What Does and Should Influence the Number of Lawyers?

Richard L. Abel

Before we can ask whether there are too many lawyers we must answer several preliminary questions: whom do we consider lawyers, and what does and should influence their number? The term “lawyer,” which English-speakers take for granted, has no obvious equivalent in many other languages. Civil law countries have the category of “jurist,” including everyone with a law degree; but a very large proportion of law graduates would not be recognized as lawyers in common law countries. Terms like “avocat,”1 “avvocato,”2 “abogado,”3 or “anwalt”4 refer to lawyers with rights of audience in court—but this criterion would exclude jurists employed by corporations and civil servants, who are considered lawyers in common law countries. Notaries in civil law countries perform many of the functions of common law lawyers. Japan is famous for having few bengoshi compared with its population; but many of the functions of lawyers in other countries are performed by tax accountants, patent attorneys, and judicial and administrative scriveners in Japan.5 Any discussion of numbers, therefore, must be framed in terms of function rather than title.

I. Controlling the Production of Producers

All professions seek to control entry; that is what differentiates them from other occupational categories.6 At a moment like the present, when legal professions in many countries worry that their numbers are increasing in the face of great uncertainty about the future of the global economy, it is essential to review the ways in which lawyers have regulated their numbers in the past. “Those who cannot remember the past are condemned to repeat it.”7

Numerus Clausus. Some legal professions had a numerus clausus: a fixed number of practitioners. Entry was dependent on obtaining an existing place by purchase, inheritance, or appointment. French notaires are an historical example.8 The Netherlands only recently liberalized its

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7 Santayana, Reason in Common Sense (1905).
8 Boigeol supra 260.
notariat, allowing numbers to rise in response to demand. Many occupational categories in the United States enjoyed similar protections through state licensing. Some still do. In New York a seat on the Stock Exchange sold for $3.25 million in 2005, and a taxi medallion recently sold for $1 million. A Los Angeles liquor license also cost $1 million. When license holders do not simply admit self-interest in restricting the numbers they offer unconvincing rationales. True, limiting liquor licenses may reduce alcohol consumption, but there are more effective and efficient ways to do so. We can reject a numerus clausus for lawyers.

**State Monopolies.** The state can directly control the number of lawyers by making them state employees. Sweden has a state monopoly of liquor sales and China a state monopoly of tobacco; many governments monopolize lotteries. There are historical examples of state monopolies of lawyers: procurators and counsel for state enterprises in communist regimes, prosecutors and judges in most countries. But few today would advocate that all privately practicing lawyers become state employees.

**Ascribed Characteristics.** Larson argued that the professional project sought to control not only how many could enter in order to extract monopoly rents but also who could enter so as to enhance lawyers’ collective status. (These two goals obviously can reinforce each other.) Caste is a classic mechanism for differentiating status. At independence, India recognized more than a thousand castes: hereditary, endogamous social categories that enjoyed (or were degraded by) occupational monopolies. Although this is an extreme example, it is far from unique. Kohanim had an exclusive entitlement to enter the Jewish rabbinate; the roles of blacksmith, healer, and diviner were restricted by lineage in much of Africa. Everywhere heritable kingship and aristocratic titles conferred political power and rights in land. Even when social closure was not legally mandated, families perpetuated membership in occupational categories through inheritance and marriage. Many small firms were and still are family enterprises of fathers and sons (now also mothers and daughters), brothers (now siblings), and spouses. Anthony Trollope vividly portrayed the role of kinship in the Anglican Church hierarchy.

No one today would urge that lawyers be a caste.

Professions historically enhanced their status (and income) by excluding stigmatized categories. Most legal professions barred women until well into the twentieth century on the ground that gender “unsuited” them for the practice of law. Slavery barred African Americans. Many countries admitted only citizens. Well into the twentieth century American legal elites openly voiced anti-Semitism. In 1913 Harlan Fiske Stone (then Dean of Columbia Law School and later Chief Justice of the U.S. Supreme Court) wrote a letter deploring “the influx to the bar of greater numbers of the unfit,” who “exhibit racial tendencies toward study by memorization” and display “a mind almost Oriental in its fidelity to the minutiae of the subject without regard to any controlling rule or reason.” Henry S. Drinker, celebrated for writing the first American legal ethics code, railed as chairman of the Philadelphia bar’s grievance

