UK’s legal services market has managed to grow by nearly £16 billion and the number of employed professionals has risen by nearly 30 percent. This data indicates that the LSA has had a tremendous positive effect upon the delivery of legal services in the UK. Ignoring the way London has managed to completely transform their legal services industry for the better is the equivalent of ignoring technology advances that come out of Silicon Valley.

The US, like the UK prior to deregulation, is experiencing a competition problem in the legal profession. Additionally, public opinion about lawyers’ level of ethics and honesty as a profession is at an all-time low.<sup>123</sup> The current social climate for lawyers in the United States is remarkably similar to that of pre-deregulation UK. Lawyers regulating lawyers is not working. Too many lawyers are without work, too many Americans are unable to afford a lawyer because the prices are too high, and too few lawyers in power are willing to instigate change. These are the same issues that Clementi uncovered in

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117. Flood, *supra* note 7, at 538.

118. *Research Note, supra* note 115, at 22.

119. *Id.* at 23.

120. *Id.*

121. *Id.* at 24.

122. *Id.* at 25.

123. *Honesty/Ethics in Professions*, GALLUP, (last visited Feb. 13, 2014), <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx#3>.

the UK. As a result, lawyers in the US should attempt to emulate how the UK has managed to overcome those issues and embrace the changes that the UK system adopted.

### B. United States Version of the LSB

If deregulation is ever going to be a reality in the US the first thing that needs to happen is the creation of an ultra-regulator similar to the LSB in the UK. The major flaw in the regulatory structure governing legal markets is that it is in the hands of lawyers and judges.<sup>124</sup> This creates a conflict of interest. The legal profession is the only profession to make its own rules and police itself.<sup>125</sup> With this kind of regulatory system the lawyer comes first and the client (often the uninformed client) gets left behind. But even if we think that lawyers and judges are sincere in their belief that the regulatory efforts of the bar and judiciary are necessary to protect the public interest, there is no reason to think that lawyers and judges make good policymakers in this regard.

This leads to a lot of ‘wrong-regulation’ because the policymaking is ill-informed and poorly executed. Lawyers and judges are not policy experts. In fact, judges are supposed to remain silent to outside pressures of public opinion. Additionally, all judges are lawyers and have gone to law school. Law school is about learning how to think like a lawyer, which is great for being a lawyer. However, it is not so great for adaptability because the myopic way of thinking that law school creates leads to lawyers being poorly equipped to instigate change. Not only are lawyers not thinking about change, or even how to change, most of them resist it completely just as the lawyers in the UK did.<sup>126</sup> Thus, in a changing global economy leaving the regulatory controls in the hands of bar associations, courts, and ultimately lawyers has led to a stalemate of sorts.

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124. BARTON, *supra* note 5, at 131-40.

125. *Id.*

126. *See* Flood, *supra* note 7, at 545.

Implementing the UK's LSB model to oversee the state bar associations could be a starting point for ending the stalemate in legal regulation. An LSB in the US could administer the deregulation process. Like in London, a US version of the LSB would monitor the front-line regulator bodies. In the US the front line regulatory bodies are state bar associations. The board would be responsible for directing the front-line state bar associations on how to go about deregulation.

Any model adopted in the United States should be an *independent regulatory*<sup>127</sup> executive office that answers to the President and his staff only.<sup>128</sup> By making the US version of the LSB an executive office, it adds legitimacy to the regulator because the President was elected by the people and our system allows our elected officials to delegate some of their authority to outside offices. Like the LSB, the percentage of lawyers in the US version should be very small. Within the purpose and by-laws of the US version of the LSB there should be a rule that the President should keep the percentage of lawyers on the LSB's staff as a minority. If the majority of the members of the LSB regulator model are non-lawyers it not only adds to the legitimacy factor of not having lawyers regulate other lawyers, but it also brings new thinking and experiences into the legal

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127. Alan B. Morrison, *How Independent Are Independent Agencies?*, 1988 DUKE L.J. 252, 252 (1988).

