

**FROM THE GREAT DEPRESSION TO THE GREAT
RECESSION: (NON-)LAWYERS PRACTICING
DEREGULATED LAW**

I.	INTRODUCTION AND THESIS	1185
II.	SCOPE	1188
III.	BACKGROUND	1189
	A. <i>Current Efforts To “Deregulate”: Relevance After the 2007 Recession</i>	1189
	B. <i>Regulation: The Recurring Debate</i>	1193
	1. Current Arguments in Favor of Deregulation	1193
	2. Historical Intersection Between Economic Cycles and Calls for Deregulation	1195
	3. Current Unauthorized Practice of Law Regime	1199
	C. <i>The Debate Surrounding the Guild of Lawyers</i>	1202
	1. Criticisms of Current Regulation	1203
	2. Supporters of Current Regulation	1206
IV.	WHAT THE DEBATE IS REALLY ABOUT: REGULATION AS A STALKING HORSE.....	1212
V.	PLANS FOR REFORM TO PROTECT THE RULE OF LAW	1216
VI.	CONCLUSION	1219

Perhaps with historical hindsight, 2008–2009 will be remembered not for the Great Recession that first rocked the U.S. residential mortgage credit market, then froze American and global financial markets and eventually led to a worldwide recession, but as an inflection point for world history, the U.S. economy, and the legal profession.

—Eli Wald¹

I. INTRODUCTION AND THESIS

In the shadows of economic collapse, banks may fail but the rule of law remains strong. Few commentators deny the powerful relationship between the

¹ Eli Wald, *Symposium Foreword: The Great Recession and the Legal Profession*, 78 *FORDHAM L. REV.* 2051, 2051 (2010) (citations omitted).

economy and the law because the two worlds often collide to create prosperity, opportunity, and justice. This Note, however, illustrates a strong correlation between poor economies and recurring criticisms that current legal regulations make legal services unavailable and too expensive. The unanswered question then becomes whether economic reasons, alone, establish a sufficient basis to deregulate the provision of legal services. Legal analysts believe that, in light of the 2007 economic downturn,² the legal services industry will sustain permanent decline.³ This Note challenges commentators to justify limitations imposed by mandatory lawyer licensing, or alternatively, to outline a system of reform that ensures unique protections otherwise offered by the organized bar.

Under traditional notions of American jurisprudence in which lawyers practice law, the organized bar uses various tools to prevent non-lawyer engagement in the unauthorized practice of law.⁴ However, critics of traditional rules argue for deregulating legal services by abolishing unauthorized practice of law (“UPL”) restrictions.⁵ These critics believe “that lawyer licensing limits the availability of so-called legal services and increases the costs of services that nonlawyers could provide as well.”⁶

In addition to cost and access arguments, which make this topic particularly relevant in the shadows of an economic recession, other pressures accompanying an evolving profession challenge traditional notions of legal services: increasing demand for legal services; rising competition among legal service providers, lawyers and non-lawyers; changing regulations regarding legal services; and other policy-related concerns, such as providing indigent legal services.⁷ Overall, proponents of reform challenge the traditional unauthorized practice regime, in response to increasing costs and limited access to necessary legal services—factors especially relevant in poor economic times.

² For a brief synopsis of the 2007 credit crisis and subsequent recession, see Richard D. Cudahy, *The Coming Demise of Deregulation II*, 61 ADMIN. L. REV. 543, 547–52 (2009).

³ See William Hornsby, *Challenging the Academy to a Dual (Perspective): The Need to Embrace Lawyering for Personal Legal Services*, 70 MD. L. REV. 420, 433 (2011) (“The impact on the legal profession from the economic downturn that began in 2008 is unclear, but there is speculation that legal services will see a long-term or permanent contraction.”).

⁴ See Laurel A. Rigertas, *Lobbying and Litigating Against “Legal Bootleggers”—The Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 66 (2009).

⁵ See Meredith Ann Munro, Note, *Deregulation of the Practice of Law: Panacea or Placebo*, 42 HASTINGS L.J. 203, 203 (1990).

⁶ Fred C. Zacharias, *Reform or Professional Responsibility as Usual: Whither the Institutions of Regulation and Discipline?*, 2003 U. ILL. L. REV. 1505, 1524 (2003).

⁷ See generally Quintin Johnstone, *An Overview of the Legal Profession in the United States, How That Profession Recently Has Been Changing, and Its Future Prospects*, 26 QUINNIPIAC L. REV. 737 (2008) (discussing the overview of recent changes to the legal profession and possible long-term consequences).

Again, traditional notions of the practice of law require as a condition precedent that a practitioner be a lawyer before rendering legal services. However, nothing about this premise is cut-and-dried in light of changing societies and cyclical arguments to abolish such restrictions. Defining whom a lawyer is and what becomes the practice of law can change the entire debate. In other words, “who’s in, who’s out, and why[?]”⁸ Now more than ever, the answers to these questions matter in the wake of this Nation’s most recent economic recession⁹ because legal work impacts the economic fabric of this Country’s market economy.¹⁰ Despite the need for a quick fix for cheaper legal services, “[t]he market for legal services is too important for so much of the law as to who may participate in that market to remain indefinitely so ambiguous, uncertain and unenforced.”¹¹

Continuing the long-time debate regarding licensed lawyers’ control of legal services,¹² proponents of restrictive licensing requirements argue that “limiting the practice of law to members of the bar protects the public against the rendition of legal services by unqualified persons.”¹³ On the other hand,

⁸ Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 J. INST. FOR STUDY LEGAL ETHICS 197, 197 (1996) (“No issue is more central to the contemporary American legal profession than how to define itself as a profession: who’s in, who’s out, and why.”).

⁹ For a list of recessions in America since 1854, see *US Business Cycle Expansions and Contractions*, NAT’L BUREAU OF ECON. RES., <http://www.nber.org/cycles/cyclesmain.html> (last visited Mar. 10, 2013) [hereinafter *Expansions and Contractions*]. See also Dan Barufaldi, A Review of Past Recessions, Investopedia, <http://www.investopedia.com/articles/economics/08/past-recessions.asp#axzz2NAdFIFqT> (last visited Mar. 10, 2013).

¹⁰ See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1717 (2008).

¹¹ Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 818 (2003).

¹² Legal regulation and licensing is not a new debate:

Legal historians may ultimately treat the bar’s unauthorized practice campaign as both a product and a casualty of the Depression. The same forces that gave rise to the bar’s economic concerns generated a set of governmental structures and societal adjustments that made the profession’s aspirations to monopoly increasingly anachronistic. As early as 1938, Karl Llewellyn recognized that “some of these [lay] encroachments on the practitioner’s ancient fields are like the encroachments of the white man on the Indian: neither right nor law, neither tradition nor stubborn fighting by the gathered tribe, will over long hold up the disposition.

Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 97 (1981) (citations omitted).

¹³ MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 2 (2011); see also Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly From a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 260 (2002) (regulating lawyers’ conduct “offer[s] consumer protection as the rationale for UPL rules”).

proponents of reforming the American legal system for a less restrictive regime argue that “a system with fewer restrictions on who will practice law will reduce the costs of legal assistance and increase access to the judicial system.”¹⁴

My thesis addresses this tension: Economic pressure cannot legitimize completely deregulating the American legal system because unique protections enforced by an organized bar support the rule of law essential to our society. Further, recognizing commentators’ arguments regarding inevitable changes in the law, I propose a framework of analysis which any reform must follow to sustain protections otherwise provided by an organized bar.

The purpose of this Note is to highlight proponents’ arguments for deregulating the practice of law in poor economic times and provide an analysis of why this single trigger is insufficient to completely abolish unauthorized practice of law statutes. In Section II, I limit the scope of this Note to facilitate a manageable debate regarding the much larger topic of regulating lawyers, generally. In Section III.A, I highlight current statements by scholars and media outlets arguing for less regulation of legal services. In Section III.B, I lay out the historical rise of legal regulation in America followed by an analysis of both sides of the regulation debate in Section III.C. In Section IV, I question what the regulation debate is actually about, and Section V provides a set of criteria that must accompany future reform efforts if the rule of law is to be protected. Finally, if some reform is attained, Section VI questions the future of the American legal system with less regulation.

This Note is not based on economic analyses regarding the cost-benefit demand of licensed lawyers as it is beyond the scope of this work. Therefore, the reader should approach this topic from a professional responsibility perspective, recognizing that the inherent protections offered by an organized bar cannot be abolished due to financial restraints, alone, without some other substantial equivalent.

II. SCOPE

For purposes of this Note, I limit the scope of regulation to specific areas of law, while discussing regulation as illustrated through unauthorized practice of law restrictions. First, because critics cite increasing costs and insufficient access to justify reforming legal services, this Note is limited to legal services that low to middle-class consumers may forgo due to financial

¹⁴ Gary S. Moore, *Lawyers and the Residential Real Estate Transaction*, 26 REAL EST. L.J. 351, 362–63 (1998); see also CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, *FIRST THINGS WE DO, LET’S DEREGULATE ALL THE LAWYERS* 95–99 (2011) (analyzing and arguing in favor of deregulating legal services to address cost concerns and general inefficiencies of occupational licensing).

limitations.¹⁵ Generally, “[t]here is more litigation in the wake of [a] financial crisis.”¹⁶ As demand for legal services increases, specific types of litigation are likely to recur during times of economic difficulty: foreclosures, domestic relations, consumer issues, and other non-foreclosure housing matters.¹⁷ Further, because more litigants represent themselves due to heavy financial burdens,¹⁸ this Note focuses on those legal services a consumer is likely to waive due to limited resources.

Second, regulation in the context of this Note refers to state-based UPL statutes. Recognizing the cost of limiting legal services, “important determinants of the quality, availability[,] and costs of legal services in every state are the state’s unauthorized practice laws and how vigorously those laws are enforced.”¹⁹ Therefore, states’ unauthorized practice laws provide an adequate cross-section of the debate surrounding deregulation of legal services regarding prices and access. Restating my thesis, economic pressure cannot legitimize completely deregulating the American legal system because unique protections enforced by an organized bar support the rule of law essential to our society.

III. BACKGROUND

A. *Current Efforts To “Deregulate”: Relevance After the 2007 Recession*

Following the sequence of historical recessions in the United States, December 2007 marked the beginning of credit freezes and mortgage crises

¹⁵ See Rhode, *supra* note 8, at 209.

¹⁶ Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and Its Solutions*, 45 FAM. L.Q. 45, 45 (2011).

¹⁷ See *id.* Extrapolated, this eliminates some criminal legal services; however, the scope of this paper mostly eliminates the discussion regarding commercial legal consumers, whose pockets may be deeper and less affected by economic pressure.

¹⁸ See Nathan Koppel, *More Strapped Litigants Skip Lawyers in Court*, WALL ST. J., July 22, 2010, <http://online.wsj.com/article/SB10001424052748704229004575371341507943822.html>; see also Nolan-Haley, *supra* note 13, at 268–69 (identifying a nexus between legal costs and *pro se* representation); Painter, *supra* note 16, at 46; Christina L. Underwood, *Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437, 442 (2004).