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12 Larson, supra.
13 Trollope, The Warden (1955); Barchester Towers (1857); Doctor Thorne (1958); Framley Parsonage (1961); The Small House at Allington (1964); The Last Chronicle of Barset (1967).
15 Quoted in Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 107 (1976).
committee against those who, having come “up out of the gutter...were merely following the methods their fathers had been using in selling shoe-strings and other merchandise....” There had been many complaints against “Russian Jew boys” until the requirement that applicants to the bar have a preceptor (sponsor) excluded them.\textsuperscript{16} Nazi Germany took the next step by expelling Jews (54% of the Berlin bar, 62% in Vienna) and even the tiny number of women lawyers.\textsuperscript{17} But excluded categories eventually overcome the obstacles. Jews rose as a proportion of admissions to the New York City bar from 26% in 1900-10 to 36% in 1911-17, 40% in 1918-23, 56% in 1923-29, and an astonishing 80% in 1930-34.\textsuperscript{18} The enrolment of women in American law schools increased 1650 percent between 1967 and 1983; indeed, because the number of men law students did not grow after 1973, all the increase in law school enrolments—and hence the profession—is attributable to the entry of women.\textsuperscript{19} Racial barriers were the last to be lowered; and all minorities except Asian-Americans remain underrepresented in law schools and the profession.\textsuperscript{20} Today most legal professions find this history acutely embarrassing and seek to enhance their collective status by making their membership more not less representative of the society they serve.\textsuperscript{21} Status criteria, therefore, cannot and should not limit numbers.

**Formal Education.** Formal education is the hallmark of modern professions, invariably seen as definitional. The 1979 English Royal Commission on Legal Services listed mastery of “a specialized field of knowledge” requiring a “period of education and training” as one of “the five main features of a profession.”\textsuperscript{22} Structural functional sociology is equally emphatic.\textsuperscript{23} But there is ample reason for skepticism. Manchu China used an elaborate system of examinations to staff its civil service.\textsuperscript{24} The English civil service (and its colonial Indian counterpart) long was filled by Oxbridge graduates who had read classics. In neither case did the knowledge these recruits were forced to demonstrate bear any relationship to the professional tasks they ultimately performed.

The relationship between formal education and legal professions is historically and culturally specific. That connection is strongest in civil law countries, whose universities have had faculties of divinity, law and medicine for more than a millennium. But formal education did not become the dominant entry path for American lawyers until the early decades of the twentieth century. In England that transformation took a half-century longer, partly because there were so few university places and partly because many law dons preferred the logical rigor of Roman law, dismissing their own law as too incoherent to be worth studying or teaching. (Law student enrolment in England rose from just over 3,000 in 1960-61 to over 8,500 two decades later; enrolment in polytechnic law departments, first opened in 1965, rose to nearly 6,000 in 1981-82; hence the aggregate total rose nearly 500 percent.)\textsuperscript{25} Indeed, no formal education was required in the United States until the twentieth century. Emulating the success of the American Medical Association’s 1910 Flexner Report in drastically reducing the

\textsuperscript{16} Id. 126-27.
\textsuperscript{18} Abel, American Lawyers 85-86 (1989) (hereafter AL).
\textsuperscript{19} Id. 91.
\textsuperscript{20} Id. 99-108.
\textsuperscript{22} Royal Commission on Legal Services, I Final Report 28, 30 (1979).
\textsuperscript{24} Van der Sprenkel, Legal Institutions in Manchu China: A Sociological Analysis (1962).
\textsuperscript{25} Abel, The Legal Profession in England and Wales 465 Table 3.2 (1988) (hereafter LPEW).
number of medical students, the American Bar Association waged a long, vigorous campaign—including annual publication of a map seeking to shame delinquent states by highlighting them in black—to persuade regulators to impose educational requirements: first a high school diploma, then a baccalaureate, and finally graduation from a three-year law school. This drastically reduced the number of part-time students from 31,319 in 1928 to 11,865 in 1953, greatly curtailing entry by those from poorer families. California still allows graduates of unaccredited law schools and those studying in a law office to take the bar exam; New York allows those completing one year of law school and three of law office study to take the bar (but few in either state succeed in entering by this route). Such efforts by accreditors have not gone unquestioned. The U.S. Department of Justice forced the ABA to end its hostility toward proprietary (for-profit) law schools by warning of possible anti-trust prosecution.