[I]ndependent agency is one whose members may not be removed by the President except for cause, rather than simply because the President no longer wishes them to serve. . . . Typically, they are multi-member bodies, they usually have both rulemaking and adjudicative functions, and there are often limits on the number of members of one political party who may serve on them at any one time.

128. Ideally the board's members should serve staggered set terms, thereby ensuring that the Board's composition stays relatively intact when a new political party takes over the White House. For example, if the Board was composed of eight members like the LSB the Chair and the Chief Executive of the Board could serve a set five-year term. Ordinary members' terms could be for three years.

profession that the existing regulatory model currently goes without. The success of the model depends on its independence.

As Professor Barton says, “lawyers have a strong incentive to support and mandate the ratcheting up of entry standards [to practice law].”<sup>129</sup> As long as lawyers are in charge of regulating the legal profession there will be no incentive to change. The only way to solve the access to justice problems, the obvious lack of legal jobs for new law graduates, and the high entry restraints on the legal profession is to first change the way it’s regulated. If London really is to law what Silicon Valley is to technology there is no better place to watch, learn, and implement the actions of our English legal comrades.

#### IV. DEREGULATION OPTIONS IN THE US

##### A. State Bar Examination Test Failers

In order to fully follow London’s lead we need to deregulate. One form of deregulation could conceivably involve law graduates who have not passed their state bar examination. The state of Michigan alone had approximately 45 percent of its test takers not pass the July 2012 Michigan bar examination.<sup>130</sup> California boasted a slightly better passage rate with roughly 32 percent failing its state bar examination.<sup>131</sup> This list is not exhaustive as there are, of course, 48 other states in the country that each hold bar examinations for potential lawyers. There are two<sup>132</sup> bar exams a year and after every exam there are a good

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129. BARTON, *supra* note 5, at 152.

130. Elie Mystal, *Test Takers Tank On the July 2012 Michigan Bar Exam*, ABOVE THE LAW. (Nov. 1, 2012, 11:25 AM), <http://abovethelaw.com/2012/11/test-takers-tank-on-the-july-2012-michigan-bar-exam/>.

131. Elie Mystal, *California Bar Passage Rate Holds Steady; Shame for Underperforming Schools Deepens*, ABOVE THE LAW. (Jan. 11, 2012, 6:33 PM), <http://abovethelaw.com/2012/01/california-first-time-bar-passage-rate-holds-steady-shame-for-underperforming-schools-deepens/>.

132. NATIONAL CONFERENCE OF BAR EXAMINERS, *MBE Test Dates*, available at <http://www.ncbex.org/about-ncbe-exams/mbe/test-dates-mbe/>.

number of takers that do not pass the test and, as a result, do not become licensed to practice law.

These test failers could be perfect test subjects for deregulation. The only entry barrier they have not met as of now is passing their state's bar. However, presumably they have graduated from a three-year law school program. Not allowing them into the market of legal services simply because they have not passed a state bar examination is senseless. The loans that these students acquire during law school do not go away because they do not pass a state bar examination and the people that they could help with their legal education likely will not find help elsewhere.

Thus, allowing these state bar examination test failers to practice in a market that does not require passing a state bar examination could be a first small step into deregulation. The market that these providers would work in should be limited to every day legal procedures like drawing up divorce papers, drafting wills, real estate transfers, counseling on the eviction process, and the like. Allowing law graduates who did not pass their state bar examination or who simply elected not to take the state bar examination would increase competition by introducing a new type of legal service provider that currently does not exist in the US. If our version of an LSB found this small step toward deregulating the legal services market as positive then, naturally, deregulation should be extended.

