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2012

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#### Recommended Citation

Russell G. Pearce and Sinna Nasser, *The Virtue of Low Barriers to Becoming a Lawyer: Promoting Liberal and Democratic Values [with Sinna Nasser]*, 19 *Int'l J. Legal Prof.* 35 (2012)

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# The virtue of low barriers to becoming a lawyer: promoting liberal and democratic values

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**ABSTRACT** *This article offers a new perspective on how to determine whether barriers to practicing law are appropriate. It identifies a connection between those barriers and the role of legal services providers ('lawyers') in permitting individuals to obtain their basic political and economic rights in a liberal democracy. Democratic values require making legal services as equally available as possible to all citizens, while liberal values dictate that each individual has access in order to enforce human rights, compete in a market economy, and engage in a legal system grounded in the rule of law. Liberal and democratic values therefore require the lowest barriers to becoming a lawyer, consistent with the minimum requirements of competence and the recognition that the level of competence required will vary according to the type of legal services provided and the segment of the market served. Any contrary regulatory approach requires strong empirical support to overcome the presumption of low barriers that liberal and democratic values create. Accordingly, the article rejects as unpersuasive arguments for high barriers based on promoting the public good, avoiding rent-seeking, protecting consumers, advancing judicial efficiency, redressing lawyer misconduct, and preserving lawyers' high incomes.*

## 1. Introduction

With regard to the question of whether a society has 'too many lawyers?', our concern is not that a society has too many lawyers, but rather that it has too few. The preliminary thesis we present is relatively simple: lawyers provide vital functions in a liberal democracy and the values of a liberal democracy require making the barriers to becoming a lawyer as low as reasonably possible.<sup>1</sup> We do not restrict our consideration to those persons who today are formally denominated as lawyers. Instead, we employ the term to refer more broadly "to occupations that require nearly full-time expertise

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and commitment to analyzing, explaining, and arguing the law, whether they are expressly termed ‘lawyers’ or not” (Pearce & Levine, 2009, p. 1637). We use the term ‘liberal democracy’ to describe a political system that is democratic in the sense that the basis for governance is majority rule of equal citizens and liberal in the sense that it seeks to promote and protect individual freedom (Pearce & Levine, 2009, p. 1637). One component of liberalism is rule of law. Although rule of law is subject to a range of definitions, this Article “will focus in particular on the equal application of legal rules to all members of a society, whether or not they are part of the ruling elite” (Pearce & Levine, 2009, pp. 1636–1637). Given their commitment to individual freedom, liberal democracies rely on market economies.

In a liberal democracy, lawyers serve as ‘civics teachers’ (Green & Pearce, 2009). They provide necessary assistance to people in managing their personal and business affairs, in participating in political life, and in accessing the system of justice. In doing these things, lawyers have a particular responsibility for encouraging popular support for liberal democratic values. While some lawyers are public officials, most provide their services to private clients through the market. In order to promote the democratic value of equal access to knowledge and power, and the liberal values of protecting human rights and rule of law (which may conflict with democratic values), as many citizens as possible should be able to become a lawyer and as many citizens as possible should be able to afford to retain a lawyer when needed. The best way to achieve this goal is to permit only those barriers to law practice consistent with the minimum standard of consumer protection. Although the precise calibration of the appropriate barriers is beyond the scope of this article, they would provide a floor that would permit the market to determine the number of lawyers a liberal democracy needs, with exceptions for additional government-subsidized services for low- and middle-income persons. The appropriate level of these subsidies is also beyond the scope of this article, which focuses specifically on the effect of barriers to permission to practice law absent such subsidies.

We next consider five common arguments in support of high barriers to becoming a lawyer. These are: the lawyer’s commitment to the public good, the danger of rent-seeking, the requirement of highly expert generalists to protect consumers, the need for judicial efficiency and redress of lawyer misconduct, and the protection of lawyers’ livelihoods. We find these arguments unpersuasive. Low barriers satisfy the legitimate concerns that these arguments implicate. Beyond those concerns, these arguments rely on claims that have little or no empirical support. Given the virtues of low barriers, the burden of demonstrating the value of high barriers is on their proponents. Absent persuasive evidence for high barriers, therefore, societies should prefer low barriers in the interest of democratic and liberal values.

In performing this analysis, we rely more heavily on US sources because we are more familiar with them and because US commentators have traditionally focused on a political role for lawyers beyond valuing excellence and integrity in their work (Pearce, 2001, p. 386). Nonetheless, we do seek to consider sources outside the United States and argue that our claims apply in general to liberal democracies. We identify both the United States and South Africa as nations that create barriers that undermine liberal democracy and contrast the approach in the United Kingdom,

which appears to be on the road to developing a system of low barriers more consistent with liberal democratic values.