Even today there is enormous variation in legal educational requirements. Law is a graduate degree in the U.S., Canada, and increasingly Australia and Japan. In the rest of the world, however, it is a first degree, whose length varies from three years in the U.K. to often twice as long in the civil law world. England allows those who read other subjects for their baccalaureate to cram three years of undergraduate law study into a single post-graduate year. Some American universities let students compress the seven-year BA-JD into six. And now, just as American medical schools are shortening the MD from four years to three, American law schools are contemplating shrinking the JD from three years to two. Some argue that the arduous training of doctors could be cut by a third (from 14 post-secondary years to 10). Many American law schools give full credit for a semester-long externship (pocketing the tuition while offering little or no pedagogy); Northeastern University Law School alternates periods of formal education and externships during the last two years. And many American law schools allow students to combine a three-year JD with a two-year Master’s degree (business administration, public policy, urban planning, public health, or social work) in four years rather than five (just as several medical schools allow a compressed course for the MD-MPH). Law students constantly complain about the irrelevance of legal education, and their subsequent employers complain that law graduates lack essential knowledge and skills. Studies of Scottish solicitors and Chicago sole practitioners found that they made little use of the knowledge they acquired through formal legal education. (That is hardly surprising: few English majors become authors, few political science majors become politicians.) All this argues strongly against any simple correlation between legal education and the knowledge essential to practice law. Formal educational credentials appear to perform other functions. They demonstrate discipline, ambition, and educability. They function as a warrant for the perquisites of income and status lawyers enjoy. And they distribute law graduates to increasingly stratified positions within the legal profession.

26 I have argued that the AMA’s success in restricting the supply of doctors explains the American invasion of Grenada in 1983. Pres. Reagan justified it in significant part as necessary to rescue Americans who were in medical school there—because they could not obtain places in the U.S.
27 Abel, American Lawyers chap. 3.
28 Abel, AL 254 Table 5.
29 Hartocollis, “N.Y.U. and Other Medical Schools Offer Shorter Course in Training, for Less Tuition,” NYT (12.23.12).
30 Rodriguez & Estreicher, “Make Law Schools Earn a Third Year,” NYT (1.17.13). For responses, see Letters to the Editor, NYT (1.25.13).
But regardless of their justification, formal educational requirements clearly do influence the number of lawyers. The most extreme example of legal education functioning as supply control is Japan’s Institute for Legal Training and Research, the sole means of becoming a bengoshi. The ILTR historically accepted only about 2 percent of university law graduates taking the entrance examination after cramming for two years or more (although this is being relaxed, as it is in Taiwan and Korea, which had similarly restrictive entry). The ABA campaign cut the number of unaccredited law schools from 106 in 1935 to 17 in 1962 and the number of students in those schools from 31,013 in 1928 to 3,218 in 1961. Growing enrolment at accredited schools—from 5,385 in 1928 to 38,894 in 1961—meant that the overall number of students remained relatively constant—36,398 in 1928 and 42,112 in 1961—despite the fact that population grew by half and GNP twenty-fold during this period. Increasing pressure for entry to the limited number of places allowed law schools to become far more selective. Harvard admitted four out of five applicants in 1937-38 and one out of two as late as 1960 but just over one out of ten in 2012. At the same time, attrition within law school declined drastically. A Harvard dean was said to have greeted each first year class by warning: “look to your left, look to your right, one of you will not be here next year.” Indeed, Harvard flunked out a third of its entering class in 1937. As late as 1968 a third of American law students failed to graduate in three years. Now, however, virtually all do so (California’s unaccredited law schools offering an instructive counter-example). In many civil law countries, by contrast, graduation from secondary school guarantees a university place, and law is often the largest faculty, but many entrants fail to complete their degrees, change subjects, or never qualify to practice.

Making law schools gatekeepers can have unpredictable consequences. Individual law schools have obvious incentives to expand in order to generate income and raise status. Suffolk Law School, founded in Boston in 1914 over Harvard’s opposition, enrolled almost 4,000 students just ten years later, making it the world’s largest law school, a boast it proclaimed on a rooftop neon sign big enough to be seen from Harvard Square, five miles away. More recently, driven by US News rankings (which give greatest weight to the median LSAT scores of entering students), American law schools have cut enrolments, often by eliminating evening programs (thereby curtailing access for the poor, minorities, and women). Law schools seek to attract applicants by falsifying data on the scholarships they offer students and the jobs and salaries of their graduates. At the same time, in response to declining demand for lawyers, more than half cut the size of their entering classes and a quarter of the rest expected to do so in 2013. The number of students taking the LSAT fell 16 percent from October 2011 to October 2012. Even state monopolies on legal education can be broken by new private institutions.