Ultimately, “legal rules” matter, and regulations governing lawyers likely impact the allocation of legal services. According to Judge Richard Posner, “economic analysis [can] explain all of law.” George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 273–74 (1998).

¹⁹ Johnstone, *supra* note 11, at 850.

sparking the Great Recession.²⁰ In the wake of this recent recession and consistent with previous times of economic hardship, critics vocalized their opinions to deregulate the practice of law.

Some say, “First thing we do, let’s deregulate all the lawyers.”²¹ Others say, “It’s time to deregulate the practice of law,” analyzing other industries that have successfully done so.²² Most poignantly, the question is posed: “What do the New York Times, the Brookings Institution, and the Cato Institute have in common? Turns out we agree on deregulating the legal profession.”²³ For four reasons, some of this Country’s most influential players in politics and scholarship reassert controversial arguments about the provision of legal services: the relationship between economics and deregulation, an increased need for legal services, the flexibility of UPL enforcement for specific areas of practice, and continued issues with cost and access of legal services.

First, as outlined above, economic hardship triggers recurring arguments to deregulate the practice of law. Legal services are considered economic activity that contributes to the success of market economies.²⁴ As such, the demand for legal services clearly reflects changes in the economy.²⁵ Changing demand, as past recessions illustrate, may create “intraprofessional competition” in addition to “external competition” from lay practitioners.²⁶

In other words, economic instability presents opportunities for reshaping the legal field as lawyers compete for business among themselves, while competing against lay professionals who may practice in a certain specialty.²⁷ As such, the legal profession is experiencing a watershed moment into the twenty-first century.²⁸ Increasing competition, technology, and non-

²⁰ See Catherine Rampell, “Great Recession”: A Brief Etymology, N.Y. TIMES: ECONOMIX (Mar. 11, 2009, 5:39 PM), <http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology/>.

²¹ See generally WINSTON, CRANDALL, & MAHESHRI, *supra* note 14.

²² See Koppel, *supra* note 18.

²³ Tim Lynch, *Lawyers and Their Licenses*, CATO INST. (Aug. 24, 2011, 1:03 PM), <http://www.cato.org/blog/lawyers-their-licenses>.

²⁴ See Hadfield, *supra* note 10, at 1717; Johnstone, *supra* note 11, at 798–806 (discussing the Competitive Market for Legal Services).

²⁵ See George C. Leef, *Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes*, REG., <http://www.cato.org/pubs/regulation/regv20n1/reg20n1c.html> (last visited Mar. 18, 2013).

²⁶ See Wald, *supra* note 1, at 2054.

²⁷ See *id.*; see also *id.* at 2054 n.14 (citing Harry W. Arthurs & Robert Kreklewich, *Law, Legal Institutions, and the Legal Profession in the New Economy*, 34 OSGOODE HALL L.J. 1, 48 (1996)) (“stating that the legal profession continues to experience ‘growing internal political dissension at the very moment when it also confronts the profound and permanent external challenges of the new economy’”).

²⁸ See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343 (2004).

lawyer alternatives, such as dispute resolution, combine with economic pressures that will certainly impact the future of legal services.²⁹ Therefore, because economic hardship often triggers arguments for reform, analyzing current regulation of the law is relevant in light of America's most recent recession.

Second, in response to the 2007 recession, demand for legal services in America swelled. Litigation, generally, increases in the aftermath of a financial crisis.³⁰ Specifically, legal services germane to financial difficulty multiplied in 2010 as the nation remained within the shadows of financial hardship: foreclosure, domestic relations, consumer issues, and housing matters other than foreclosure, among others.³¹ However, limited disposable income likely limits individuals' ability to retain legal representation,³² and arguably *pro se* litigation rates rise with financial strain.³³ Disadvantaged without proper representation, "[t]he economic downturn has left more Americans with the daunting prospect of fighting court battles without a lawyer."³⁴ Layoffs, pay cuts, bill collections, and other products of a recession likely limit consumers' ability to pay for legal services. Limited funds increase *pro se* litigation,³⁵ and "[o]pening the door to lay-providers may also be a necessary reaction to the growing, unsatisfied need of the poor and middle classes for law-related services."³⁶

Third, the law governing unauthorized practice is already changing in the twenty-first century. Primarily, practice of law definitions differ among jurisdictions,³⁷ and varying interpretations directly affect the regulation of legal

²⁹ See *id.* at 355. However, it is interesting to note that most prior criticisms of lawyer regulation followed major political and economic controversies. "The accusations sometimes turn out to be inaccurate or only partially true, but some of the accusatory fingers usually point in the direction of attorneys. And that's what makes the current economic mess—and the absence of any blame for lawyers—so noteworthy." Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909, 919 n.26 (2009) (quoting Andrew Perlman, *The Biggest Legal Ethics Story of the Year?*, LEGAL ETHICS FORUM (Oct. 5, 2008, 10:05 AM), <http://legaethicsforum.typepad.com/blog/2008/10/the-biggest-leg.html>) (examining a potentially distinguishing feature of criticisms of lawyers in this economic downturn, as opposed to previous recessions explained below).

³⁰ See Painter, *supra* note 16, at 45.

³¹ See *id.*

³² See Soha F. Turfler, Note, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903, 1904–05 (2004).

³³ See Nolan-Haley, *supra* note 13, at 268–69.

³⁴ Koppel, *supra* note 18.

³⁵ See Underwood, *supra* note 18, at 442.

³⁶ Zacharias, *supra* note 6, at 1506.

³⁷ See Nolan-Haley, *supra* note 13, at 262.

services. If certain practices fall outside a specific definition of the practice of law, there can be no violation of unauthorized practice restrictions.

For example, courts define three separate tests to determine if a certain act is the practice of law. The Professional Judgment Test analyzes whether an activity requires specialized training and skills.³⁸ The Traditional Area of Practice Test establishes a functionalist definition of exactly what lawyers do.³⁹ The Incidental Legal Services Test states that activities so routine in the business or commercial setting are not defined as the practice of law.⁴⁰ Outlining these three tests illustrates the difficult task of defining and enforcing unauthorized practice regimes, largely due to jurisdictions' authority to alter regulations based on its definition of the practice of law.

Also, express exceptions to unauthorized practice restrictions demonstrate a shift in regulating legal services. Most certainly, one has the constitutional right to represent himself or herself in all cases, with or without a law degree and bar admission.⁴¹ However, a minority of jurisdictions recognize additional exceptions to unauthorized practice laws that allow non-lawyers to practice work otherwise classified as legal work: cases where an attorney-client relationship is absent, lay representation before administrative agencies and small claims courts, law students practicing under supervisory authority, and publishers' rights to publish do-it-yourself kits for consumers, among others.⁴² Therefore, varying definitions of the practice of law and exceptions to the unauthorized practice rules suggest that traditional regulations are shifting, especially relevant in uncertain economic times.⁴³

Last, the 2007 recession and other recessions, generally, ignited reformists' criticisms that legal services are unavailable due to high costs of representation. For example, criticisms of previous recessions reflect contemporary commentary: "Rates are too high, inexperienced associates are paid too much, processes are inefficient, and the overall cost of legal fees is outrageous. Yet . . . little has changed since the last recession . . ." ⁴⁴ Commentators regularly criticize the cost and access of legal services,⁴⁵ and it

³⁸ See *id.* at 263.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *id.* at 263–64 (citations omitted).

⁴³ Anecdotally, the areas of highest UPL complaints include the following: employment issues at administrative hearings, divorce, adoption, child support, insurance, real estate, and mortgages cases. *Id.* at 265.

⁴⁴ Gary R. Garrett, *Will the Recovery Bring Changes to the Legal Services Business Model?*, 09-8 L. OFF. MGMT. & ADMIN. REP. 1 (2009).

⁴⁵ See Roger C. Cramton, *The Future of the Legal Profession: Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 533–34 (1994) ("The legal system . . . is

seems that the most recent recession once again revisits these arguments in 2012.

B. Regulation: The Recurring Debate

1. Current Arguments in Favor of Deregulation

The practice of law in America has been regulated for a long time, in that non-lawyers are traditionally prohibited from practicing law and individuals have the constitutionally recognized right to represent themselves.⁴⁶ However, rules governing the practice of law developed neither quickly nor without opposition.

In colonial America, a diverse group of individuals made up the legal community, subject to few restrictions regarding the practice of law.⁴⁷ During this period, state statutes largely governed regulations dealing mostly with fees, appearance restrictions, and oath requirements.⁴⁸ Cases regarding the unauthorized practice of law did not exist.⁴⁹

After the American Revolution, many states' constitutions established finite barriers among the three branches of government, but none expressly demarcated control of the practice of law.⁵⁰ The result: some of the earliest practice of law debates in America. To further shed ties with the British system, legislators aimed to simplify the law and its processes to increase accessibility for lay individuals.⁵¹ In response to anti-lawyer legislation, the legal profession organized and formed the American Bar Association ("ABA") in 1878 "to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union."⁵² Thereafter, state and local bar organizations developed across the country and actively supported licensed members, while challenging state attempts to steer the American practice of

'grossly inequitable and inefficient. There is far too much law for those who can afford it and far too little for those who cannot.')

⁴⁶ See Johnstone, *supra* note 7, at 754.

⁴⁷ See Margaret O. Rentz, Note, *Laying Down the Law: Bringing Down the Legal Cartel in Real Estate Settlement Services and Beyond*, 40 GA. L. REV. 293, 302–04 (2005).

⁴⁸ Rigertas, *supra* note 4, at 77.

⁴⁹ See *id.*

⁵⁰ See *id.* at 77–82.

⁵¹ See *id.*

⁵² *About the ABA*, AM. BAR ASS'N, http://www.americanbar.org/utility/about_the_aba/timeline.html (last visited Mar. 18, 2013) (slide the date bar all the way to the left and select "FIRSTS: American Bar Association Forms"); see also Rigertas, *supra* note 4, at 77–82. However, the American legal system transformed in the late nineteenth century when Christopher Columbus Langdell served as Dean of Harvard Law School and put forth his idea of law as a "science." See Rentz, *supra* note 47, at 304.

law away from formalistic ideals of the British legal system.⁵³ Ultimately, state bar associations facilitated the implementation of a standardized legal scheme, which led to the creation of entrance requirements very common to a practicing lawyer today: (1) a college graduation, (2) a law school graduation, (3) passing the bar, and (4) passing the character and moral fitness analysis.⁵⁴

Already, two differing camps emerged regarding access to the practice of law: those favoring fewer restrictions and those supporting greater restrictions. This debate set the stage for the ABA's first attempt at legislative reform in the 1920s to prohibit the unauthorized practice of law by statute.⁵⁵ However, the ABA's movement failed due to legislative opposition, and stalled temporarily.⁵⁶

The ABA regrouped in the 1930s and launched its second campaign to counter unauthorized practice of law by non-lawyers. After a short hiatus, "[t]he bar's focus on the unauthorized practice of law did not experience a major revival until after the beginning of the Great Depression."⁵⁷ The strategy during this second campaign differed from previous legislative efforts, focusing on case-by-case litigation to enforce unauthorized practice restrictions instead of statutory codification.⁵⁸

Instead of lobbying, lawyers litigated. Subsequent litigation centered on courts' inherent power to regulate the practice of law, as vested within the judiciary through states' constitutional separation of powers.⁵⁹ Authority also stems from court rules, administrative regulations, and judicial opinions, in addition to state constitutions,⁶⁰ creating a broad-based body of law that arms state judiciaries with the inherent authority to manage state-specific legal affairs.⁶¹

Finally, in 1933, the ABA established the Standing Committee on the Unauthorized Practice of Law to investigate claims of unauthorized practice, educate the legal community about the role of the ABA, and lobby for unauthorized practice statutes at the state level.⁶² As a measure of success,

⁵³ See Rigertas, *supra* note 4, at 82–103.