## 2. The virtue of low barriers

Dean Roscoe Pound (1953, p. 5) described lawyers as “pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood.” This description captures how the provision of legal services has both public and private dimensions. As this section explains, the public dimension of the delivery of legal services is connected to the exercise of political and economic rights in a democracy. At the same time, in a liberal democracy, the delivery of most legal services occurs through the market, and not through government action. To maximize the availability of legal services – and to best promote liberal democratic values – the barriers to providing legal services should be as low as possible consistent with the minimum standards of consumer protection.

### *The public dimension of lawyers’ work*

In his 1921 and 1928 reports on legal education for the Carnegie Foundation, Alfred Z. Reed described the importance of low barriers. He explained that becoming a lawyer was “admission to our governing class” (Reed, 1921, p. 56). Reed observed that:

Practicing lawyers do not merely render to the community a social service, which the community is interested in having them render well. They are part of the governing mechanism of the state. Their functions are in a broad sense political. This is not due primarily to the circumstance a large proportion of our legislative and administrative officials and virtually all of our judges, are chosen from among this practically ruling class... It springs even more fundamentally from the fact, early discovered, that private individuals cannot secure justice without the aid of a special professional order to represent and to advise them. (Reed, 1921, p.3).

In identifying lawyers’ work as having a vital political dimension, Reed offered a perspective that historically dominated the thinking of American legal ethicists. In the United States, the first legal ethicists built

on the insights of the Framers and of leading jurists like Justice Story and Chancellor Kent [to] posit that lawyers, as professionals, were skilled at perceiving and promoting the public good and would ensure that society balanced the interests of individuals with the public good. (Pearce & Wald, 2012, p. 517)

In 1854, George Sharswood, one of the fathers of American legal ethics, explained that lawyers served both liberal and democratic goals. In democratic government, lawyers “fill the highest public stations’, including dominance of the legislative

process, and exclusive administration of the judicial system as advocates and judges” (Pearce, 1992, p. 255). As private practitioners and community leaders, they “counsel[ed] the ignorant, defend[ed] the weak and oppressed, and . . . [stood] forth on all occasions as the bulwark of private rights against the assaults of power” (Sharswood, 1907, pp. 53–54). Whether “providing counsel to clients, [or] making arguments in court to judge and jury” (Pearce, 1992, p. 255), lawyers “diffuse[ed] sound principles among the people” (Sharswood, 1907, pp. 30, 54) and brought the law “home so nearly to every man’s fireside” (pp. 30–31).

Later, when the American Bar Association (ABA) codified legal ethics, this understanding of lawyers’ central political role continued. The ABA’s 1908 *Canons of Ethics* asserted that “[t]he future of the republic, to a great extent depends upon [lawyers’] maintenance of justice pure and unsullied”. The ABA’s 1969 *Model Code of Professional Responsibility* declared that “[l]awyers, as guardians of the law, play a vital role in the preservation . . . and [t]he continued existence of a free and democratic society”. The ABA’s 1983 *Model Rules of Professional Conduct* called lawyers “public citizen[s] having special responsibility for the quality of justice” and “play[ing] a vital role in the preservation of society”.

Another classic exposition of this perspective is the 1958 American Bar Association–American Association of Law Schools joint report on Professional Responsibility, for which the famous legal philosopher Lon Fuller was the reporter. Bruce Green and Russell Pearce (2009) have described the Report’s conception of the lawyer’s role as a ‘civics teacher’. The Report describes

[p]rivate practice [as] a form of public service when it is conducted with appreciation of, and a respect for, the larger framework of government of which it forms a part, including under the term government . . . voluntary forms of self-regulation. (ABA & Association of American Law Schools, 1958, p. 1162)

As a counselor and litigator, the lawyer maintains “the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends” (p. 1162).<sup>2</sup> Indeed, “democratic and constitutional government is tragically dependent on voluntary . . . co-operation in the maintenance of its fundamental processes and forms” (p. 1162). In both private and public roles, lawyers promote “voluntary cooperation” and “help shape the growth and development of public attitudes toward fair procedures and due process”, in order to prevent the “inevitable tendency for practice to drift downward to the level of those . . . whose experience of life has not taught them the vital importance of preserving just and proper forms of procedure” (p. 1216).