37 Abel, AL 254 Table 5.
38 Abel, AL 59-60.
40 Abel, AL 61, 256 Table 7.
41 Stevens, Law School: Legal Education in America from the 1850s to the 1980s, 75, 80 (1983).
Increasing numbers of foreign law graduates seek entry despite protectionist obstacles. Law school tuition has risen much faster than the rate of inflation; but educational loans by government and private lenders have made it possible for students to pay those fees (whether or not they will ever be able to repay the loans).

Some commentators have urged law schools to assert a strong role in controlling the number of lawyers by reducing admissions and encouraging students who perform less well in their first year to drop out. Some want separate tiers of law schools for the two hemispheres of the legal profession, asserting that lawyers representing ordinary individuals require less expertise than those serving business and the wealthy. But when Alfred Z. Reed proposed different accreditation standards more than 90 years ago, the ABA responded by commissioning an establishment figure, Elihu Root, to write a report reaffirming the profession’s fictitious unity. And Gary Bellow persuasively showed that the legal problems of the poor are just as challenging as those of rich corporations, if not more.

Those arguing that law schools should control the number of lawyers must answer some hard questions. What gives law schools the moral authority to make that decision? What evidence do they offer for the proposition that the education they provide is essential for every practitioner? How can they ensure that self-interest does not contaminate their actions? What criteria will they use to determine the “right” number of lawyers? What data are required for that calculation; how will they collect those data, and how reliable are they? Should law schools act individually? If so, won’t their different interests and calculations produce divergent actions (so that some expand as others contract)? If they seek to act collectively, what institutional framework should they use? Where will it get the coercive power necessary to overcome the collective action problem? How will it defend against antitrust challenges? Should law schools control entry (through admissions or tuition levels) or graduation (by dismissing a proportion of entering students)?

Examinations. Although we take it for granted that lawyers must pass examinations, those actually are fairly recent innovations in common law countries, dating from the nineteenth century. In 1856 the Treasurer of Lincoln’s Inn opposed any examination for barristers: “I do not see the mischief of men being called to the Bar, who are after all incompetent, whether it is from want of means, or from idleness, or from incapacity, or anything else.” Having risen to become Chief Baron a quarter century later, he demonstrated a perhaps unfortunate consistency by exempting 141 aspiring solicitors from the Law Society’s examination (nearly a tenth of those passing). Even today examinations are not universal. A few American jurisdictions allow graduates of in-state law schools to practice without any further test, although ABA hostility has cut the number of states granting this “diploma privilege” from a high of 32 to just one or two. Although the profession usually sets the examination in common law countries, the state does so in the civil law world.

Examinations, like formal education, are justified as necessary to establish a floor of competence. But Weber long ago warned:

45 Medicine, as always, offers an illuminating comparison. See Blumenthal, “New Steam from an Old Cauldron—the Physician-Supply Debate,” 350 NEJM 1780 (2004).
47 Reed, Training for the Public Profession of the Law (1921); Abel, American Lawyers 46.
When we hear from all sides the demand for an introduction of regular curricula and special examinations, the reason behind it is, of course, not a suddenly awaked "thirst for education" but the desire for restricting the supply of these positions and their monopolization by the owners of educational certificates. Today the "examination" is the universal means of this monopolization, and therefore examinations irresistibly advance.50

There are many reasons to be dubious about the legal profession’s examinations. States granting the diploma privilege dispense with it. Some exams are too easy. The English Bar examination historically had a very high pass rate even though many took it just a few months after coming down from Oxbridge having read a subject other than law.51 For-profit cram courses (often very expensive) successfully teach to the test. There has never, to my knowledge, been an attempt to validate the examinations, i.e., to study empirically: 1) whether scores correlate with competence in practice; 2) all those passing are minimally competent; and 3) those failing are incompetent. The examinations have a disproportionate impact on test takers disadvantaged by class, race, or language.52 And there is ample evidence that those setting the test manipulate the pass rate to influence the number qualifying—a particularly dubious practice when the profession is in charge. In 1923 the pass rate varied from 25% in Texas through 46% in New York to 100% in North Dakota.53 In 1985 it varied between 57% in California to 90% in Ohio.54 There is no reason to believe that these results correlated with the competence of test takers in those states. Nationwide, the proportion passing declined from 59% in 1927 to 38% in 1948, rose to 76% in 1973, and declined to 64% in 1984.55 Again, it is inconceivable that competence fluctuated in these ways. Indeed, New York explicitly made the examination more difficult in response to the dot-com bust at the end of the 1990s.56 England exhibits similar patterns. Pass rates for the English Bar Final (part 2) rose to a high as 87% in autumn 1929 (just before the Crash), only to fall to 50% the next year and remain that low or lower for decades (partly because of the growing number of Commonwealth students).57 Pass rates for the Law Society’s Final Examination averaged 75% in 1909-15, rose to 87% in 1918-30 (including an astonishing 97% in 1920) to make up for catastrophic losses suffered during World War I, then declined steadily during the Depression to 54% in 1939 and stayed low except for a brief surge to 69% and 71% in the two years immediately after World War II.58 Examinations should be constantly revalidated to ensure that they perform their only legitimate function: excluding the unqualified.