⁵⁴ Rentz, *supra* note 47, at 304–05.

⁵⁵ See Rigertas, *supra* note 4, at 66–67.

⁵⁶ *Id.*

⁵⁷ *Id.* at 103.

⁵⁸ See *id.* at 68.

⁵⁹ See *id.* at 68–71.

⁶⁰ See Todd M. Schild, *To Each Its Own: State Decision-Making and the Residential Real Estate Transaction*, 45 BRANDEIS L.J. 387, 390 (2007). Real estate transactions, for example, are largely governed by state law. State statutes often enumerate “certain activities which constitute the ‘practice of law,’ while . . . reserving for the judiciary the power . . . to determine which other activities should be considered the ‘practice of law.’” *Id.*

⁶¹ See Turfler, *supra* note 32, at 1905 n.11; see also Johnstone, *supra* note 11, at 823–30.

⁶² See Rentz, *supra* note 47, at 305.

“[b]y 1940, at least 400 state and local bar associations had unauthorized practice committees.”⁶³ Overall, the growing number of bar organizations has proven instrumental in setting the stage for current unauthorized practice of law debates regarding restrictive licensing requirements for legal services.

2. Historical Intersection Between Economic Cycles and Calls for Deregulation

Historic economic cycles and calls to deregulate the legal profession are neither novel nor isolated. The perceived benefit of allowing lay practitioners to represent an otherwise unrepresented population is not new.⁶⁴ “However, this realization alone has never carried sufficient weight to force a change”⁶⁵ Though various motivations for legal restrictions invoke debate, the reader must understand that a struggling economy translates to an increasing demand for cheaper legal services, as discussed above. And this is no surprise, because “a great deal of legal work is, and should be appreciated as, economic activity that contributes to the effective functioning of a market economy.”⁶⁶

Any comparison between American economic cycles and deregulation likely begins with the Great Depression of August 1929. “Legal historians may ultimately treat the bar’s unauthorized campaign as both a product and a casualty of the Depression. The same forces that gave rise to the bar’s economic concerns generated a set of government structures and societal adjustments that made the profession’s aspirations to monopoly increasingly anachronistic.”⁶⁷ Soon thereafter, legal scholar Karl Llewellyn observed the tension between the lawyer’s ancient practice and modern encroachment by lay practitioners, which remains relevant today.⁶⁸

The Great Depression serves as a logical starting point, as well, because the ABA established the Standing Committee on the Unauthorized Practice of Law in 1933. As stated previously, the ABA established this standing committee to investigate claims of unauthorized practice, educate the legal community about the role of the ABA, and lobby for unauthorized

⁶³ *Id.*; see also Johnstone, *supra* note 11, at 795–96 (defining state-specific UPL restrictions based on individual states’ constitutional authority).

⁶⁴ See Zacharias, *supra* note 6, at 1525.

⁶⁵ *Id.*

⁶⁶ Hadfield, *supra* note 10, at 1717.

⁶⁷ Rhode, *supra* note 12, at 97.

⁶⁸ See *id.* “As early as 1938, Karl Llewellyn recognized that ‘some of these lay encroachments on the practitioner’s ancient fields are like the encroachments of the white man on the Indian: neither right nor law, neither tradition nor stubborn fighting by the gathered tribe, will over long hold up the disposition.’” *Id.* (citing K. N. Llewellyn, *The Bar’s Troubles, and Poultrices—and Cures?*, 5 LAW & CONTEMP. PROBS. 104, 112 (1938)).

practice statutes at the state level.⁶⁹ Furthermore, the post-Depression shift occurred during the ABA's second wave of attempts to increase restrictions on lay competition offering legal services—the shift from lobbyist to litigator.⁷⁰ In light of these developments, August 1929 marks the beginning point of research and analysis for period-specific calls to deregulate the law and/or criticisms that lay practitioners should reap some benefits of the practice of law.

The National Bureau of Economic Research defines a recession as “a significant decline in economic activity spread across the economy, lasting more than a few months, normally visible in real GDP, real income, employment, industrial production, and wholesale-retail sales.”⁷¹ From the Great Depression until today, the United States has endured fourteen periods of economic recession from the Great Depression of August 1929 until the Great Recession of December 2007.⁷² Throughout these periods of economic decline, Americans had less money to spend on legal services and calls to deregulate the profession sustained through each economic trough. A timeline of period-specific examples is discussed below.

Unauthorized practice regulations and American economic cycles are related. Measured since the mid-19th century, and presumably before, the American economy periodically experiences a “significant decline in economic activity” that affects peoples’ everyday lives: income, jobs, politics, and others.⁷³ At the same time, arguments for deregulating the legal framework sustain through these economic cycles as high costs and limited access to legal services remain relevant for many Americans. Therefore, a fair argument highlights the intersection between the economy and the law—related through individuals’ ability to afford legal services. More specific to the thesis of this Note, failed reform over previous decades reaffirms the history of American economics that financial motivations, alone, cannot justify complete deregulation of legal services without alternative means to impose current duties and obligations of the organized bar upon lay practitioners.

As previously stated, the Great Depression of August 1929 established a beginning point for rising tension between lawyers and lay practitioners. After the Great Depression, subsequent litigation demarcated the point of formal attempts to quell non-lawyer practice, establish a formal UPL oversight committee, and maintain lawyers’ traditional control of legal services. Shortly after the Great Depression, scholars reflected on the tension between lawyers and non-lawyers. “Despite such clear prohibitions, many unlicensed individuals

⁶⁹ See Rentz, *supra* note 47, at 305.

⁷⁰ See Rigertas, *supra* note 4, at 68.

⁷¹ See *Expansions and Contractions*, *supra* note 9.

⁷² See *id.*

⁷³ See *id.*

and organizations are today performing functions heretofore commonly regarded as within the exclusive province of the lawyer.⁷⁴ Furthermore, in light of state court decisions upholding strict lawyer licensing restrictions, lawyers are likely to protest any encroachment by lay practitioners.⁷⁵ These court decisions “may prompt many individuals to ask why there should be a professional monopoly in the practise [sic] of law.”⁷⁶ Post-Great Depression, “encroachment” by lay practitioners likely came from one of three areas: trade associations, collection agencies, or title and trust companies.⁷⁷

Shortly after the recession of May 1937, commentators revisited the debate regarding lawyer licensing. “The problem of unauthorized practice of the law is a problem of using the processes of the law to define and protect a monopoly.”⁷⁸ Professor Llewellyn also discusses the role of laymen and a potential non-lawyer skill set that may be just as capable as the skills of lawyers.⁷⁹ From the perspective of a scholar already entrenched in the academy and practice of law, Llewellyn does not criticize the bar for its restrictions. He simply warns that the bar must be aware of and ready to justify its position on the “relation between the Bar and the work which the Bar seeks to do.”⁸⁰

In the wake of the February 1945 recession, commentators again identified jurisdictional disputes between lawyers and other professionals doing similar work, e.g., income tax practice, among others.⁸¹ In light of recent litigation involving accountants and the practice of law, courts likely ask a series of questions. The first question asks “what right the legal profession may lay claim to social protection of its monopoly as against lay intruders.”⁸² The second question addresses whether the violator’s “conduct could be considered to constitute the practice of law,” if unauthorized practice restrictions are justified.⁸³ Finally, the third question asks “whether the service in question is such that the public interest requires a particular skill possessed only by the trained lawyer, and a standard of personal responsibility which the lawyer alone

⁷⁴ Frederick C. Hicks & Elliot R. Katz, *The Practice of Law by Laymen and Lay Agencies*, 41 YALE L.J. 69, 70 (1931).

⁷⁵ See E. Smythe Gambrell, *Lay Encroachments on the Legal Profession*, 29 MICH. L. REV. 989, 991 (1931).

⁷⁶ *Id.* at 989.

⁷⁷ See *id.* at 991.

⁷⁸ Llewellyn, *supra* note 68, at 104.

⁷⁹ See *id.* at 106–07.

⁸⁰ *Id.* at 109.

⁸¹ See generally Note, *Attorney Versus Accountant: A Professional Jurisdictional Dispute in the Field of Income Tax Practice*, 56 YALE L.J. 1438 (1947) [hereinafter *Attorney vs. Accountant*].

⁸² *Id.* at 1442.

⁸³ See *id.*

can guarantee.”⁸⁴ For all of these questions, the burden rests on bar organizations to illustrate the necessity of complete control by lawyers.⁸⁵

After the 1957 recession, courts further addressed the unauthorized practice of law by businesses on behalf of clients regarding matters closely related to principle business matters, e.g., a bank drafting probate documents.⁸⁶ Subsequent case law held that three requirements were necessary for any entity to practice law: sound moral character, adequate learning, and subjection to the canons of ethics and the control of the courts.⁸⁷ The role of the independent bar is important to ensure that the better-educated members of society take leading roles.⁸⁸ However, lay individuals should not be foreclosed *per se* if they can protect the central tenets of practicing law and the advantage of lay services is substantial.⁸⁹ This commentary reaffirms the importance of an independent bar, but warns that a “re-investigation” regarding the public’s demand for the method of delivery for legal services is warranted.⁹⁰

After the July 1981 recession, the deregulation movement became quite vocal with reformists’ efforts to abolish restrictions on the unauthorized practice of law.⁹¹ Critics proclaimed, “dismantle the legal monopoly!”⁹² or “relinquish the barricades,”⁹³ rebuking costly legal services and related inaccessibility. Extremist critics further expressed that UPL restrictions were no longer defensible, at all, because these “lawyerly” values only benefitted lawyers’ self-interest.⁹⁴ The more reasonable view, however, states that no profession can usurp power and authority without some justification of costs imposed on society as the result of limited opportunity—“No profession can stretch its jurisdiction infinitely.”⁹⁵ The profession, again, has the burden of proof.

Finally, after the March 2001 recession, critics charged that organized professions and ethical rules are “products” of market control, presumably

⁸⁴ *Id.* at 1443.