Perhaps the best-known inquiry into the role of lawyers in a liberal democracy has been that of Alexis de Tocqueville. He famously struggled with the question of how the United States could successfully maintain a liberal democracy without declining into a tyranny of the majority. He identified the key role of lawyers and observed that they “form the political upper class . . . of society” (Tocqueville, 1840, p. 268). On one hand, “their interest . . . naturally pulls them toward the people” (p. 270). Lawyers would only have such a prominent role in a democracy, and not an

aristocracy or oligarchy where others would fill the role of the “political upper class” (p. 268). On the other hand, lawyers would not have the same powerful role without a commitment to the liberal values of rule of law and individual rights. Tocqueville observes that lawyers

are the masters of a necessary and not widely understood science; they serve as arbiters between the citizens; and the habit of directing the blind passions of the litigants toward the objective gives them a certain scorn for the judgment of the crowds. (Tocqueville, 1840, p. 264).

Tocqueville described how lawyers promoted both liberal and democratic values:

There is hardly a political question in the United States which does not sooner or later turn into a judicial one. . . . As most public men are or have been lawyers, they apply their legal habits and turn of mind to the conduct of affairs. Juries make all classes familiar with this. So legal language is pretty well adopted into common speech; the spirit of the law . . . infiltrates through society right down to the lowest ranks, till finally the whole people contracted some of the ways and tastes of a magistrate. (Tocqueville, 1840, p. 270)

Many other commentators have identified a similar function of lawyers. The structural-functionalist (Abel, 1989, p. 15) approach of Emile Durkheim (1957) and Talcott Parsons (1954, pp. 370, 384), for example, identified lawyers as intermediaries between the people and the law, and suggested a role that is central in a liberal democracy. Commentators in legal scholarship today continue to explore the political dimensions of lawyers’ work from a variety of perspectives.<sup>3</sup> Halliday *et al.* (2007, p. 4), for example, have noted that lawyers have a strong history of supporting “freedoms of the person, speech, movement, property and association”. They find that

[h]istorical and sociological studies demonstrate the legal professions often were active builders of the institutions of liberal politics. In a variety of ways, legal professions sought the moderation of state power via judicial independence, the creation and mobilisation of a politically engaged civil society, and the vesting of rights in subjects as citizens who would be protected by judiciaries. (Halliday *et al.*, pp. 1–2)<sup>4</sup>

Nonetheless, at the same time, other commentators ignore or minimize the political role of lawyers. They view lawyers from a guild perspective that focuses largely on the integrity and excellence of lawyers’ work (Pearce, 2001, p. 382, n. 5); a Marxist perspective of lawyers as marginal to politics (Abel, 1989, p. 15); a Weberian view of lawyers as market actors seeking a “competitive advantage within a relatively free market” through professional organization (p. 15), or a skeptical understanding that because lawyers pursue their own self-interest and not the public good they have withdrawn from their political role (Pearce, 2006, p. 1339).

While a more detailed response to these commentators is beyond the scope of this article, we hold with those commentators who find a central role for lawyers in a



liberal democracy. We make this argument as a descriptive matter – and for purposes of this article do not reach the debate regarding whether lawyers have an adequate ideological commitment to the public good, or serve their own interests or those of business clients (Pearce, 1995; Halliday & Karpik, 1997, p. 53). We agree with Reed, Fuller, Tocqueville and others that lawyers do indeed play a significant political role. As a result of both their expertise and their work, lawyers tend to serve in disproportionate numbers as formal political leaders (Shepherd, 2003, pp. 652–654; Halliday, 1989, p. 375; Heinz *et al.*, 1993, pp. 127–132). They also serve as informal leaders both in their communities and through their everyday work, in which they are civics teachers who help shape how clients and community understand liberal democratic values (e.g. Pearce, 2006; Green & Pearce, 2009). Accordingly, both in their public and private capacities, lawyers in fact serve as intermediaries between the people and the law. In this role, lawyers influence how well a liberal democracy provides democratic participation in political and economic institutions and protects human rights and rule of law, whether lawyers consciously seek those goals or not.

*Why lawyers' political role requires low barriers in a liberal democracy*

Given this role, liberal democratic values require that the opportunity to become a lawyer and to obtain the services of lawyer be widely available. Democratic values require that citizens have an equal opportunity to become a lawyer and join the political leadership class. Democratic values also weigh in favor of providing citizens with an equal opportunity to gain from lawyers the legal knowledge and assistance they need to participate effectively in political and economic life. Liberal values weigh in the same direction. Citizens need to access the legal knowledge and assistance of lawyers to vindicate their individual rights, especially when those rights conflict with the will of the majority. Rule of law further requires that citizens have access to lawyers in order to obtain equal justice from the legal system, even when justice conflicts with the will of the majority. Broad access to becoming a lawyer and to obtaining a lawyer's services helps disseminate liberal democratic values throughout the population.