#### B. Decrease in Law School Time

Another way deregulation could look would be to allow lawyers to attend a two-year law degree program rather than a three-year program. Currently, leaders of the New York State bar, lawyers, and judges are debating whether to "amend the rules of the New York State Court of Appeals to allow students to take the state bar exam after two years of law school instead

of the three [as] now required.”<sup>133</sup> “If adopted by the state’s highest court, it could make law school far more accessible to low-income students” and help the next generation of law students decrease their debt load by an entire year.<sup>134</sup>

While this would not necessarily mandate that law schools decrease their curriculum and graduation requirements it would certainly encourage it.<sup>135</sup> Some law schools might even go as far as making the second year of law school completely online. According to Northwestern University School of Law Dean Daniel Rodriguez and New York University Law School Professor Samuel Estreicher, although decreasing the amount of time future law students spend in school would not increase the number of available jobs for future graduates, “a two-year option would allow many newly minted lawyers to pursue careers in the public interest or to work at smaller firms that serve lower or average-income Americans, thereby fulfilling a largely unmet need.”<sup>136</sup>

Where New York would be the first state in the United States to allow law students to sit for the bar after their second year of law school, it would not be the first state to offer a shortened law school curriculum. Northwestern School of Law and Michigan State University College of Law both currently offer a five-semester degree, which allows a student to finish law school in two years rather than three years.<sup>137</sup> Unfortunately both program’s tuition is not less for students who finish in two years, so the cost savings are minimal.<sup>138</sup>

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133. Daniel B. Rodriguez & Samuel Estreicher, *Make Law Schools Earn a Third Year*, N.Y. TIMES, (Jan. 17, 2013), available at [http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html?\\_r=0](http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html?_r=0).

134. *Id.*

135. *Id.*

136. *Id.*

137. See generally Press Release, *Northwestern Law Announces Accredited JD, Other Proposals*, NORTHWESTERN LAW SCHOOL (June 20, 1998), available at <http://www.law.northwestern.edu/news/newsdisplay.cfm?ID=19>.

138. *Id.*

The fear of shortening law school curriculums is that it might create an unequal class of lawyers with the students finishing in two years lacking the skills and training of previous generations. However, that is exactly what the market demands. The market needs legal service providers with different skill sets than what the *old guard* currently offers. This would be another type of legal service provider entering the market that currently does not exist. A lawyer with a two-year education rather than a three-year education is but one person of what the future of legal services needs to look like in the US in order for the legal market to be accessible to all Americans rather than just the wealthy ones. According to Dean Rodriguez and Professor Estreicher “the risk [of an unequal class of legal services providers] ought to be balanced with the varied needs of the American people for legal services and a two-year law degree option...would provide young lawyers with the training they need to get started” and help alleviate the debt load of new graduates.<sup>139</sup>

### C. Alternative Degrees and Apprenticeships

Alternative degree options would be one more way to create new versions of legal service providers. Not all of these providers need to be trained as lawyers, but certainly some training is necessary. The two-year law degree is one option, but not the only one. Before the rise of law schools, lawyers were trained through apprenticeship. “Adding apprenticeship back into the system could make legal education shorter, less costly and more practical.”<sup>140</sup> There is already historical precedent for apprenticeships in the legal world.<sup>141</sup>

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139. Rodriguez & Estreicher, *supra* note 133.

140. David Lat, *Bring Back Apprenticeship*, N.Y. TIMES (Feb. 2, 2012), available at <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/bring-back-apprenticeships-in-legal-education>.

141. Mark Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework- A History of U.S. Legal Education Phase I: From the Founding of the Republic Until The 1860s*, 39 J. MARSHALL L. REV. 1041, 1041 (2006).

Apprenticeship coupled with new forms of legal education would be the most efficient way to create new legal service providers. Legal education is undoubtedly important for the future of deregulation. That being said, law schools need to be more flexible in changing the status quo and willing to modernize their degree programs. Law schools need to tailor their programs so as to offer alternative degrees depending on what type of legal practitioner the student wants to be.<sup>142</sup>

Law schools could offer one-year credential programs post undergraduate school for certification in one or even two areas of the law. Something like this could be one semester of legal writing and black letter law courses in whichever area of the law the student secured an apprenticeship followed by completion of a six to nine month apprentice contract. During the apprenticeship law schools could offer online learning to the student in order to maximize the student's learning and the law school's bottom line.

