

ONE

INTRODUCTION

The legal profession occupies a special and vital role in American society. Its valuable social contributions include, for example, developing and applying the rule of law, enabling people to settle disputes peacefully, and promoting social justice for everyone in the country.

As pointed out by Bonica (2017), the profession has dominated American politics and public policymaking since at least 1840, when Alexis de Tocqueville wrote *Democracy in America*, and it continues to do so today. Of the roughly 1.3 million lawyers in the United States, about 7.5 percent of them (more than one hundred thousand) work in all levels of state and federal government. They lay claim to an entire branch of government, the courts, and they are heavily over-represented in the ranks of public officials; for example, there are more lawyers than any other occupation in Congress. Since 1789, lawyers have also accounted for nearly 60 percent of the presidents, 70 percent of the vice presidents, and 63 percent of cabinet members.¹

Lawyers exert an enormous influence on public policy, even in areas where government employees trained in other disciplines have expertise. For example, the U.S. Department of Justice (DOJ) employs more than fifty economists in the Economic Analysis Group that works in the antitrust division, but it's the lawyers in the DOJ who decide whether or not to bring an antitrust case, and they determine the strategy to win it (Crandall and Winston 2003). The U.S. Department of Transportation does not have an economics division, but lawyers who influence national transportation policy occupy important policy-

making positions. There are other important government entities, such as the U.S. Federal Reserve, that are led by economists, not lawyers. However, attorneys at the Federal Reserve play a vital role by counseling the board on banking law and other issues and by administering the board's statutory responsibilities in consumer credit protection.

Hadfield (2020) succinctly summarizes law's importance from an economics perspective by pointing out that markets are defined by law, and policy is implemented with law. Law, therefore, forms the basic operating system, the transactional platform of all economic and social activity.

To the best of our knowledge, no one has offered a comprehensive overview of the legal profession's pervasive influence in the policy arena, which, in our view, has created two important social problems. First, the legal profession has been able to create a powerful self-aggrandizing position in the United States. In a widely seen segment on *60 Minutes* in 2014, attorney Mark Koplic went as far as to say that "we [lawyers] make the laws and we make them in a way that is advantageous to the lawyers."² Knake (2019) points out, for example, that the legal profession has, in particular, been able to preserve certain anticompetitive features such as the states' requirements that lawyers obtain a license to practice law and the American Bar Association's (ABA) regulation of the legal profession. Both features constitute barriers to entry that increase lawyers' earnings and reduce employment in legal services.

Economists have opposed occupational licensing in general (Kleiner and Vortnikov 2018) and in the legal profession in particular on cost-benefit grounds (Winston, Crandall, and Maheshri 2011; Winston and Karpilow 2016). Barriers to entry that raise the cost of and limit employment in legal services do not address any alleged problems of imperfect information for consumers or improve the quality of legal services. On the contrary, Hadfield (2020) argues that the high price of legal services and the lack of innovation that could lower costs and increase quality are instead a consequence of the industry's self-regulation that has prevented competition that could transform its inefficient business model.

The legal profession has taken some tentative steps to allow alternative suppliers of legal services, such as LegalZoom, a company that enables its customers to create certain legal documents without hiring a lawyer. A few states have approved a new category of nonlawyer licensees, known as limited license legal technicians in Washington State, licensed paralegal practitioners in Utah, and legal paraprofessionals in Arizona and Minnesota, who have not yet passed the bar and are not full-fledged lawyers, to provide a limited range of legal services

at low cost. Other states, like California and New Mexico, have established task forces to explore whether nonlawyers could provide some legal services. But high barriers to entry for would-be legal service providers still exist, and the ABA aggressively prosecutes the unauthorized practice of law (UPL) by individuals.³ In addition, Hadfield (2020) reports that some state bar associations have used UPL actions to stop innovative firms such as LegalZoom from operating.