In applying this analysis to the qualifications for becoming a lawyer, we return to the work of Alfred Z. Reed. First, he recognized that barriers to becoming a lawyer should be as low as possible. He explained that “democratic ideals” necessitated “that participation in making and administration of the law shall be kept accessible to Lincoln's plain people” (Pearce & Levine, 2009, p. 1655). As a result, the “general education requisite for admission to . . . public service [as a lawyer should not exceed] the level that can be reached by the average man” (Reed, 1921, pp. 52–53). Second, Reed observed that the market for legal services was differentiated. Accordingly, the delivery of legal services should not be subject to a unitary legal profession (p. 60). Consumers of legal services have a range of needs and a range of resources. This differentiated market, in Reed's view, demanded “lawyers of differing skills and qualifications serving different purposes and different elements in society” (Stevens, 1983, p. 114).

Reed's principles accord with liberal democratic values. To make the ability to provide or to obtain legal services as broadly available as possible, the only barrier to legal practice should be the minimum standard of consumer protection – that the provider can provide the legal services competently and honestly.<sup>5</sup> Although the precise calibration of such minimum standards is beyond the scope of this article,<sup>6</sup> delivery of simple legal services might require only a few weeks or months of legal training, or it might require allowing a lawyer to create procedures for, and supervise, non-lawyer service providers. More complicated services, such as representation in court, would require mastery of court procedures, as well as some minimum amount of general legal knowledge. A competitive market would provide additional protection to consumers. Efficient markets provide consumers with the best quality services at the lowest cost. An efficient legal services market would include products, such as private referral or rating services, to help consumers evaluate the quality of lawyers (Pearce, 1995, p. 1273).

In addition, liberal democratic values would suggest that the range of acceptable requirements could depend upon the level of education and resources in a society. In Stevens, 1983, p. 184 n. 42, the nineteenth-century United States, for example, where free public education through high school was not generally available (Goldin, 1999, p. 4), lawyers representing clients in court had to satisfy only minimal standards and did not even need a high-school education (Barton, 2011, pp. 111–113). During this period, many distinguished lawyers, such as Abraham Lincoln and John Marshall, lacked formal legal education, and the legal system as a whole functioned reasonably well (Barton, 2011; Pearce & Levine 2009, pp. 1654–1660).

### 3. Unpersuasive defense of high barriers

Using the examples of the United States and South Africa, this section explains how high barriers transgress liberal and democratic values. Next, it evaluates arguments commentators have used to justify these harms and finds little support for them.

#### *Harms of high barriers*

The United States and South Africa offer examples of liberal democracies with high barriers to becoming a lawyer. The barriers undermine both democratic and liberal values. They make it more difficult than necessary for people to become lawyers and skew membership in the legal profession toward those with privilege in society. Similarly, high barriers make it more challenging for those without privilege to obtain legal services (Barton, 2011, pp. 144–146). This deprives them of an equal opportunity to participate in both democratic government and the market economy, to obtain justice from the courts, and to protect their human rights. High barriers also undermine popular commitment to liberal democratic values.

In the United States today, the barriers to becoming a lawyer include a four-year college degree, the Law School Admission Test (LSAT), three years of law school, a bar exam, and a moral character requirement.<sup>7</sup> The cost of the three years of law school tuition (without even considering living costs) averages \$105,000 for private school and \$60,000 for public school (Law school tuition soars, 2011). These



requirements are the same for all lawyers, from those who prepare the simplest wills to those who litigate the most complicated antitrust cases. Several states also allow for the practice of ‘reading law’, in which lawyers integrate work experience in a legal office with independent study of the law (Moeser & Huismann, 2012, pp. 8–12). According to a 2003 estimate, only a few hundred students nationwide were pursuing this route to the bar (McDonald, 2003). The ABA and National Conference of Bar Examiners strongly discourage this practice, maintaining that “Neither private study, correspondence study, law office training, age, nor experience should be substituted for law school education” (Moeser & Huismann, 2012).

High barriers in the United States lead to two key types of harms. First, they restrict the type of people who become lawyers (Winston *et al.*, 2011, p. 82). In the legal profession, persons with privilege are over-represented and those who are less privileged are under-represented. For instance, racial minorities made up more than one-third of the United States population in 2010 (Hixson *et al.*, 2011, p. 2), but only 11.6% of lawyers (Chambliss, 2011, p. 10).<sup>8</sup> And the American legal education system skews the same way: racial minorities<sup>9</sup> and low-income people<sup>10</sup> are under-represented among law students. For example, a UCLA Law School study found that “of people in their twenties, those from families with incomes over \$200,000 were about fifty times more likely to end up as students at [the] law school than were those from families below the poverty line” (Sander, 1997, p. 475).

Second, high barriers restrict the type of people who are able to purchase legal services. According to Deborah Rhode (2004, p. 5), “about four-fifths of the civil legal needs of the poor, and two-to three-fifths of the needs of middle-income individuals, remain unmet”. Further, “[o]nly one lawyer is available to serve approximately 9,000 low-income persons, compared with one for every 240 middle- and upper-income Americans” (Rhode, 2003, pp. 47–48).