⁸⁵ *Id.* at 1448.

⁸⁶ See Note, *The Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys*, 72 HARV. L. REV. 1334, 1334–35 (1959).

⁸⁷ See *id.* at 1334.

⁸⁸ See *id.* at 1347.

⁸⁹ See *id.* at 1348.

⁹⁰ See *id.* at 1349.

⁹¹ See Munro, *supra* note 5, at 203.

⁹² *Id.* (citations omitted).

⁹³ *Id.*

⁹⁴ See Hadfield, *supra* note 10, at 1691–92 (citations omitted).

⁹⁵ Ronen Shamir, *Professionalism and Monopoly of Expertise: Lawyers and Administrative Law*, 27 LAW & SOC’Y REV. 361, 371 (1993) (citations omitted).

created to secure some control on the consumer market.⁹⁶ “It is no surprise, critics charge, that in the latest assault on the monopoly of the American legal profession . . . lawyers are hiding behind their ethics rules to protect their turf.”⁹⁷ In response, the Author admits that lawyers exercise monopolistic control over legal services.⁹⁸ However, the lawyers’ monopoly is necessarily justified based on a unique set of skills and rigorous fiduciary obligations protecting courts and consumers, as explained below.

These historical illustrations criticizing legal regulations do not exhaust the vast body of scholarship on this subject. However, the intersection between the economy and deregulation is clear. Critics began protesting the current regime of UPL enforcement after the Great Depression, and these criticisms against licensing and bar membership continue to this day. During this period, the United States endured fourteen economic recessions that further enhanced critics’ arguments that legal services are inaccessible due to high costs. However, at no point during this period did economic hardship prove substantial enough to justify abolishing completely all UPL restrictions and open all legal services to all lay practitioners. With this assertion in mind, the next logical question asks why this intersection between economics and deregulation remains relevant today.

3. Current Unauthorized Practice of Law Regime

Based on early successes of bar organizations, unauthorized practice of law statutes are prevalent in every American jurisdiction. States’ authority to regulate the practice of law “is a patchwork of legal rules and concepts from a variety of sources: court rules, statutes, administrative regulations, judicial opinions, and [state constitutions].”⁹⁹ Furthermore, in each jurisdiction, unauthorized practice restrictions impact a number of special interests, including lawyers, judges, consumers, non-legal competitors, law schools, and others.¹⁰⁰ Each of these unauthorized practice statutes prohibits legal service providers from practicing law without bar membership in that jurisdiction.¹⁰¹ However, because the unauthorized practice of law is predominantly a field of

⁹⁶ See Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 87 (2003).

⁹⁷ *Id.*

⁹⁸ See *id.* at 87–88.

⁹⁹ Johnstone, *supra* note 11, at 806.

¹⁰⁰ See generally Johnstone, *supra* note 7 (applying regulatory debate to consumers, non-lawyer competitors, lawyers, judges, law schools, bar associations, and legal service providers such as law firms and legal aid).

¹⁰¹ See Leef, *supra* note 25, at 1 (stating the prerequisites for bar membership).

state law,¹⁰² the definition and enforcement of legal services provided by non-lawyers varies by jurisdiction.

Practitioners need a common definition of the practice of law to solve the greater debate surrounding the unauthorized practice of law.¹⁰³ Understanding this debate is two-fold: the practice of law depends upon what activities constitute legal services, and the unauthorized practice of law depends upon who, or which practitioner, can provide those legal services.¹⁰⁴ As shown below, varying definitions and enforcement of unauthorized practice restrictions prompted many commentators' support for a more uniform approach—which has never been achieved.¹⁰⁵

First, each state independently defines the practice of law.¹⁰⁶ Jurisdictions struggle to assess the practice of law beyond a general definition because whether or not a practitioner's services constitute the practice of law is highly fact-specific.¹⁰⁷ Reaching consensus about the practice of law is critically important to the deregulation debate because if a particular service does not constitute the practice of law, the debate is over. "[T]he real culprit in the enormous increase in the cost of legal services is the more subtle dynamic of how the content of legal products is defined."¹⁰⁸ Unauthorized practice of law restrictions only limit those services that a jurisdiction has deemed the practice of law, and the debate of unauthorized services is secondary to defining the practice of law.¹⁰⁹ Vague practice of law definitions muddy distinctions between authorized and unauthorized practices of law, particularly in those industries where lay practitioners are deemed to be practicing law.¹¹⁰

Second, once consumer services rise to the level of practicing law, unauthorized practice provisions "prevent those who are not admitted to the bar

¹⁰² See Johnstone, *supra* note 11, at 795.

¹⁰³ See Turfler, *supra* note 32, at 1908–09.

¹⁰⁴ See *id.* at 1911.

¹⁰⁵ See generally *id.*

¹⁰⁶ See generally ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, APPENDIX A: STATE DEFINITIONS OF THE PRACTICE OF LAW, available at http://www.americanbar.org/content/dam/aba/migrated/cpr/modeldef/model_def_statutes.authcheckdam.pdf (last visited Mar. 18, 2013) (listing state-specific definitions and schemes regarding the unauthorized practice of law citing relevant authority from each state).

¹⁰⁷ See Underwood, *supra* note 18, at 444–45.

¹⁰⁸ Hadfield, *supra* note 10, at 1695.

¹⁰⁹ See Cramton, *supra* note 45, at 544 ("Prohibitions against the unauthorized practice of law prevent those who are not admitted to the bar in each state from engaging in the 'practice of law.'").

¹¹⁰ For example, real estate transactions may constitute the practice of law based on state-specific and fact-specific scenarios; conducting closings, document preparation, offering advice, or other activities may constitute the unauthorized practice of law if performed without a license to practice law. See generally Schild, *supra* note 60.

in each state from engaging in the ‘practice of law.’”¹¹¹ Most generally, “[t]he unauthorized practice of law is the practice of law by a person, generally a non-lawyer, who lacks authorization to practice in a given jurisdiction.”¹¹² Practitioners must meet all requirements to practice law in a certain jurisdiction.¹¹³ Failure to comply with these requirements is held to be the unauthorized practice of law, without some exception for non-lawyer participation in certain areas of the law.¹¹⁴ In general, violating a state’s unauthorized practice rules often results in civil and/or criminal penalties, depending on the rules and enforcement in each jurisdiction.¹¹⁵

Deregulation occurs when unauthorized practice restrictions are abolished, which allows unlicensed, lay practitioners to offer legal services without fear of penalty.¹¹⁶ Today, many states actively enforce unauthorized practice rules; however, the future of these restrictions is arguably uncertain.¹¹⁷

¹¹¹ Cramton, *supra* note 45, at 544; *see also* Rhode, *supra* note 12, at 29 (discussing examples of UPL complaints).

¹¹² Underwood, *supra* note 18, at 443.

¹¹³ *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 (2000).

¹¹⁴ For example, the California State Bar established the Public Protection Committee to study the unauthorized practice of law and the feasibility of future deregulation. *See* Munro, *supra* note 5, at 220–25. The committee recognized the potential harm imposed by non-lawyer “legal technicians” but could not come to any form of deregulation greater than allowing registered lay practitioners to practice in a few “lower-to-mid level[]” areas: landlord-tenant, immigration, family law, and bankruptcy. *Id.*

¹¹⁵ *See generally* ABA STANDING COMM. ON CLIENT PROT., 2009 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES (March 2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/09_upl_survey.authcheckdam.pdf (surveying, in 2009, a majority of states’ definition and enforcement of the unauthorized practice of law).

¹¹⁶ *See* Nolan-Haley, *supra* note 13, at 259–60.

The UPL doctrine limits the practice of law to licensed attorneys who have satisfied educational and moral requirements. Every state regulates the unauthorized practice of law by statute, case law, or a combination of both. Unauthorized practice rules apply both to non-lawyers and to attorneys who are not licensed to practice in a particular state or who assist non-lawyers in the unauthorized practice of law. UPL enforcement methods vary and may rest with bar associations, supreme court committees or civil and criminal law enforcement through the attorney general or prosecutor’s office [R]emedies may take the form of injunction, criminal prosecution, criminal contempt, and quo warranto writs.

Id.

¹¹⁷ *See generally* Zacharias, *supra* note 6 (analyzing likely changes in professional responsibility in the twenty-first century); *see also* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1247–49 (2003) (outlining the current scheme of lawyer regulation, entry regulation and conduct regulation, as managed by state supreme courts and/or powers delegated to state bar associations).

The quid pro quo¹¹⁸ justifying current restrictions may be inadequate to prevent non-lawyers' practice in an evolving legal profession—for which the current deregulation debate relies upon the applicability of traditional unauthorized practice provisions. Like the practice of law, if a practitioner is authorized to perform the services that he or she renders, the debate is over.

Though jurisdictions may disagree about the scope and enforcement of practice restrictions, proponents' arguments for UPL limitations apply universally. Broadly speaking, "Different legal restrictions or exemptions imposed by unauthorized practice laws may have different objectives, but . . . [likely] have one or both of these goals: protecting consumers from incompetent or unethical legal service providers; or assuring a market for [sufficient] legal services . . . at a reasonable price."¹¹⁹ At a basic level, proponents of practice restrictions assume that licensed attorneys satisfy basic educational and moral benchmarks.¹²⁰ The preceding, however, is only one side of the debate, and a proper analysis of deregulating legal services must balance competing policies: protecting consumers from unqualified and unethical practitioners versus ensuring access to legal services.¹²¹

C. *The Debate Surrounding the Guild of Lawyers*

The legal profession is unique in that one must be a lawyer to practice law.¹²² In other fields, such as the medical profession, legislatures regulate professionals according to various levels of training and corresponding costs to consumers based on level of expertise.¹²³ Restrictions governing legal services are self-regulated by powerful bar organizations,¹²⁴ not legislatures, which restrict who can practice law and which services may be offered.¹²⁵ Such restrictions, predictably, initiate intense debate.

¹¹⁸ See Cohen, *supra* note 18, at 291 ("Professional responsibility has long recognized the quid pro quo of a limited monopoly for the legal profession in return for an undertaking of various social obligations.").

¹¹⁹ Johnstone, *supra* note 11, at 807–08.

¹²⁰ See Nolan-Haley, *supra* note 13, at 259; see also Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 725 (2007) ("Comment two to Model Rule 5.5 states that the purpose of the rule is to protect 'the public against rendition of legal services by unqualified persons.'" (citations omitted)).

¹²¹ See Rhode, *supra* note 8, at 197.

¹²² See Derek A. Denckla, *Responses to the Conference: Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2581 (1999) ("In every state, nonlawyers are generally prohibited from practicing law, deemed the 'unauthorized practice of law.'").

¹²³ See Rigertas, *supra* note 4, at 71.

¹²⁴ Johnstone, *supra* note 7, at 784–85.

¹²⁵ Hadfield, *supra* note 10, at 1714.