Apprenticeship. Before aspiring professionals studied at university they qualified through apprenticeship, which everywhere survives in some form, if not as a de jure requirement. Historically, it was a major barrier. English solicitors had to pay a premium of £100-500 (sometimes more than a year's average income) and support themselves without wages for five years.59 English barristers had to pay a premium of 200 guineas for a two-year pupilage (100 guineas for the one-year pupilage that was mandatory after 1959).60 The willingness of masters to take apprentices determines the number who can enter. Because some lawyers found apprentices a useful form of exploited labor, legal professions

51 Abel, LPEW 41-42.
52 Abel, AL 103; Abel, ELMS chap. 4.
53 Abel, AL 267 Table 16.
54 Id. 270 Table 18.
55 Id. 269 Table 17.
57 Abel, LPEW 42, 310-14 Table 1.1 (1988).
58 Id. 396-401 Table 2.10.
59 Abel, LPEW 149.
60 Abel, LPEW 53.
sometimes capped the number per master.\textsuperscript{61} But once again the profession’s efforts to limit supply in order to reduce competition among lawyers cannot be justified. And apprenticeship allows free rein to the preferences (and biases) of masters, who typically choose entrants like themselves, often kin. The contribution of apprenticeship to lawyer competence is uncertain and, as far as I know, has never been tested empirically.\textsuperscript{62} Articled clerks in England often complained of wasting their time performing routine tasks: photocopying documents, even making tea.\textsuperscript{63} At the very least, advocates of apprenticeship must ensure that it is designed to optimize pedagogy, not the master’s profit or convenience. And a profession that mandates apprenticeship after students have invested years in higher education should ensure places for all, allocated without discrimination. Hence any apprenticeship requirement should not limit entry.

**Employment.** Even where the state does not monopolize the practice of law, employment options can restrict entry. An English solicitor must work for three years as assistant to a fully qualified solicitor before practicing independently. English barristers traditionally had to find a seat in chambers, which in London were restricted to the Inns of Court. Because they could not be salaried or enter partnerships, they often earned little during the early years of practice, making survival difficult for those without family support. Although almost all American states allow lawyers to practice independently immediately after qualifying, only 6 percent of the Class of 2011 did so.\textsuperscript{64} A salaried associateship of five to ten years is the only way of to become a partner in most American law firms. This more market-oriented limitation appropriately introduces the last influence on the number of lawyers.

**Market Influences.** If every effort to control supply by the profession or the state (often under pressure from the profession) is suspect as motivated by self-interest—another example of George Bernard Shaw’s “conspiracy against the laity”\textsuperscript{65}--is the market a solution? Market advocates argue, correctly, that all entry barriers enable the profession to extract monopoly rents from clients. By contrast, allowing supply to increase in response to demand reduces the cost of services and increases access. Milton Friedman, founder of the Chicago school of neo-classical economics, argued that even when justified in terms of ensuring the profession’s clients a minimum level of quality, entry barriers actually lower aggregate quality by denying any service to those who cannot afford the prices charged by qualified professionals.\textsuperscript{66} We can see consumers making price-quality tradeoffs when they use cheaper gypsy cabs instead of London’s more expensive black cabs, or cheaper car services rather than New York’s more expensive yellow cabs. During the Thatcher government, Lord McKay, the Lord Chancellor, vigorously pursued a program of reducing restrictive practices in the legal profession.\textsuperscript{67} The recent “crisis” in the American legal profession—unemployed graduates, lower starting salaries, law firm layoffs and dissolutions, spiraling educational indebtedness, declining law school applications, possible