South Africa has similar high barriers and similar harms. In South Africa, the barriers include a college degree, brief practical training, and an apprenticeship (Pearce & Levine, 2009, p. 1650). Though seemingly less restrictive than the barriers in the United States, South African barriers constrain diversity in the legal profession and limit the populace’s access to justice.

The white minority dominates the legal profession in South Africa. Although blacks, coloreds, and Asians are 90.6% of the population, they represent only 25% of lawyers (Pearce & Levine, 2009, p. 1650). The high barriers to entry cause this disparity for many reasons. Although blacks are approximately 50% of current law students (p. 1652), this number is still below their percentage of the population and indicates that equality in the legal profession is far from realization. Similarly, for example, the requirement of an apprenticeship with a practicing attorney has “had the practical effect of keeping non-white law graduates from obtaining admission” because “candidate attorneys [must] find a lawyer or law firm [willing to] offer them [a clerkship]” and “the legal profession historically has been comprised overwhelmingly of white attorneys in a racially segregated legal system” (p. 1652, n. 67).

In addition to attorneys, South Africa provides a limited number of alternative legal services practitioners: “approximately 350 ‘community advice centers’, and 56 ‘paralegal advice offices’, some of the staff of which have completed ‘an intensive

three month training program', provide advice 'at the community level', especially 'in rural areas'" (Pearce and Levine, 2009, p. 1650).

Even with this additional group that falls within our definition of lawyers, South Africa fails to meet the test of liberal and democratic values in providing legal services. David McQuoid-Mason (2012, p. 26) estimates that as much as 70% of the population is unable to afford a lawyer. Strikingly, for example, "about 10,000 people a year are . . . sentenced to terms of imprisonment without being legally represented" (McQuoid-Mason, 2012, p.7).

All these statistics illustrate how high barriers function to reinforce the privileged position of white South Africans and to create a barrier to equality for black and colored South Africans.

*Why efforts to justify these harms are unpersuasive*

In countless books and articles, commentators have sought to justify high barriers. This article briefly considers these arguments and explains why they are unpersuasive.

*The lawyer's commitment to the public good.* Some commentators argue that high barriers are necessary to limit lawyers to those who will, in Roscoe Pound's (1953, p. 5) terms, "purs[ue their legal careers] as a common calling in the spirit of public service".<sup>11</sup> Commentators have identified a range of qualifications that arguably promote this spirit, including a liberal arts education (ABA, 1929, pp. 605, 621–624), a multi-year Socratic legal education (Robinson, 2011), or a required professional responsibility course.

Undoubtedly, commitment to public service has potential benefits in a liberal democracy. If lawyers as civics teachers view their work as a "calling in the spirit of public service," they are probably more likely to work to promote both democratic and liberal values. On the other hand, the arguments for each of the proposed requirements are based on supposition. There is no persuasive evidence that a liberal arts education, Socratic legal education, or professional responsibility course make it more likely that lawyers will view their work as a "calling in the spirit of public service" (Pound, 1953, p. 5).<sup>12</sup>

Moreover, anecdotal evidence is to the contrary. Some of the greatest members of the US legal profession, such as Chief Justice John Marshall (Stevens, 1983, p. 11, n. 14; Federal Judicial Center, 2012) or Abraham Lincoln (Stevens, 1983, p. 19, n. 72, p. 25; Law school tuition soars, 2011), never completed a liberal arts education, Socratic legal education, or a professional responsibility course.<sup>13</sup> Anecdotal evidence also suggests that these educational barriers have proven ineffective in inculcating 'the spirit of public service'. Bar leaders, for example, complain of a "crisis of professionalism" (Pearce, 1995, p. 1263) resulting from lawyers' declining commitment to the public good.

Accordingly, there is no evidence to support arguments that high barriers promote an ethic of public service.

*Danger of rent-seeking.* Some commentators worry that lawyers are "parasitic rent-seekers" (Galanter, 1994, p. 636) who seek to manipulate law and the legal system

to their own benefit or the benefit of their clients and who accordingly exert a negative influence on economic growth (Magee, 2010, p. 2). They argue, for example, that rent-seeking lawyers promote excessive lawsuits, too many laws and regulations, and economic inefficiency (p. 3). High barriers could reduce the number of lawyers and therefore the opportunity for rent-seeking (p. 3) or could exclude those with a propensity for becoming rent-seekers from the pool of lawyers.