This type of legal education coupled with apprenticeship could be copied in all shapes and sizes. Undergraduate schools

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In 1840, a period of apprenticeship training was required in . . . [roughly] 11 out of 30 jurisdictions; in 1860 it was required in only 9 out of 39 jurisdictions, and everywhere bar examinations were oral and usually casual. In addition, very few states required even a rudimentary general education, although many states did impose a minimum age requirement of twenty-one for admission to the bar. Consequently, it seems that, due to the absence in most jurisdictions of any meaningful requirements for admission to the bar, many of those practicing law during the latter part of the period may have received no formal legal education at all.

142. Admittedly, law schools have no incentive to create alternative degrees until the ABA entry barrier restriction are lifted because under the current regulatory regime such a degree would be worthless. See James Huffman, *Perverse Incentives of the Lawyers Guild: While Law School Enrollment Drops, ABA Rules Bust the Budgets*, WALL S T . J., (Feb. 20, 2013), available at <http://online.wsj.com/article/SB10001424127887324162304578305710253751052.html>.



could even make their way into the legal education mix. They could potentially start offering degrees in law with one of the graduation obligations requiring students to complete a semester long full time apprenticeship. All of these degree options should give the legal service provider a distinct title different than that of a lawyer, but still be known as a recognizable legitimate legal service provider.

The New York State Court of Appeals recently adopted a requirement that, effective January 1, 2015, admission to the New York bar will require an applicant having completed 50 hours of pro bono service.<sup>143</sup> Besides helping to meet the enormous unmet demand for legal services, providing pro bono services provides law students valuable legal training. There is no other way to learn to practice law except to do it. It is unfathomable that medical schools would graduate medical students who had never seen patients. Nonetheless, many law students graduate without ever meeting a client. Pro bono work under the supervision of a lawyer changes that and provides important practical legal experience.

The main difference between allowing a law student to provide pro bono services under the supervision of a licensed lawyer and allowing pure apprenticeship is the latter is not necessarily in school. Under this system, aspiring lawyers would stop accruing debt and start earning money at an earlier point. As apprentices, they would learn about the actual practice of law, addressing the common complaint among employers and clients that young lawyers, fresh out of school, lack practical knowledge. Employers who hire apprentices would receive inexpensive labor and could train these workers to their specifications. This model would benefit everyone involved as employers would be able to handle more clients at lower costs

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143. Erwin Chemerinsky, *Require Pro Bono For Bar Admission: Every State Should Follow New York's Lead and Require Applicants to Fulfill a Minimum Number of Hours of Service*, NAT'L L. J., (Dec. 17, 2012), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?i=1202581505806&Require\\_pro\\_bono\\_for\\_baradmission&slreturn=20130119203013](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?i=1202581505806&Require_pro_bono_for_baradmission&slreturn=20130119203013).

because of the additional help from their apprentices. Additionally, the costs to the client should be lower because an apprentice is working with their case most of the time rather than a licensed lawyer. Moreover, the ultimate increase in alternative legal providers will have the effect of driving down the prices of everyday legal services because of the increased competition. Meaning more people should be able to access the legal market.