\textsuperscript{61} A limit of two was established in eighteenth-century England. Abel, LPEW 152.
\textsuperscript{63} Abel, LPEW 155-56.
\textsuperscript{65} “The Doctor’s Dilemma” (1906). Adam Smith was first and just as cynical (if less epigrammatic): “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.” An Inquiry into the Nature and Causes of the Wealth of Nations (1776).
\textsuperscript{66} Friedman, Capitalism and Freedom (1962); Friedman & Kuznets, Income from Independent Professional Practice (1945).
\textsuperscript{67} Abel, ELMS chap. 2. For further developments, see Clementi, Review of the Regulatory Framework for Legal Services in England and Wales: Final Report (2004).
law school collapses—has led many observers to advocate further liberalization of the market for lawyers’ services.\textsuperscript{68} Although law students, lawyers, law firms, and law schools are suffering real hardship, this could be seen as an inescapable example of the creative destruction Schumpeter claimed was one of the great virtues of capitalism.\textsuperscript{69}

Marx argued, however, that labor markets are unique because labor differs from other commodities.\textsuperscript{70} True, there are numerous examples of occupations with few or no entry barriers: street peddlers and door-to-door and telephone sellers of goods or services, domestic and agricultural workers, gardeners, child and home health care providers, casual workers (construction now, longshoremen at an earlier time). But these are undesirable jobs, paying less than minimum wage (sometimes nothing), with no benefits or job security. They tend to be filled by people of color, women, and immigrants (often illegal). “Free” markets without unions or government regulation are bad for workers (although, of course, economists would reply that the offer more jobs).

Free markets also are bad for consumers. Although Friedman notoriously argued that patients should be allowed to “choose” unqualified brain surgeons, I doubt he did so himself. Clients trading off the quality of legal services for lower prices confront acute problems of information asymmetry.\textsuperscript{71} They find it difficult, often impossible, to evaluate quality ex ante. Even ex post, outcome is a highly imperfect surrogate measure of professional expertise, since it does not control for other variables, such as case difficulty, the adversary’s resources, or the judge assigned. One-shot consumers (who are the vast majority of individual clients) cannot rely on their own experience.\textsuperscript{72} Restrictions on advertising (for instance, of success rates) make it harder to assess reputation. In the absence of other indices, consumers may wrongly view price as a reliable signal of quality.\textsuperscript{73} A truly free market in lawyers would offer clients no protection. Nor would malpractice liability or professional discipline adequately guarantee quality. Both operate only after the damage is done. We know that all tort victims greatly underclaim;\textsuperscript{74} I would expect this problem to be even greater for legal malpractice (as it is for medical malpractice).\textsuperscript{75} Furthermore, such claims are very difficult to prove; clients may have to demonstrate


\textsuperscript{69} Schumpeter, Capitalism, Socialism and Democracy 82-85 (1942).

\textsuperscript{70} Capital, vol. 1, chap. 1.


\textsuperscript{73} While practicing in Los Angeles, Richard Nixon charged a client $25,000 for advising that it would be safe to invest in France as long as de Gaulle was in power—something easily learned from the newspapers. The ex-vice president justified his fee by explaining that it would let allow the client boast: “as my lawyer, Dick Nixon, said to me the other day....”Hoffman, Lions in the Street 100 (1973).

\textsuperscript{74} Harris et al., Compensation and Support for Illness and Injury (1984); Hensler et al., Costs and Compensation for Accidental Injury in the United States (1991).

\textsuperscript{75} Danzon, Medical Malpractice: Theory, Evidence, and Public Policy (1985).
they would have prevailed in litigation absent the malpractice.\footnote{Wiley v. County of San Diego, 966 P.2d 983 (Cal. 1998).} Professional discipline overlooks most misconduct; and many of the few lawyers who are punished recidivate.\footnote{Abel, Lawyers in the Dock (2008); Abel, Lawyers on Trial (2010).}