As an initial matter, the factual grounding for the claim that lawyers are rent seekers is weak. Economists and sociologists have examined this claim at length and the evidence is equivocal at best.<sup>14</sup> But even assuming that lawyers are rent-seekers, the arguments for high barriers are unpersuasive. As noted above, high barriers have not proven effective in identifying lawyers with a greater or lesser commitment to the public good and would therefore be unlikely to exclude lawyers who have an inclination to rent-seeking. Similarly weak is the argument that high barriers will minimize rent-seeking solely by reducing the number of lawyers (Magee, 2010, p. 3). Other economists have argued, for example, that high barriers and the resulting oligopoly on the provision of legal services promote rent-seeking. They suggest that high barriers create “socially perverse incentives for attorneys in their collective behavior as an interest group to support inefficient regulatory, liability, patent, and other policies that preserve and enhance their wealth” (Winston *et al.*, 2011, p. 5). Lowering barriers would make the market for legal services more efficient by “allow[ing] a greater number of qualified participants to spur competition in the legal services market and reduce legal fees, creating substantial economic welfare benefits” (p. 85).

*Consumer protection requires a profession of highly expert generalists.* Some commentators argue that the high barriers associated with highly expert generalists are necessary to protect consumers. They reject the idea of differentiated legal services and a differentiated legal services market. They argue that all legal problems are complex and require the attention of an attorney who has undergone extensive training.<sup>15</sup> Accordingly, even legal matters that appear to be relatively simple, like an uncontested divorce, implicate countless rights and liabilities (Robinson, 2011). Only a highly trained professional can navigate this complex web to prevent possible unintended and profound consequences (Robinson, 2011). Commentators argue that as a result of this complexity, the information asymmetry between lawyers and consumers of legal services, as well as the potential for irremediable harm, require protecting consumers through *ex ante* barriers rather than through market competition and *ex post* remedies (Barton, 2011, pp. 147–150).

This argument suffers from a number of weaknesses. First, as Benjamin Barton (2011, p. 148) observes, “[n]either information asymmetry nor irremediable harms is present in most areas of legal practice”. Second, the limited empirical evidence that exists does not support the claim that high barriers provide necessary consumer protection. Studies in England and Wales, for example, found that “nonlawyers provided better legal service in civil matters such as welfare benefits, debt, housing, and employment than solo and small-firm practitioners provided” (Winston *et al.*, pp. 86–87).<sup>16</sup> In a US study, Herbert Kritzer (1998, pp. 76, 108, 148, 190) compared lawyers and non-lawyers in representing clients in administrative proceedings and

found that “formal training (in the law) is less crucial than is day-to-day experience”.<sup>17</sup> Another study in California of “people who had obtained assistance in litigating pro se, [found that] a higher percentage of those who had obtained help from paralegals were satisfied than of those who received help from lawyers” (Selinger, 1996, pp. 879, 910).

Third, the argument for a unified legal profession of highly expert generalists necessarily relies on the assumption that the legal services market is unitary. This assumption is false. Consumers with different resources and needs seek different levels of legal services in today’s market. Indeed, treating the legal services market as undifferentiated and requiring only one level of services leaves many individuals without any access to legal services. In a liberal democracy, legal services are sold on the market. In the market, low- and middle-income consumers will never be able to afford the same quality of services as wealthy individuals and organizations.

Some commentators nevertheless prefer to treat legal services as a unitary market because in theory low- and middle-income people would receive the same quality of legal services as more privileged consumers.<sup>18</sup> In reality, though, the legal services market is not unitary. Accordingly, the choice is not between equal or inferior services for low- and middle-income consumers. The choice is between no services in a unitary market or affordable services in a differentiated market (Rhode 2004, p. 5, 2003, pp. 47–48) Of course, in all markets, wealthy individuals and organizations are able to purchase higher quality goods and services than low- and middle-income persons. The answer is not to deny low- and middle-income persons services altogether but to provide the greatest amount of access possible through the market and to pursue institutional strategies to maximize the possibility of equal justice. (Pearce, 2004). As Deborah Rhode (2004, p. 4) notes, “Equal justice may be an implausible aspiration, but more accessible legal institutions are within our reach.”

*Judicial efficiency and redress of lawyer misconduct.* We group these arguments because they are similar and have similar responses. In essence, commentators have claimed that low barriers would permit legal services providers who do not understand procedural law to interfere with the efficient administration of justice (Mystal, 2011) and also to provide legal services without being subject to liability for malpractice and discipline (Elefant 2011). These objections have little merit. Requiring legal services providers to understand procedural law before they can practice in court would fall squarely within the minimum requirements of even a low barrier to practice. So, too, would liability for malpractice and discipline.