The second social problem caused by lawyers that merits attention is that the inefficiencies of the legal profession not only impose costs on consumers and would-be and actual suppliers of legal services but also contribute to a mindset that, given the legal profession's influence in government, decreases the efficacy of public policy more broadly. The most obvious examples are policies that directly increase business for lawyers at a higher cost to consumers. Matter and Stutzer (2015) find that lawyer-legislators are significantly less likely than other legislators, for example, to support tort-reform legislation that could reduce expenditures on liability disputes, and Bonica (2017) argues that lawyer-legislators have created tax loopholes that helped to develop the "income defense industry," which caters to high-net-worth individuals looking to minimize their tax liability. At the same time, lawyers themselves have not been subject to provisions in banking and financial legislation to improve transparency and avoid tax evasion, money laundering, failure to comply with regulations, and fair accounting.⁴

By enabling barriers to entry to persist and preventing nonlawyers and business entities that are not law firms from providing legal services, the legal profession, aided by policymakers, has restricted the public's access to legal services. Hadfield (2010) argues that compared with other advanced market democracies, the United States devotes fewer resources to legal markets and institutions to help individuals with their everyday legal relationships. Juetten (2018) characterizes the law profession's legal monopoly as failing the public because it does not serve 80 percent of the known market and continues to build barriers for people to access legal services. As indicated by the Legal Services Corporation (2017), a government-funded organization established by Congress that promotes equal access to legal services, the problem is particularly acute for low-income Americans because 86 percent of their civil legal problems have not been addressed with adequate or professional legal help. Strikingly, Judge Richard Posner abruptly retired from the U.S. Court of Appeals for the Seventh Circuit in 2017 to focus on litigation finance because he came to believe that the courts have failed to treat litigants who lack financial resources fairly.

The legal profession's role in restricting access to legal services clearly indi-

cates its harmful effects on public policy. However, we argue that its harm is even more extensive. Because lawyers dominate public policymaking, their influence (and by implication, the legal profession's influence) is likely to be associated with the vast inefficiencies in government policies (Winston 2006; Schuck 2014; and Winston 2021b). Lawyers' training and career development have occurred in an environment shaped by regulations that have reduced competition and innovation and that have fostered status quo bias—a factor that has compromised government policymaking. In addition, legal training and practice does not encourage policymakers to acknowledge and correct their policy failures by subjecting decisions to rigorous retrospective cost-benefit analyses.

Commentators on the legal profession have identified several distinctive features of lawyers' training and approach to problem solving that compromise their ability to be an effective force for efficient and equitable policies. For example, Howard's (2019) critique of the legal profession points out that lawyers share a philosophy of the technical correctness of the law, such as compliance with a rule, regardless of the law's actual economic and social effects. Such legal rigidity also encourages status quo bias because any new, superior approach could be nixed because some lawyers claim it conflicts with some rule somewhere. At the same time, a focus on "correctness" also encourages legal advocates to find ambiguities in a law that they can exploit for their own benefit.

Gibney (2019) argues that the law fails to effectively confront social problems because law school graduates as practitioners demonstrate a slavish deference to authority, a belief in the normalcy of American law, an obsession with the past, and an unshakeable belief in the power of rules. To be fair, the stability in rules does provide a favorable climate for investment, and, given the separation of powers built into the Constitution, it can be difficult for policymakers to enact huge and potentially disruptive policy changes.

Still another serious flaw with the legal profession is that lawyers have well-defined ideological biases that are reflected in their policy positions (Posner 2008; Bonica, Chilton, and Sen 2016). Those biases have a powerful influence because lawyers have not been trained to develop an analytical approach, such as cost-benefit analysis, to carefully assess public policies.⁵ For example, Chief Justice Roberts' response to statistical evidence that showed Wisconsin's voting districts had been warped by political gerrymandering was to dismiss it as "sociological gobbledygook," when, in fact, it was a conclusion based on basic mathematical methods (Liptak 2018).⁶ Cohen and Yang (2018) found that Republican-appointed judges, all else equal, gave longer prison sentences to Black defendants than did Democratic-appointed judges. If future research

corroborates that finding, would the judiciary look into the matter, or would it follow Roberts and dismiss the research as “sociological gobbledygook?”

Finally, Kronman (1993) laments the decline of lawyers as public-spirited statesmen who have practical wisdom. He argues that many lawyers have lost their ideals and their motivation for a career in law, which is an ominous sign for the country because a disproportionate share of America’s political leaders have always come from the legal profession. Those future leaders will be less qualified than lawyers in the past and therefore less likely to be effective. Kronman blames institutions for the decline of the ideal of the lawyer-statesman, including American law schools, where legal thought does not stress that ideal; law firms, whose commercial culture downgrades it; and the courts, whose bureaucratization stymies it.