Proponents of licensing regimes argue that the public interest is best served if innocent consumers are necessarily protected from incompetent and fraudulent practitioners.¹²⁶ On the other hand, critics of current unauthorized practice laws believe that increased consumer choice and heightened competition will best serve the public interest.¹²⁷ Furthermore, critics argue that self-regulated restrictions provide little utility other than satisfying lawyers' self-interest at others' expense.¹²⁸ But even if this latter assertion is true, practice restrictions are likely justified by the inherent protections of the organized bar, and economic arguments fail to justify complete deregulation without a substantially equivalent mechanism to sustain current duties binding lawyers' commitment to the rule of law.

1. Criticisms of Current Regulation

Critics of unauthorized practice restrictions may be heard chanting, "The first thing we do, let's kill all the lawyers."¹²⁹ Advocates for legal reform believe that abolishing current regulations will likely reduce costs of legal services and better accommodate consumer choice.¹³⁰ Again, posing these questions during poor economic periods is particularly effective when low-to-middle-income households forgo legal services due to heavy costs of representation.¹³¹ Amidst scholarship and recent arguments for reshaping the legal institution, proponents of reform support their position with four arguments: the cost and access of legal services, the lack of empirical support for current restrictions, an unjustified monopoly of legal services, and an increasing competition from lay practitioners.

First, and most relevant to the comparison between economic cycles and deregulating legal services, reformists argue that legal services are inaccessible due to high transaction costs. For many individuals, "The legal system . . . [is] grossly inadequate and inefficient. There is far too much law for

¹²⁶ See Rentz, *supra* note 47, at 300–01.

¹²⁷ See *id.*

¹²⁸ See Eli Wald, *An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals*, 31 SETON HALL L. REV. 1042, 1047 (2001) ("[Professional] ideals are critiqued as a tool at the hands of professionals aimed at increasing lawyers' self-interest at the expense of their clients and the public.").

¹²⁹ Frank B. Cross, Essay, *The First Thing We Do, Let's Kill All The Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645, 653 n.39 (1992) (citations omitted).

¹³⁰ See Rhode, *supra* note 8, at 211; see also *id.* at 197 (When neighbors asked a New England farmer whether his livestock was purchased for a good price, he said, "[w]ell I didn't get what I thought I would but then I knew I wouldn't.").

¹³¹ See Rentz, *supra* note 47, at 296.

those who can afford it and far too little for those who cannot.”¹³² Scholars argue further that providing some alternative means of legal representation could provide legal services to the poor and middle classes at a reasonable cost and quality.¹³³ Put simply, “[M]illions of consumers cannot pay lawyers’ bills without real sacrifice.”¹³⁴

Also, reformists argue that a free market system is well-equipped to stoke competition, drive down fees, and increase consumer choice in legal services.¹³⁵ However, UPL proponents offer rebuttal: “Legal services, however, are unlike products that are freely traded on the market[,]” in that legal services cannot readily be tested for value.¹³⁶ Ultimately, reformists argue that the availability of legal services depends on the availability of funding.¹³⁷ Expensive legal services result in large segments of the population without counsel, or if they are represented, the representation often proves inadequate.¹³⁸

Second, reformists argue that UPL proponents have no empirical basis on which to rest their arguments for regulation to protect against harm by non-lawyers. “Hypotheses alone are an insufficient basis for restricting competition in a way that is likely to harm consumers.”¹³⁹ Admittedly, there are certain difficulties in justifying a legal services monopoly, also known as the lawyers’ monopoly, without adequate evidence of actual or potential harm from lay competition.¹⁴⁰ However, the logical rebuttal would be that the public interest is too important to wait until harm has already been done, and arguing hypothetically is appropriate due to the high stakes of protecting the rule of law. Nonetheless, any empirical evidence on lay competition illustrates that, in certain areas, there is little qualitative difference and proof of harm when lay individuals have completed “legal work.”¹⁴¹ In fact, “[m]any individuals who retained lawyers were paying large sums for routine work that could readily have been done (and often was done) by nonlawyer assistants without substantial supervision.”¹⁴²

¹³² Cramton, *supra* note 45, at 533–34 (citations omitted).

¹³³ *See id.* at 534.

¹³⁴ Rhode, *supra* note 8, at 208–09.

¹³⁵ *See* Munro, *supra* note 5, at 217.

¹³⁶ *Id.* at 234.

¹³⁷ *See* Johnstone, *supra* note 7, at 771–72.

¹³⁸ *See id.* at 770–71.

¹³⁹ Joyce D. Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, 431 (1999).

¹⁴⁰ *See* Johnstone, *supra* note 11, at 816.

¹⁴¹ Rentz, *supra* note 47, at 323–24.

¹⁴² Rhode, *supra* note 8, at 200.

Third, proponents of reform argue that bar associations monopolize the industry for legal services and unfairly foreclose others' opportunities to offer these services. Generally, occupational licensing may be justified when the proper balance between economic freedom and societal protection has been met¹⁴³—though it may be “difficult to say when licensing of certain occupations can be justified based on quality-consideration.”¹⁴⁴ Occupational licensing may yield high quality outcomes through education and training requirements, and licensing likely encourages higher investment in human capital, like a law degree.¹⁴⁵ However, studies show that licensing imposes a fifteen percent wage premium on professions requiring occupational licensing, resulting in higher unemployment, higher consumer prices, and lower employment growth rates.¹⁴⁶

In sum, there is a “strong presumption in economics that occupations licensing is a form of cartel activity that restrains trade to the disadvantage of consumers and the public.”¹⁴⁷ Specific to legal services, occupational licensing is most stringent for lawyers, and many commentators suggest that industry controls impose an unjustifiable guild-like cartel motivated solely by self-interest.¹⁴⁸ Even if the issue is narrowly tailored to address whether or not the legal profession can satisfy its burden in justifying practice restrictions,¹⁴⁹ critics argue that proponents fall short.

¹⁴³ See MORRIS M. KLEINER, UPJOHN INST. FOR EMP'T RESEARCH, POLICY PAPER No. 2011-009, OCCUPATIONAL LICENSING: PROTECTING THE PUBLIC INTEREST OR PROTECTIONISM? 1 (July 2011), available at http://research.upjohn.org/cgi/viewcontent.cgi?article=1008&context=up_policypapers (analyzing the tension between special interests and the public with regard to regulations upon occupations through licensing).

¹⁴⁴ *Id.* at 4.

¹⁴⁵ *See id.*

¹⁴⁶ *See id.* at 2.

¹⁴⁷ Cramton, *supra* note 45, at 551.

¹⁴⁸ See Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 1–2 (1993) (explaining the legal profession as a restrictive cartel, and analyzing the under-appreciated intersection between cartel theory and jurisprudence); *see also* Leef, *supra* note 25, at 2.

¹⁴⁹ See Wald, *supra* note 29, at 912. Further distinguishing the role of lawyers and the Bar's unique position to regulate:

To be clear, lawyers' responsibilities and duties to the rule of law are not merely the “price” the legal profession must pay for the privilege of exercising a monopoly over the provision of legal services. In other words, it is not as if the legal profession receives a monopoly over the provision of legal services so it could be responsible for the rule of law. Rather, pursuant to the social bargain, lawyers as professionals are uniquely positioned because of their esoteric knowledge not only to self-regulate but also to safeguard the rule of law. This is better thought of not as the “price” for exercising a monopoly, but rather as the source of the obligation that, to follow our metaphor, distinguishes the Bar from the case of truck drivers and the road.

Finally, reformists' fourth argument highlights the availability of lay practitioners to complete routine legal work or provide specialized legal services unfamiliar to generalist lawyers. For example, lay competitors include accountants, real estate brokers, insurance representatives, and other industry professionals.¹⁵⁰ One argument in favor of lay practitioners is that many legal transactions require little more than filing forms. For many routine legal needs, such as routine divorces, landlord-tenant disputes, bankruptcy, immigration, welfare claims, tax preparation, and real estate transactions, "retaining lawyers is like hiring 'a surgeon to pierce an ear.'"¹⁵¹

The other argument is that consumers are better served by specialized professionals instead of generalist lawyers. "Three years in law school and passage of a bar exam is neither necessary nor sufficient to ensure competence in areas where lay provision of services is common."¹⁵² The logical rebuttal is that, in certain areas, especially, legal issues present hidden problems and may uncover other issues.¹⁵³ A trained lawyer, with at least a basic level of training and duty to the client will likely minimize the inherent risks of a lay practitioner. However, proponents of reform correctly argue that many lay practitioners provide quality services that yield little or no qualitative difference.¹⁵⁴ In light of changing regulations affecting legal services,¹⁵⁵ "[T]he bar's best interest ultimately lies in constructively assisting the process, not in trying to prevent it."¹⁵⁶ Without a doubt, critics' calls to deregulate the practice of law have merit and rise above academic rhetoric. The regulation of law under its current regime, however, is justified and provides necessary oversight to protect consumers, as outlined below.

2. Supporters of Current Regulation

Proponents of unauthorized practice restrictions believe that jurisdictions must have the authority to oversee legal practitioners and deter

Id. at 962; *see also infra* note 171 (explaining the analogy between the duties of truck drivers and lawyers).

¹⁵⁰ *See* Rhode, *supra* note 8, at 206.

¹⁵¹ *Id.* (citation omitted).

¹⁵² *Id.*

¹⁵³ *See* Michael C. Ksiazek, *The Model Rules of Professional Conduct and the Unauthorized Practice of Law: Justification for Restricting Conveyancing to Attorneys*, 37 SUFFOLK U. L. REV. 169, 177 (2004). Advocates of regulation argue that "layperson conveyancers inherently fail to recognize and account for complicated issues only the trained lawyer is adequately capable of spotting, disclosing, and managing." *Id.*

¹⁵⁴ *See* Munro, *supra* note 5, at 218.

¹⁵⁵ *See* Rhode, *supra* note 8, at 204.

¹⁵⁶ *Id.*

unqualified individuals from practicing law.¹⁵⁷ Without such institutionalized protections, “no effective sanction and deterrence system will be available,” which translates into devastating effects on the availability and quality of legal services.¹⁵⁸ Despite any potential economic benefits of deregulation, these advantages are not likely to counter overarching concerns for consumer protection.¹⁵⁹ Arguments for deregulation likely do not rebut the presumption that “[l]awyers play a vital role in the preservation of society.”¹⁶⁰

Restricting the unauthorized practice of law shields unknowing consumers from incompetent or unethical practitioners. Proponents worry that harm inevitably results from ineffective legal assistance and too few enforcement tools for non-lawyer accountability.¹⁶¹ Further, “[t]he American Bar Association feels that prohibiting laymen from practicing law protects the public from ineffective assistance.”¹⁶² Sufficient legal representation requires an understanding of the complexity of all issues hidden and apparent, a proper scope of representation with the client and reasonable expectations, and certain duties to protect the clients’ interests.¹⁶³

Critics argue that the “lawyerfication” of American society hinders economic growth and development by imposing higher fees and increasing litigation.¹⁶⁴ However, the more plausible argument is that in the absence of any licensed counsel, “an economy without lawyers would function far less efficiently than an economy with lawyers . . . ‘[L]aw is essential to construct and operate even the ‘free’ market.’”¹⁶⁵ Furthermore, it is likely that the perceived benefits of abolishing UPL restrictions cannot justify deregulating the law: fee differences may not be substantial enough to scrap law restrictions; society-at-large is certainly at an informational disadvantage to make informed legal decisions; and other externalities, such as eroding legal aid services, may occur if lawyers are no longer bound by professional duties.¹⁶⁶ Because effective assistance necessarily protects the rule of law and perceived benefits of deregulation are likely insignificant, restricting lay practitioners in the name of protecting the public interest is justified.