*Protection of lawyers’ livelihoods.* Some commentators endorse high barriers and limiting the number of lawyers in order to protect relatively high incomes for lawyers. They argue that the legal market is saturated,<sup>19</sup> and that steps should be taken to reduce the supply of lawyers in order to protect the profession’s average wage (Greenbaum, 2010). Critics<sup>20</sup> (See Grassley, 2011; Mystal, 2010) have singled out the ABA in particular for “continu[ing] to allow unneeded new schools to open and refus[ing] to properly regulate the schools” (Greenbaum, 2010). They argue that the ABA

should use its accreditation power more forcefully to restrict the amount of new law schools and to close some existing schools.<sup>21</sup>

This argument suffers from three weaknesses. First, limiting freedom to pursue an occupation and to purchase services freely violates the principles of liberal democracy. Second, even if it did not, low – and not high – barriers would actually benefit lawyers in the long run. Lowering barriers would likely lead to competition that would encourage the legal services industry to innovate to include low and middle-income consumers and potentially create more jobs.<sup>22</sup> Lowering barriers would also reduce the cost of legal training and therefore would similarly “make it possible for [lawyers] to afford to work at salaries that would permit the development of new law practices that could serve the large number of low and middle income consumers who cannot currently afford to purchase legal services” (Pearce, 2012b). Last, while lower barriers and increased competition would probably decrease the income of some lawyers, lower barriers would also

benefit lawyers and people who are thinking about becoming a lawyer in other ways. By reducing earnings premiums, deregulating entry into the legal profession would reduce the likelihood that some individuals make a socially and privately suboptimal career choice to become a lawyer in pursuit of high earnings. (Winston *et al.*, 2011, p. 90).

#### 4. Experiments in lower barriers

As a counter to the negative examples of the United States and South Africa, we offer the positive examples of developments in England and Wales. With a history of somewhat lower barriers and recent developments that significantly lower barriers, the experience of England and Wales tentatively suggests that moving in the direction of liberal democratic values can prove workable. We also draw attention to parallel developments in Australia and increasing interest in low barriers in the United States.

First, the general requirement in the United Kingdom for being a lawyer who can provide a wide range of services, such as a solicitor or barrister, is more in accord with liberal and democratic values. In contrast to the United States, which requires three years of expensive graduate education, England and Wales only require an undergraduate degree in law (or college degree plus a year of legal training), together with practical training and an apprenticeship (Law Society, 2012). Moreover, in England and Wales, undergraduate education is more widely available and less expensive than in the United States. South Africa has general requirements similar to those in England and Wales, but its barriers are less liberal and democratic both because a smaller percentage of the population attends college and because, as noted above, the racial majority is significantly under-represented in legal education.<sup>23</sup>

Second, especially since the 1980s, England and Wales have made it significantly easier for those who are not solicitors and barristers to provide legal services; i.e. to fit within this article’s definition of a lawyer. As a historical matter, the United Kingdom, including England and Wales, never erected the high barriers to providing transactional representation that the United States created in the twentieth century. As a result,



in the UK, there have been very few restrictions on offering legal advice and assistance. Most legal services can be offered by anyone for free or for a fee. Some important legal services are “reserved” in the sense that only authorised practitioners may offer them. However, the list is relatively short: conveyancing (real property transfer), probate, preparation for litigation, advocacy and notary work. By contrast, the number of authorised practitioners who may offer these services is relatively large and includes not only lawyers but also, depending on the work, licensed conveyancers, legal executives, patent agents, banks and insurance companies. (Whelan, 2009, pp. 465, 471)

Indeed, today “the single largest providers of legal advice are probably the Citizen Advice Bureaus, which are actually staffed by lay volunteers” (Kritzer, 1999, p. 744). Tesco, the UK analog to Wal-Mart, began to offer low-priced legal services pertaining to “divorce, employment and business online” in 2004 (Whelan, 2009, p. 491).<sup>24</sup>

Moreover, in an effort to promote economic liberalism,<sup>25</sup> the trend since the 1980s has been to broaden the extent of legal services offered by those who are neither solicitors nor barristers. In 1985, for example, the government abolished “the solicitors’ conveyancing monopoly” (Whelan, 2009, p. 472). Predictably, as “[l]icensed conveyancers [came to] undertake work that had yielded fifty percent of their collective income”, the result was “[i]ncreased competition [and] lower prices” (p. 473). Today, the liberalization continues. Following the Clementi Report and the Legal Services Act of 2007, people who are not solicitors will be able “to invest in and own law firms” (Flood, 2011, p. 514). Moreover, the new regulatory structure permits the creation of Alternative Business Structures that can “provide any type of legal services, both reserved and unreserved, as well as other related services such as insurance, surveying and so on[; can] raise capital by listing on the stock exchange” and can consist of both solicitors and other service providers, or even no solicitors at all (Whelan, 2009, pp. 481–482).