In this book, we join forces with lawyers who are concerned about their profession by taking an economic approach, one that provides a critical assessment of the legal profession that raises concerns about its self-regulation, how it limits the public’s access to justice, and its role in the persistent inefficiency of government policy. Our approach focuses on the adverse effects created by barriers to entry in the practice of law and suggests that they appear in various ways throughout a lawyer’s lifecycle: from law school through job choice and up to, in some cases, filling important elected or appointed positions in government. In our analysis, we investigate empirically important issues that arise during the lifecycle of lawyers’ careers, beginning with law school and culminating, for some, in partnerships at major law firms or in positions at the highest levels of government. The issues that have significant implications for the legal profession and for social welfare, and our primary conclusions, include:

- *The economic returns from attending law school:* In chapter 2, we find that the monetary reward from an investment in time and money to obtain a law degree may have declined markedly since the Great Recession, and the value proposition of attending a low-tier law school has become increasingly difficult to justify.
- *The current state of legal education and the training a lawyer receives:* In chapter 3, we suggest that the private and social benefits of a legal education may have been reduced and the private and social costs increased by the excessive time and out-of-pocket costs of attending law school. There are now limited curriculum for students and job opportunities for graduates, and the quality of law school faculty, as suggested by their research accomplishments, is in question.

- *Private law firms:* In chapter 4, we raise several concerns about private sector law firms, which are important because they are a potential breeding-ground for many lawyers who assume high-level policymaking positions in government. We argue that those lawyers are not imbued by their law firm experiences with the merits of efficient and compassionate public policy.
- *Lawyers' self-selection to work in the public or private sector:* In chapter 5, we explore how lawyers' choices to work for the government or the private sector may be affected by an earnings penalty that is associated with working for the government. We find that the earnings penalty is large, consistent with evidence that the government is not able to attract and retain lawyers of the same ability, as measured by law school attendance and grades, as the private sector can attract and retain. We suggest that this allocation of legal talent may adversely affect government performance.
- *Critical issues at the highest levels of government:* In chapter 6, we study the performance of the U.S. Department of Justice's Office of the Solicitor General, providing empirical evidence that even when the government can attract highly capable lawyers, the effectiveness of those lawyers may be reduced by the government's organizational and workplace constraints. And in chapter 7, we provide empirical evidence based on the outcome of business cases of growing ideological polarization among justices on the U.S. Supreme Court.

Some of the chapters develop new empirical evidence using econometric models. We provide a nontechnical summary of our analytical approach and the main findings, which enables nontechnical readers to skip the mathematical development of the models and to turn directly to an in-depth discussion of the findings and their implications. We then synthesize the empirical evidence that we develop here with other evidence to present a strong case that lawyers' performance in the public and private sectors could be improved substantially by deregulating the legal profession to spur competition and innovation in the private sector and to increase the quality and preparation of lawyers who occupy policymaking positions in the public sector.

Instead of self-regulation, members of the legal profession would have the freedom to acquire licensing credentials by attending accredited law schools and passing a bar examination, for example, or to not acquire any credential at all. Licensing would be a free-market outcome, and consumers would determine if it leads to higher-quality services that they are willing to pay for. We envision

that licensing would be valued and reflected in higher rates for clients who seek a licensed lawyer to represent them, for example, in complex business litigation or in a case before the Supreme Court. Clients would be much less likely to pay licensed lawyers a higher rate for other legal services such as drafting a will or reviewing a simple contract. Even if licensed lawyers were generally of higher quality than unlicensed lawyers, consumers would be able to afford more, and have much greater access to, legal representation for all types of services.

We do not believe that the legal profession is likely to deregulate itself, but we suggest that the recent decline in the number of lawyers who are attracted to government positions and the public's disenchantment with elected officials conducting business as usual may lead to an influx of public officials who do not have allegiance to the legal profession and who would therefore be willing to eliminate its monopoly status and licensing requirements. Lawyers could therefore obtain training and experiences to optimize their career goals in the private or public sector and expand the public's access to justice. When lawyers are in a policymaking position, we suggest that their improved training and experiences could contribute more effectively to enabling America to become a fairer and more efficient society.

As this book goes to press, the United States and the entire world is engaged in a stressful battle to control and eradicate the novel coronavirus and its associated disease, COVID-19. In the final chapter, we argue that this challenging period is creating serious challenges for the American public, some of whom are in need of legal assistance, as well as for current and prospective law students, law schools, and law firms. At the same time, we argue that on closer examination, the global pandemic is also strengthening the case for deregulating the legal profession to improve its efficiency and equity, and consequently benefit society in general and its most vulnerable members in particular.