In support of this position, UPL proponents argue that the following arguments protect the public interest: proper authority to regulate and

¹⁵⁷ See Hoppock, *supra* note 120, at 728.

¹⁵⁸ See *id.*

¹⁵⁹ See Underwood, *supra* note 18, at 438.

¹⁶⁰ MODEL RULES OF PROF’L CONDUCT Pmb1. ¶ 13 (2011).

¹⁶¹ See Moore, *supra* note 14, at 363.

¹⁶² *Id.*

¹⁶³ See Underwood, *supra* note 18, at 440.

¹⁶⁴ See Cross, *supra* note 129, at 650–51.

¹⁶⁵ *Id.*

¹⁶⁶ See Munro, *supra* note 5, at 226–40.

justification of regulatory rules; quality legal services protecting consumers and courts; inherent protections of the rules; and the failure of historical arguments to deregulate based solely on economic concern.

First, bar organizations' authority to regulate the practice of law is legitimized by state constitutions and historical common-law. At the outset, regulating the practice of law falls within states' authority, which often delegate regulation of the legal profession to state judiciaries and bar associations.¹⁶⁷ In other words, the unauthorized practice of law is not a federal issue, and each jurisdiction, by way of state-specific constitutions, is free to establish its own unauthorized practice restrictions.¹⁶⁸ UPL restrictions are "traditionally asserted by the courts and legislature as being the protection of both the public and judicial system . . . [from] practitioners who are not subject to educational and ethical restraints."¹⁶⁹ Because of lawyers' skills and fiduciary duties that result from a self-imposed monopoly, lawyers are in the best position to regulate the rule of law and deal with the unauthorized practice of law.¹⁷⁰ This distinguishes lawyers from other professions.¹⁷¹

In addition to legal justification, unauthorized practice enforcement is economically justifiable. The overall cost of legal services is not necessarily disproportionate with clients' expectations or the actual value of those services,¹⁷² and there is no question that lawyers' services facilitate the overall development of wealth.¹⁷³ Although an alternative system of legal services may be possible, no alternative form of regulation is currently in place, and there is

¹⁶⁷ See Zacharias, *supra* note 6, at 1509.

¹⁶⁸ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c (2000) ("The highest courts in most states have ruled as a matter of state constitutional law that their power to regulate lawyers is inherent in the judicial function.").

¹⁶⁹ Munro, *supra* note 5, at 207–08.

¹⁷⁰ See Wald, *supra* note 29, at 961–62. The legitimacy of the self-imposed monopoly is defended below, in large part because the rule of law must be protected. Because lawyers have the requisite tools to regulate lawyers getting licenses and then keeping those licenses, and because no other system currently exists to fill the void inevitably left by abolishing bar associations' regulation of the unauthorized practice of law, current regulations are justified.

¹⁷¹ For example, the duties of truck drivers and lawyers are analogous. Truck drivers, too, have a duty to their "client," the employer, to deliver goods safely, in addition to other duties such as driving professionally, etc. However, truck drivers have no express obligation to maintain the roads on which they travel, but lawyers do. Lawyers are obligated to maintain the rule of law. *See id.*

¹⁷² See Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 1000–06 (1998) (highlighting arguments surrounding the oft-cited criticism of costly legal services).

¹⁷³ See Cross, *supra* note 129, at 651.

no guarantee that any alternative would be more efficient than a system including lawyers.¹⁷⁴

Second, UPL proponents argue that limiting unlicensed legal services ensures a basic level of competency to protect qualitative concerns of consumers and courts. The Bar recognizes its “dark secret” that restrictive regulations and requirements do not necessarily ensure that all lawyers are equally competent in all areas of the law.¹⁷⁵ However, licensed attorneys at least guarantee a minimum level of education and ethical standards, “whereas non-lawyers are not regulated ‘as to integrity or legal competence.’”¹⁷⁶ From judges’ own experience, individuals proceeding without a lawyer are disadvantaged by the following: failure to present necessary evidence, procedural errors, ineffective witness examination, failure to object properly, and ineffective argument.¹⁷⁷

Further, advocates for unauthorized practice restrictions argue that the rule of law also relies upon protecting courts’ interests. Identifying broader concerns, “[T]he public well-being is not the sole area of concern [regarding licensing restrictions]. The efficient and fair administration of justice must also be protected.”¹⁷⁸ Courts’ interests include two scenarios: (1) an individual proceeding without a lawyer and (2) an advocate’s lack of candor to the court. If an individual represents himself or is represented by inadequate counsel, likely due to financial limitations, courts suffer: proceedings are slower, more court staff is required, facts are twisted, courts may compromise impartiality, and juries and judges are more susceptible to improper decisions based upon the insufficient development of an individual’s case.¹⁷⁹ In addition, representation by a non-lawyer increases the chances of incompetency regarding rules of evidence, procedure, and common law precedent, in addition

¹⁷⁴ See *id.* at 652. For purposes of argument, any proponent of current regulations must concede that unauthorized practice statutes may not be the only way to protect the rule of law. For comparison, Justice Warren stated in *Miranda v. Arizona* that the “Miranda warning” was not the sole vehicle to protect individuals’ right against self-incrimination. See *Miranda v. Arizona*, 384 U.S. 436 (1966). However, without some other substantial equivalent formulated by legislatures and courts, officers must recite the familiar Miranda warning: “[U]nless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.” *Id.* at 467–68. Like *Miranda*, enforcing unauthorized practice statutes, without some other substantial equivalent, not only make sense but are required.

¹⁷⁵ See Zacharias, *supra* note 6, at 1522.

¹⁷⁶ Nolan-Haley, *supra* note 13, at 261; see also Benjamin H. Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justification for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 430 (2001).

¹⁷⁷ See Painter, *supra* note 16, at 46.

¹⁷⁸ Shane L. Goudey, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 893 (1996).

¹⁷⁹ Painter, *supra* note 16, at 46.

to lack of discipline and candor to the court.¹⁸⁰ Therefore, the logical conclusion is that the organized bar is in the best position to objectively balance consumer needs versus legal qualifications, again ensuring quality legal work-product to protect the public interest.¹⁸¹ Non-lawyers affect the administration of justice, which is another important obligation imposed upon licensed lawyers.

Third, licensing requirements provide a mechanism for enforcing inherent professionalism found in the law governing lawyers.¹⁸² Membership in a bar association, as required by UPL restrictions, requires that a licensed lawyer be bound by rules of professional responsibility. The ABA publishes the Model Rules of Professional Conduct to guide and support state bar organizations, which exercise ultimate authority for implementing and enforcing state-based rules governing lawyers.¹⁸³ The Model Rules provide inherent protections that lawyers must uphold as individuals and practitioners—obligations that bind no other profession.¹⁸⁴ For example, “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”¹⁸⁵ A lawyer’s failure to fulfill his or her professional obligation results in varying forms of discipline.¹⁸⁶

The Model Rules also impose upon lawyers a duty to counsel¹⁸⁷ and advocate¹⁸⁸ for their clients while imposing fiduciary obligations to third-party non-clients.¹⁸⁹ In addition to fiduciary responsibilities, examples of a lawyer’s duty to the client include the following: competence in representation,¹⁹⁰ a defined scope of representation,¹⁹¹ a duty to communicate adequately,¹⁹²

¹⁸⁰ See Denckla, *supra* note 122, at 2597. *But see* Zacharias, *supra* note 6, at 1522.

¹⁸¹ See Zacharias, *supra* note 6, at 1522 (increasing specialization for legal services requires “increased bar participation in assessing competence within those field [of specialization]”).

¹⁸² See Wald, *supra* note 128, at 1043–44 (“Professional ideals capture the core beliefs and aspirations of the bar, its commitments and goals, as well as its standards and ethical codes of conduct.”). Today’s ABA is committed to pursuing four unique goals: to serve its members, to improve the profession, to eliminate bias and enhance diversity, and advance the rule of law. See Am. Bar Ass’n, *supra* note 52.

¹⁸³ See Zacharias, *supra* note 6, at 1509.

¹⁸⁴ See Ksiazek, *supra* note 153, at 185 (“Members of other professions who seek to engage in layperson conveyancing lack such client protections.”).

¹⁸⁵ MODEL RULES OF PROF’L CONDUCT Pmb1. ¶ 1 (2011).

¹⁸⁶ See Zacharias, *supra* note 6, at 1509.

¹⁸⁷ MODEL RULES OF PROF’L CONDUCT R. 2.1–2.4 (2011).

¹⁸⁸ *Id.* at R. 3.1–3.9.

¹⁸⁹ *Id.* at R. 4.1–4.4.

¹⁹⁰ *Id.* at R. 1.1.

¹⁹¹ *Id.* at R. 1.2.

¹⁹² *Id.* at R. 1.4.

confidentiality of information,¹⁹³ a duty to avoid conflicts of interest in representation,¹⁹⁴ and obligations to prospective clients,¹⁹⁵ to name a few. The Rules outline responsibilities in the management of law firms,¹⁹⁶ public service by members of the Bar,¹⁹⁷ communicating information about legal services,¹⁹⁸ and measures to maintain the integrity of the profession.¹⁹⁹ When lawyers' engagement with an individual or entity rises to the level of becoming a client or prospective client, certain obligations are imposed under the Client-Lawyer Relationship.²⁰⁰ At the end of the day, the Model Rules ensure that each lawyer upholds his or her fiduciary responsibilities justifying lawyers' self-regulation: client control of representation, communication, competency, confidentiality, and conflict avoidance.²⁰¹

Membership in an organized bar requires a lawyer's undivided loyalty—the obligation to represent interests other than simply closing “the deal” for the lawyer's own financial gain.²⁰² Illustrating the power of the fiduciary relationship, “Loyalty influences behavior; it impels one to do what, in the absence of loyalty, one would not do; it changes the moral equation for deciding on a proper course of action.”²⁰³ Without these rules and without some form of alternative regulation, there is little retribution for acts of disloyalty: abandoning the client, disclosing confidences, lying to the client, and avoiding personal responsibility for a client's actions resulting from legal advice.²⁰⁴

The Model Rules play an integral role in differentiating lawyers from other professionals practicing in related fields. The Model Rules protect the rule of law. The Model Rules, as argued in this Note, provide non-quantifiable value that rebuts reformists' criticisms of the costs of regulation. The Model

¹⁹³ *Id.* at R. 1.6.