Successful completion of an alternative degree program coupled with apprenticeship and possible passage of a state bar exam would qualify an individual as a new legal service provider. Depending on how much schooling the provider went through and what type of apprenticeship was completed, he or she would become something equivalent to the legal market's version of physician assistants, nurse practitioners, nurses, and medical assistants. This certified legal service provider would then be able to advertise their services and compete for clients against lawyers. Letting all of these and other versions of lawyers practice law would be an introductory step into deregulation and making the American system look more like the UK's.<sup>144</sup>

## CONCLUSION

With the access to justice problems, a lack of legal jobs available for new law graduates, and the superficial barriers imposed by the ABA for entrance into the legal profession, the US must start thinking about deregulation. Today there are more law schools than ever, which means there are more lawyers

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144. Although beyond the scope of this paper, in order to fully follow in the UK's lead Alternative Business Structures need to be allowed into the US. Model Rule 5.4, Professional Independence of a Lawyer needs to be eliminated. Like in the UK American lawyers need to be free to choose to form legal corporations, partnerships, or other business enterprises. Lawyers, non-lawyers, and/or outside corporate or non-corporate investors must be able to partner with lawyers to manage American ABS's. Put differently, one stop shopping for users of legal services needs to be the goal in the United States. ABS model would be the quickest and easiest way to put the emphasis on the consumer's convenience.

than ever.<sup>145</sup> However, the legal needs of low-and middle-income Americans remain seriously unmet. As a practical matter, this can all be traced back to the laws of allowing only members of the public with a license to practice law to provide legal services. Put another way, the monopoly on the delivery of legal services is responsible to a large degree for the lack of affordable options that might otherwise be made available in a more diversified market for legal services. The restrictions on non-lawyer legal practice are the main barrier blocking the development of affordable legal services options for society. These restrictions need to be relaxed in order to make legal services more affordable to the public at large, but also to increase competition in the legal market and to get more lawyers or lawyer-like people working in the legal industry.

In 2007, the UK's Legal Services Act<sup>146</sup> opened up the markets for non-lawyers to participate in the legal service market.<sup>147</sup> To oversee deregulation, the UK instigated a regulatory board composed mostly of non-lawyers with the goal of promoting competition and consumer protection throughout the legal services market.<sup>148</sup> The prime way the UK has achieved that goal is through the introduction of Alternative Business Structures and removing unnecessary restrictions to doing business in the legal services market.<sup>149</sup> Although deregulation seems a long way off in the US, creating a non-lawyer regulatory board to oversee small changes in the legal services market could be a first step. One of those small changes needs to be loosening the grip on the ABA's entry barriers into the profession. The UK's LSA and LSB should be models that the US follows during its much needed deregulation process. Only with deregulation can the problem of too many lawyers, too

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145. Catherine Rampell, *The Lawyer Surplus, State by State*, N.Y. TIMES, (June 27, 2011), available at <http://economix.blogs.nytimes.com/2011/06/27/the-lawyer-surplus-state-by-state/>.

146. Legal Services Act, *supra* note 2.

147. *Id.*

148. *Id.* at part 1(1)(a-h).

149. See Flood, *supra* note 7, at 545-46.

many people with little access to legal providers, and too few legal service providers be unequivocally solved.

The US legal services sector needs to follow London's lead and create its own version of Barristers, Solicitors, Legal Executives, and non-lawyers. Each branch should boast a different set of skill and training level, and it needs to be apparent to the public. The idea should not be that there is an unequal class of legal service providers, but rather it should be common knowledge that one branch or provider is simply more fit to meet the needs of whatever particular legal dilemma that potential client/consumer is facing. Put differently, the legal profession needs their own version of surgeons, oncologists, family doctors, and neurologists, physician assistants, nurse practitioners, or regular nurses. Right now the only choice in the legal services industry is to go to a lawyer, and generally an expensive lawyer at that. Deregulation can and should change that by allowing non-lawyers to practice law, but also by calling for completely new categories of legal service providers. These new categories could include traditional law school graduates who either fail their state's bar examination or elect not to take their state bar examination. They could also include two-year law graduates, and students who choose alternative legal degrees, or certification combined with completing an apprenticeship under a practicing lawyer. Whichever form the new categories take, they all must include deregulation of the US legal market. Any other solution besides deregulation would be merely a pretext.