Therefore we still need entry barriers, however imperfectly they ensure minimum quality. Whichever ones are imposed, supply periodically will over- and under-shoot demand. All labor markets are “sticky” because participants have sunk costs: training, opportunities foregone, the intrinsic pleasure of exercising skills, residence, and the effect of career moves on other family members. For all these reasons professional labor markets are particularly sticky.\footnote{Freeman, “Legal Cobwebs: A Recursive Model of the Market for Lawyers,” 57 Rev. Econ. & Statistics 179 (1975).} Attrition from the legal profession is very low.\footnote{Heinz & Laumann, Chicago Lawyers: The Social Structure of the Bar 208 Fig. 6.6 (1982).} College graduates choosing careers make comparative judgments about costs and benefits. For years I would kid students that they were in law school because they wanted a middle-class life and could neither add nor stand the sight of blood. My feeble joke usually provoked embarrassed laughter—which I took to signify agreement. But the judgments of law school entrants are made under uncertainty.\footnote{Kahneman, Slovic & Tversky, Judgment under Uncertainty (1982); Kahneman, Thinking Fast and Slow (2011).} All such judgments contain systematic biases. Applicants “know” that some large firms pay graduates $160,000 a year—and most are convinced they have a shot at that prize.\footnote{Caponecchia, “It Won’t Happen to Me: An Investigation of Optimism Bias in Occupational Health and Safety,” 40 J. Applied Soc. Psych. 601 (2010); Preuss & Alicke, “Everybody Loves Me: Self-Evaluations and Metaperceptions of Dating Popularity,” 35 Personality & Soc. Psych Bull. 937 (2009).} Even without those biases, applicants would have to rely on imperfect information. Who can predict the demand for lawyers over the next 50 years—the likely length of a career? Many factors may influence demand: business cycles, technological innovation, globalization and international trade, the rise and fall of nations, government regulation, rights consciousness, changes in substantive law (tax reform, no fault divorce, decriminalization of drugs), even how we respond to climate change or terrorism. We cannot predict these changes or their effect on the demand for lawyers. Even “experts” do not agree. The dean of Case Western Reserve University Law School claimed in a \textit{New York Times} op ed that the U.S. Bureau of Labor Statistics predicted a 10 percent increase in lawyer jobs during the decade 2010-20.\footnote{Mitchell, “Law School Is Worth the Money,” NYT (11.28.12).} This provoked a lawyer to write a letter to the editor claiming that the BLS predicted only 73,600 new jobs, not nearly enough for the more than 400,000 who will graduate during that period (but the writer ignored retirements by the large baby boom cohort).\footnote{Elizabeth F. Brown, Letter to the Editor, NYT (12.3.12).} The present imbalance between supply and demand may just be a product of the above factors; but it also can offer a salutary occasion to re-examine all the entry barriers, retaining only those necessary to ensure minimum competence.

\section{II. Controlling Production by Producers}

Entry control allows—and invites—professions to restrict competition among entrants. (Until supply control is secured, those outside the profession can flout its rules with impunity.) One of the first and most important anti-competitive practices are market divisions. Although Abbott argues that these jurisdictional lines are justified in terms of knowledge warrants, those are no more (and often less) persuasive than the assertions of exclusive expertise professions advance to defend entry barriers.\footnote{Abbott, The System of Professions.} In the 1920s and 1930s, the California State Bar negotiated jurisdictional lines with banks and trust and title companies, claims adjustors, realtors, accountants, and debt collectors. It sought to exclude non-lawyers from practice in lay magistrate’s courts and before administrative agencies and prohibit them from drafting wills or handling real estate transactions.\footnote{Abbott, Lawyers on Trial, chap. 1 (2010).} Unlike legal professions in other countries, only
American lawyers claim the exclusive right to offer legal advice, a perquisite that cannot be explained by their superior expertise. Historically, categories of lawyers often emerged as adjuncts of particular courts in which they had exclusive rights to practice: examples include ecclesiastical and Admiralty courts and Chancery in nineteenth-century England and the Patent Trial and Appeal Board in the U.S. today. The divided profession in England illustrates the symbiotic nature of some market divisions (for which there are analogies in civil law countries). English solicitors historically enjoyed two monopolies: direct access to clients and conveyancing (transfer of real property). Independently practicing barristers could be retained only through a solicitor but had exclusive rights of audience in higher courts. As the more prestigious and better established branch, barristers devised additional restrictive practices. They had to belong to one of the eight circuits and could practice in others only if the client paid an additional fee to the barrister as well as a kite fee to a circuit member (both designed to discourage non-members from poaching). Ten percent of barristers were Queen’s Counsel (appointed by the Lord Chancellor), who could charge much more by virtue of that rank and had to be assisted by a “junior” (chosen from the rest of the Bar) at two-thirds of the QC’s fee. Legal professions established minimum or fixed fees (and failed to observe or police maximum fees). They banned advertising and solicitation (which had been commonplace in some jurisdictions). Federal polities confined lawyers to practice in a single sub-unit (state or province) or required them to qualify separately in each. Countries placed high, sometimes insuperable, hurdles in the path of foreign lawyers seeking admission. Specialization was transformed from de facto to a certificate and ultimately an exclusive jurisdiction.