¹⁹⁴ *Id.* at R. 1.7–1.8.

¹⁹⁵ *Id.* at R. 1.18.

¹⁹⁶ *Id.* at R. 5.1–5.7.

¹⁹⁷ *Id.* at R. 6.1–6.5.

¹⁹⁸ *Id.* at R. 7.1–7.6.

¹⁹⁹ *Id.* at R. 8.1–8.5.

²⁰⁰ *Id.* at Scope ¶ 17.

²⁰¹ SUSAN R. MARTYN & LAWRENCE J. FOX, *TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY* 75 (2d ed. 2008).

²⁰² See SIDNEY G. SALTZ, *FROM HANDSHAKE TO CLOSING: THE ROLE OF THE COMMERCIAL REAL ESTATE LAWYER* XV (2d ed. 2010) (“Not every deal should be made, and not every deal should be closed.”).

²⁰³ Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367, 367 (1992).

²⁰⁴ See *id.* at 369.

Rules are unique to the practice of law and a necessary condition to a lawyer's admission to the bar. Other professions lack such critical protections.²⁰⁵

Finally, as shown in the timeline of scholarship from various recessions, critics' arguments for deregulation established a definite pattern that sustained through fourteen periods of economic decline. Complete deregulation failed in each one of these recessions, despite reformists' bold arguments to the contrary in favor of abolishing unauthorized practice restrictions altogether. UPL restrictions still exist across America, and historical evidence suggests that any argument to reform must recede from complete deregulation or must be bolstered by additional evidence to rebut and distinguish prior unsuccessful reforms. As applied to the 2007 recession, arguments to reform assert the same mantras: there is too little access to lawyers, legal services cost too much, and lay practitioners should be able to practice law. Because critics vocalize the same arguments in response to the same trigger and for the same purpose to achieve deregulation, recent criticisms after the 2008 recession will likely yield the same results.

Certainly, regulations hindering a free-market system impose economic costs.²⁰⁶ However, legal services are different than other commoditized goods, and their value cannot be readily calculated.²⁰⁷ The protections assured by a regulated legal system outweigh the benefits of complete deregulation,²⁰⁸ because a solid rule of law is necessary in a developed democracy. Organized bar associations impose professional obligations upon all licensed members, such as loyalty, that are foundational to the profession and not necessarily quantifiable in a cost-benefit analysis.²⁰⁹

IV. WHAT THE DEBATE IS REALLY ABOUT: REGULATION AS A STALKING HORSE

After decades of criticism, perhaps the lack of meaningful legal reform stems from critics' failure to identify the issues actually driving this debate—is the problem really regulation? Make no mistake, the law is a profession with unique ideals and duties that bind each lawyer to a code of ethics in order to

²⁰⁵ See Ksiazek, *supra* note 153, at 185; see also Denckla, *supra* note 122, at 2593 (discussing client protections available only through an organized bar).

²⁰⁶ See Hadfield, *supra* note 10, at 1717; see also KLEINER, *supra* note 143, at 3.

²⁰⁷ See Munro, *supra* note 5, at 234.

²⁰⁸ See Cross, *supra* note 129, at 680.

²⁰⁹ In the interest of self-disclosure, I am generally against over-arching government regulation on private industry for interests of privacy, autonomy, and efficiency. However, I believe the stakes involved in protecting the rule of law are too important, and the provision of legal services is different than comparing different levels of governmental influence: private versus bureaucratic governance. Therefore, I offer this defense of UPL restrictions, despite contrary arguments in this Note, because states have enough autonomy to enact specific lawyer regulations in respective jurisdictions and UPL restrictions necessarily protect the rule of law.

protect the rule of law. At the same time, however, law is a business motivated largely by financial incentives.²¹⁰ The only check restraining business goals from engulfing a lawyer's professionalism are the fiduciary obligations that he or she must uphold in order to practice law at all. Without these obligations, the rule of law cannot survive.

Regulating legal services through unauthorized practice regimes makes sense. Industry regulations, generally, are justified when the benefits of regulation exceed costs imposed by limiting free-market alternatives.²¹¹ Admittedly, institutionalized regulation is not the most efficient system of consumer protection for every industry in a free-market society. However, there is at least a colorable argument supporting tailored regulations for those industries that, by their very nature, threaten the safety of consumers if mishandled, corrupted, or abandoned. For example, clean water regulations are defensible, because water, as a staple of life, is too important to risk a tragedy of the commons.²¹² Nuclear waste regulations are defensible because the effects of irreparable contamination could devastate communities and threaten lives.²¹³

Likewise, laws governing lawyers are defensible because practitioners without fiduciary responsibilities have no motivation to protect the rule of law above personal profit. Entry barriers ensure that licensed lawyers possess a basic set of skills to protect consumers, and conduct requirements bind lawyers to a set of ethical obligations to protect the rule of law. Without the risk of losing one's license, any lawyer not bound by rules of professional responsibility is free to spout the details of a client's tough divorce, simultaneously represent opposing litigants, ignore clients' directives, or any other act destroying confidence in societal order derived from the rule of law. Above all, the rule of law must be preserved:

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become

²¹⁰ See Paul Lippe, *Law is Both a Profession and a Business—Forget That at Your Own Peril*, LEGAL REBELS (Jan. 27, 2011, 8:34 AM), http://www.abajournal.com/legalrebels/article/law_is_both_a_profession_and_a_business—forget_that_at_your_own_peril/.

²¹¹ See Barton, *supra* note 176, at 457 (analyzing when industry regulations are justified, e.g. when the benefits of regulations exceed the costs of regulation).

²¹² See 33 U.S.C. §§ 1251–1387 (2006).

²¹³ See 42 U.S.C. §§ 10101–10270 (2006).

subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.²¹⁴

Despite the justification for bar associations' imposition of entrance and conduct regulations for licensed practitioners, critics still argue for deregulation.

Commentators argue for deregulating legal services by eliminating entry regulation and conduct regulations in pursuit of lowering costs and increasing access.²¹⁵ First, critics question whether or not bar membership should cede to some less-stringent level of occupational licensing. Economist Milton Friedman identified three levels of occupational control: registration, certification, and licensing.²¹⁶ Registration is the easiest to justify, because it is the least intrusive and can serve other social goals such as facilitating taxation and consumer fraud protection.²¹⁷ Certification is more difficult to justify, because the private sector is capable of certifying practitioners without overarching, organized regulation.²¹⁸ However, an argument can be made for certification regimes, because there is little risk of unfair monopolization and the consumer is still protected by the assurance of quality services.²¹⁹ Commentators further argue that the proper response to inevitable risks of exploitation and negligence by non-lawyers is regulation, e.g. certification, not complete prohibition.²²⁰

Moreover, Friedman fails to find any circumstance where licensing is justifiable instead of certification.²²¹ Admittedly, licensing benefits the consumer by ensuring competent legal services and eliminating the information barrier limiting consumers' inability to discern between good and bad

²¹⁴ MODEL CODE OF PROF'L RESPONSIBILITY Pmbl. (1980), *available at* <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf>.

²¹⁵ *See* Barton, *supra* note 117, at 1233.

²¹⁶ *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 144 (2d ed. 1982).

²¹⁷ *Id.* Registration is defined by Friedman as follows:

By registration, I mean an arrangement under which individuals are required to list their names in some official register if they engage in certain kinds of activities. There is no provision for denying the right to engage in the activity to anyone who is willing to list his name. He may be charged a fee, either as a registration fee or as a scheme of taxation.

Id.

²¹⁸ *Id.* at 146.

²¹⁹ *See id.* at 147.

²²⁰ Rhode, *supra* note 172, at 1015.

²²¹ FRIEDMAN, *supra* note 216, at 149; *see also* Comment, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. PA. L. REV. 1515, 1535-45 (1984) (arguing in favor of certification, instead of licensing, because it is less restrictive and upholds similar protections of licensing).

practitioners.²²² However, licensing, even in the medical context, may not be justifiable, because professional certification likely satisfies the quality argument that licensing proponents put forth.²²³

In addition to adjusting levels of occupational licensing, critics propose various alternatives to monitor legal services. One alternative relies on market-based solutions that impose malpractice liability for any harm caused by ill-equipped practitioners after the fact.²²⁴ Another alternative utilizes a case-by-case analysis regarding whether or not a practitioner's services violate state-specific UPL restrictions.²²⁵ Additionally, some commentators argue for a legislative alternative based on elected officials establishing a statutory framework to regulate and enforce practitioner qualifications and consumer protections.²²⁶

However, these proposals for reform are all irreparably flawed because each plan imposes yet another layer of regulation without calling it regulation. Though reform may be accomplished by removing the regulatory power of independent bar associations, deregulation cannot be achieved by shifting regulatory authority to government agencies, courts, legislatures, or some other body that governs the practice of law. Such *de facto* regulation inevitably resulting from "deregulation" may even *increase* restrictions on legal services by empowering more regulators and industries that lack the unique qualities of an organized bar.

Undeniably, legal services must be regulated. Proponents must recognize that legal services impose risks upon unknowing consumers, and regulation of some sort is inevitable to control practitioners' self-interested motivations. The question becomes who will regulate—independent bar associations enforcing licensed lawyers' compliance with ethical duties, or a system of unorganized, *de facto* regulators with little continuity?

The organized bar is best suited to regulate legal services for reasons cited above: justified authority, quality services, inherent protections, and historical legitimacy. Lawyers are simultaneously privileged with a monopoly for legal services with the burden of loyalty to their clients, the legal system,

²²² See FRIEDMAN, *supra* note 216, at 147–49, 155–56.

²²³ See *id.* at 154 ("It is easy to demonstrate that quality is only a rationalization and not the underlying reason for restriction.").

²²⁴ See Barton, *supra* note 117, at 1232–40. Some jurisdictions rely upon deregulation (or market control) of the unauthorized practice of law, allowing a cause of action with tort remedies for improper provision of legal services. See *generally id.* at 1172.

²²⁵ See Underwood, *supra* note 18, at 462–68. The following are questions asked: (1) Is the legal advice directed to a specific problem of an identifiable person; (2) is the non-lawyer service reliable; (3) is there potential for a conflict of interest; (4) does the service have the potential to mislead consumers; and (5) has the non-lawyer addressed confidentiality and privacy concerns? *Id.* at 458.

²²⁶ See Barton, *supra* note 117, at 1217.

and the public.²²⁷ The monopoly of legal services, however, is not a reciprocal benefit for lawyers' selflessness. The monopoly of legal services is the source, not the reason, for lawyers' ability to self-regulate and protect the rule of law in the interest of others.²²⁸ Service to others is at the most foundational level of what lawyers do.