The erosion of supply control combined with the hegemony of market ideology has led to the decline of restrictive practices. In England, rights of audience have been extended to all lawyers, and building societies, banks, and estate agents may do conveyancing. Qualified lawyers find it easier to move across jurisdictions, and legal work is being outsourced to lawyers in other countries. Multinational partnerships proliferate in number and grow in size. Fee schedules have been abolished. Paralegals have advanced multiple claims to lawyers’ territory: uncontested divorce, workers compensation, immigration, patent, tax. Unbundling disengages functions requiring lawyers from those that can be performed by clients or lay advisers. Rules against advertising (if not soliciting) have been relaxed. Companies like Nolo sell web-based documents and handbooks. At “We the People” non-lawyers help clients fill out forms. In England the Citizens Advice Bureaux have been guiding people through the welfare state bureaucracy since World War II. Law firm expansion is accelerated by the possibility of raising capital from non-lawyers. Mammoth global accounting and management consulting firms challenge large law firms, aided by the relaxation of bans on multi-disciplinary partnerships. It would be extremely unfortunate if lawyers sought to reduce the competition engendered by their rising numbers by seeking to reclaim these restrictive practices or devise others.

III. Demand Creation

As the ability professions to control entry and enforce restrictive practices erodes, they turn to demand creation. This is not a new phenomenon: the division of labor between solicitors and barristers
forcing the client to retain two lawyers) and the two-counsel rule requiring a QC to be assisted by a junior (forcing the client to retain two barristers) date from the nineteenth century. English medical consultants (i.e., specialists) will see patients only on referral from a general practitioner. We have known for more than 60 years that the supply of hospital beds significantly influences “demand” for hospitalization. Critics have accused the English legal profession of engaging in “supplier induced demand.” A group of American doctors and a hospital recently paid a substantial amount to settle allegations that they performed unnecessary medical procedures: angioplasties at nearly four times the national average. Critics blame greed for the rise (and regional differences) in the rate of Caesarean sections. The American insurance industry and large institutions that are regularly sued have waged a campaign for decades to convince the public that there is a “tort litigation crisis” caused by too many lawyers filing frivolous lawsuits. But critics have shown that most of the increase in litigation is attributable to businesses suing each other.

There are many reasons to celebrate those who mobilize the law. I have argued that the real tort crisis is too few claims, not too many. In the U.S. the representation of criminal accused increased dramatically when the Supreme Court held that the Sixth Amendment guaranteed a right to counsel. The same happened for civil litigants as legal aid was expanded throughout the world in the decades following World War II. Legal insurance, which long guaranteed individuals in Germany access to justice, was expanded in England as a means of shifting the cost of representation from the state to the parties. England embraced conditional fees—long anathematized as a practice of American “cowboys”—for the same reason. The aggregation of individual clients through institutions like trade unions, associations of tenants and homeowners, and consumer cooperatives, as well as legal doctrines permitting class actions, can make small claims financially viable. Lenders can finance litigation that otherwise would be too costly to bring. The rise of alternative dispute resolution can reduce the cost of settling disputes.

IV. Conclusion

The moral panic over “too many lawyers” resembles warnings of a “tort litigation crisis.” Social constructivist theory urges us to ask who is defining the social problem and why they are doing so. Temporary imbalances between supply and demand are a cost of every profession. Legal professions emerged and matured by aggressively restricting supply, thereby increasing the monopoly rents they were able to extract and produce rising—some would say excessive—lawyer incomes. Recent increases in the production of lawyers were the response. They may have overshot the mark. Certainly law school

96 Shian & Roemer, “Hospital Costs Related to the Supply of Beds,” 92(4) Modern Hospital 71 (1959).
98 Abelson, “U.S. Settles Accusations That Doctors Overtreated,” NYT (1.4.13).
99 E.g., Olson, Schools for Mistrule: Legal Academia and an Over-lawyered America (?). For critiques, see Galanter, “Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About our Allegedly Contentious and Litigious Society,” 31 UCLA L. Rev. 4 (1983); Saks; McCann & Haltom, Distorting the Law: Politics, Media, and the Litigation Crisis (2004); Lewis & Morris, “Tort Law Culture: Image and Reality,” 39 J. L. & Soc’y 562 (2012).
103 Blankenburg & Schultz, supra.
enrolments failed to respond quickly to the global recession. But rather than rush to impose “solutions” that once again restrict the production of lawyers we should reflect on the historical and comparative experience of supply control by lawyers. The legal profession exists to serve the public, not its own members. Entry barriers can be justified only if they are demonstrably necessary to ensure a minimum level of competence. Advocates of restrictive practices must show they are essential to protect clients against lawyer overreaching or misconduct. Efforts to expand access to justice should be applauded, not stigmatized.