Moreover, bar associations are the only players well-positioned to protect the rule of law in the American legal system. For example, truck drivers have a duty to their employer to deliver goods safely and to refrain from purposeful injury to others. However, truck drivers have no express obligation to maintain the roads on which they travel.²²⁹

Lawyers, on the other hand, must uphold express duties to clients and others, while honoring duties to uphold the legal institution. Lawyers, alone, are uniquely situated with the knowledge to self-regulate and express obligations to clients, the public, and the courts. Lawyers are members of a regulated body subject to entrance and conduct requirements to protect the rule of law—no substantial equivalent currently exists capable of protecting clients, courts, and the public.

If deregulation fails to satisfy reformists' criticisms of the current regulatory legal structure, perhaps the real issue is the rising cost of legal services. As stated previously, commentators argue, "There is far too much law for those who can afford it and far too little for those who cannot."²³⁰ Alternatively, members of the ABA Commission on Nonlawyer Practice state that the cost of legal services is not disproportionate with consumers' cost-benefit expectations, where routine legal services are comparable to the cost of a day at the amusement park.²³¹ Because regulation is a stalking horse of reformists' criticisms, the cost of legal services is likely the root of critics' concerns and an issue that needs exploration beyond the scope of this Note.

V. PLANS FOR REFORM TO PROTECT THE RULE OF LAW

Reform may be inevitable, however. Due to increasing competition and economic pressure from the recent recession, reforming unauthorized practice statutes to allow non-lawyers' practice may be unavoidable—if the bar is to

²²⁷ See Wald, *supra* note 29, at 962.

²²⁸ *Id.* ("Lawyers qua lawyers benefit from the legal profession's monopoly over the provision of legal services. In return, lawyers qua lawyers assume responsibility for the law as a public good and owe a duty to protect it from manipulation . . ."). In other words, lawyers do not enjoy a monopoly, because they serve the interests of the people. Instead, because lawyers have a monopoly, the rule of law is protected by lawyers' ability to self-regulate themselves in the interest of protecting others.

²²⁹ See *id.* at 961.

²³⁰ Cramton, *supra* note 45, at 533–34 (citations omitted).

²³¹ See Rhode, *supra* note 8, at 208.

maintain its legitimacy as a protective institution, not a self-interested monopoly.²³² Because no regulatory system is infallible under democratic rule, “Competition in legal services is a fact of life that will not go away. The vast and growing numbers of lawyers, the entrepreneurial spirit of the American bar, and the growing responsiveness to consumer desires ensure a highly competitive milieu for law practice in the 21st century.”²³³ The organized bar must rise to the occasion and meet its burden of justifying traditional restrictions in a society of evolutionary legal needs, issues, and competition.²³⁴ In order to meet this burden, the costs of restricting practice in the name of professionalism cannot be rejected entirely, and the merits of practice restrictions must be balanced against other countervailing forces, e.g. lay competition.²³⁵ Even Milton Friedman, a vocal critic of occupational licensing, acknowledges beneficial aspects of licensing despite economic arguments to the contrary.²³⁶

If reform is inevitable, though unidentifiable at this time, two conditions must be satisfied in order to protect the rule of law. First, a new system of regulation must balance conflicting interests. On one hand, existing restrictions fail to recognize the value of competent lay practitioners in certain areas of legal services.²³⁷ On the other hand, complete deregulation cannot occur because “deregulation also fails to differentiate between the types of legal services lay practitioners can perform competently and those that are best left to trained attorneys.”²³⁸ Therefore, imminent reform must achieve some balance between total restriction and complete deregulation if reform is to be successful.²³⁹

Second, any reformation of current unauthorized practice restrictions should protect clients from lawyer misconduct, provide competent lawyering, assure fairness in lawyer-client relations, manage increasing pressures from non-lawyers, provide legal services for the poor, and protect third-persons from harm, among others.²⁴⁰ The rule of law, critical to the American society, rests

²³² See Wald, *supra* note 1, at 2060.

²³³ Cramton, *supra* note 45, at 610.

²³⁴ See *Attorney vs. Accountant*, *supra* note 81, at 1447–48.

²³⁵ See Wald, *supra* note 128, at 1051.

²³⁶ See FRIEDMAN, *supra* note 216, at 144–49.

²³⁷ See Munro, *supra* note 5, at 206–07.

²³⁸ *Id.*

²³⁹ “Moderation is key to resolving this crisis.” *Id.* at 248. There is a distrust of the restrictive, regulated legal profession, where problems of cost and access are exacerbated in poor economies. On the other hand, complete deregulation likely presents more problems than solutions because protecting the rule of law and interests of the client and system are too important to risk.

²⁴⁰ See Cramton, *supra* note 45, at 612–20.

upon the loyalty and professionalism to which each licensed lawyer is bound.²⁴¹ Without such an obligation, non-lawyers have no obligation, nor repercussions, for violating ethical rules to which each attorney swears.

Under the current regime, licensed attorneys have a “special responsibility” for upholding justice.²⁴² To protect the rule of law, lawyers are bound by rules of professional conduct that require ethical behavior in lawyers’ multiple roles in society: citizen, representative, advocate, and officer of the court.²⁴³

For example, the ABA Model Rules of Professional Conduct require three all-encompassing obligations applicable to all circumstances of potential conflict: a duty to the client, a duty to the legal system, and a duty to the lawyer’s own interest (duty to self).²⁴⁴ Requiring these three prongs of loyalty are critical to the administration of justice, because these rules serve as a means of “last resort against the excessive pursuit of self-interest.”²⁴⁵ When so many clients’ legal needs have high-stakes in one way or another, arguably it is only natural that the client’s representative thinks of himself when making strategic decisions about a case. However, lawyers are bound by ethical rules imposing a duty of loyalty to the client and the legal system, and loyalty is the “fulcrum in the persistent struggle to define the nature of lawyering.”²⁴⁶

The law is changing. The traditional legal profession of past decades, bound by restrictive guild-like practice limitations, is evolving into a “competitive enterprise” due to increasing demand for legal services, increasing competition by non-lawyers, and increasing technological development changing the delivery of legal services.²⁴⁷ Different from previous efforts to deregulate the practice of law, it seems that reformists may be making progress towards allowing lay practitioners to practice law. Regulators seem to be looking more introspectively at perhaps unrealistic restrictions on all non-

²⁴¹ See Wald, *supra* note 29, at 926–27. Wald explains a lawyer’s client-centered loyalty:

An advocate, by the sacred duty which he owes to his client, knows in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and amongst others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other.

Id. (citations omitted).

²⁴² See MODEL RULES OF PROF’L CONDUCT Pmbl. ¶ 1 (2011).

²⁴³ See *id.* at Pmbl. ¶¶ 1–8.

²⁴⁴ See *id.* at Pmbl. ¶ 9.

²⁴⁵ Cohen, *supra* note 18, at 292.

²⁴⁶ McChrystal, *supra* note 203, at 367.

²⁴⁷ See Posner, *supra* note 148, at 27.

lawyers,²⁴⁸ and it seems that the ABA recognizes “the dissonance between [its] traditional regulatory efforts and the reality of the legal world they govern.”²⁴⁹

At the end of the day, though, no reformist can deny the inherent risks and stakes involved when providing legal services to clients in need. Restricting the practice of law to licensed lawyers guarantees a minimum level of competency, in addition to invaluable ethical obligations that protect the rule of law foundational to our society. Support for current unauthorized practice limitations does not eliminate any possibility of future reform, nor does it ignore the value of reformists’ criticisms, discussed above. However, within the scope of this Note, deregulation and/or loosening UPL enforcement may only be appropriate when current ethical obligations enforced by the organized bar are otherwise satisfied: fiduciary duties to clients and courts while also considering the lawyers’ own interests. The rule of law depends on the strength of these three ethical prongs.

VI. CONCLUSION

When the debate dust settles, economic pressure cannot legitimize complete deregulation of the American legal system, and unique protections enforced by an organized bar support the rule of law essential to our society. Despite unsuccessful attempts to deregulate the law during fourteen prior recessions, similar arguments resurface today. Critics attack the monopolistic regulation of legal services because lay practitioners would impose more competition to decrease prices and increase access to legal services. Alternatively, supporters of current regulations argue that unauthorized practice restrictions are justified based upon invaluable protections only a regulated bar can provide.

At the end of the day, legal services impose risks upon innocent consumers, and some sort of mechanism is necessary to protect against manipulative or ill-equipped practitioners. In fact, regulation may not be the proper debate because any alternative form of monitoring legal services is simply another form of de facto regulation. Therefore, if the cost of legal services is crippling those hardest hit by an economic recession, then this is an entirely different debate.

Regardless of the merits of the current regime, the law governing lawyers imposes fiduciary duties critical to upholding the rule of law. These ethical obligations are critical to any reform initiative, if some alternative to current regulation is to find success at all. As it stands now,

²⁴⁸ See Zacharias, *supra* note 6, at 1526.

²⁴⁹ *Id.* at 1527 (discussing Multidisciplinary Practice and Multijurisdictional Practice Commissions).

[Lawyers owe a] duty to the court, that it shall be assisted by the advocate; a duty to the adversary, not to push an advantage beyond the bounds of equity; a duty to truth and right, whose allegiance no human being can renounce; and a duty to the state, that it shall not be corrupted by the example of unscrupulous insincerity.²⁵⁰

In the 1830s, Alexis de Tocqueville observed that the “American aristocracy,” in a nation of laws, rests with the attorneys’ bar and the judges’ bench.²⁵¹ Lawyers have unique intellect that sets them apart from other professions because “they are masters of a necessary science, knowledge of which is not widespread.”²⁵² In 2012, codified rules self-imposed by bar associations ensure that lawyers maintain superior knowledge of the law in addition to fiduciary obligations protecting consumers’ reliance on quality legal services.

Together, lawyers’ knowledge, abilities, and ethical constraints have protected the rule of law for centuries. In the next two hundred years, what will be the role of lawyers? Removing entrance barriers and conduct requirements likely creates an entirely different legal system. If critics eventually deregulate legal services completely, perhaps after the next economic recession, some alternative enforcement mechanism must be in place to control self-interested practitioners. Otherwise, the impact of untamed “lawyers” would be disastrous.

*Michael A. Bush**

²⁵⁰ Wald, *supra* note 29, at 930 (citations omitted).

²⁵¹ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 251 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2002).

²⁵² *Id.* at 252.

* Michael A. Bush, Executive Editor for Article Selection and Symposium, *W. VA. L. REV.* Vol. 115; J.D. Candidate, West Virginia University; B.A. History with Honors, *summa cum laude*, West Virginia Wesleyan College. I express my deepest gratitude to President David C. Hardesty, Jr., President Emeritus and Professor of Law, West Virginia University, who focused my thoughts, asked the tough questions, and dedicated many hours to this Note. I also thank Tai Shadrick and the other editors of the *West Virginia Law Review* for their assistance in editing this piece for publication. In addition, I thank my friends and family who read this Note—your commitment to my education is sincerely appreciated, and I would not be who I am without you. Any errors or omissions contained herein are my own.