This framework better serves liberal and democratic values. Lower barriers for becoming a legal services provider make more democratic the opportunity to become a formal or informal political leader. By making it easier to obtain legal services, lower barriers make more democratic the provision of legal services and the opportunity to participate effectively in political and economic life. This was the driving force behind the legal services reforms of the past decade in the United Kingdom. Lord Falconer, then serving as Secretary of State for Constitutional Affairs, outlined in a 2005 White Paper his ‘vision of a legal services market . . . that is responsive, flexible, and puts the consumer first’. Since “legal services are crucial to people’s ability to access justice”, they “must therefore be regulated and made available in such a way as to meet the needs of the public – individuals, families, and businesses” (Department for Constitutional Affairs, 2005, p. 7). Wider availability of legal services also serves the liberal end of assisting citizens in vindicating their individual rights and obtaining equal justice from the legal system. Last, this broad access holds the potential to better disseminate liberal and democratic values. We do



recognize, however, that not all commentators view these developments as wholly positive and the long-term effects have yet to be measured.<sup>26</sup>

Australia has also loosened restrictions on the provision of legal services in light of these concerns. In 2004, the Australian state of New South Wales passed the Legal Profession Act (LPA), which allows legal service providers to “incorporate and provide legal services either alone or alongside other legal service providers who may, or may not be ‘legal practitioners’”.<sup>27</sup> The purpose of the 2004 LPA is to foster liberal and democratic values: it aims to regulate legal practice “in the interests of the administration of justice and for the protection of law clients and the public generally” (LPA 2004, 1.1:3). Australia’s reforms have had a substantial impact: Slater and Gordon, a large law firm with 20 offices nationwide, made Australian history in 2007 by placing millions of shares of the company up for trade on the Australian Stock Exchange.<sup>28</sup> Early indications suggest that the quality of legal services has not diminished (Mark, 2009; Mark & Gordon, 2009).

At the same time, the United States boasts a lively academic discourse about lowering barriers. McGinnis and Mangas (2012) suggest that undergraduate institutions offer a major in law, which (combined with a year of apprenticeship after graduation<sup>29</sup>) would allow students to sit for the bar without incurring the exorbitant costs of graduate education. They expressly argue that an undergraduate degree in law would provide the benefits of a liberal arts education through “an interdisciplinary education, mixing elements of social science and humanities with legal doctrine” (p. 42). In addition to an undergraduate degree, their model would also permit alternative JD programs. Like McGinnis and Mangas, Pearce (2012a, b) promotes an undergraduate law degree, a one-year intensive course for those who complete a different undergraduate degree, and a shortened JD degree rather than the current three-year program.

Similarly, within the last two decades, many legal scholars have argued for lowering barriers more generally. Thomas Morgan (1977, 2010), Deborah L. Rhode (1996) and Russell G. Pearce (1995), and more recently Larry Ribstein (2007, 2010), Gillian Hadfield (2011), Benjamin Barton (2011) and Renee Newman Knake (2012), among others,<sup>30</sup> have argued for significant deregulation of the legal profession. Knake’s influential work, for example, argues that the prohibition on corporation ownership of law practices both violates the United States Constitution and impedes access to services for low- and middle-income consumers.<sup>31</sup> Knake (2012, p. 9) predicts a shift to permitting corporate ownership, citing the ongoing litigation against the corporate ownership ban in New York, New Jersey, Connecticut and North Carolina. Morgan (2010), Pearce (1995), Hadfield (2011), Barton (2011) and Ribstein (2007, 2010) argue that law firms already function as profit-seeking businesses and accordingly deregulation will increase access to, and improve the quality of, legal services without corrupting the legal profession.

Nonetheless, proponents of high barriers continue to have great influence. The leadership of the American bar persists in promoting high barriers in developing countries (Pearce & Levine, 2009) and Japan, South Korea, and Taiwan are engaged in transitions to graduate legal education (McGinnis & Mangas, 2012, pp. 26–28). We hope that the framework presented in this article offers a new way

of evaluating such proposals in terms of their effectiveness in either promoting or undermining liberal and democratic values.

## 5. Conclusion

Low barriers to becoming a lawyer, consistent with minimum standards of competence in differentiated markets for legal services, best promote liberal and democratic values. Low barriers make it easier to become a lawyer and to purchase legal services. In doing so, they provide more equal access to political and economic institutions, and greater protection for human rights and the rule of law. High barriers, as in the examples of the United States and South Africa, favor those who are already privileged in society and disadvantage those who are less privileged, without demonstrably improving the quality of legal services. Proponents of high barriers have failed to offer persuasive evidence to the contrary.

We acknowledge that there is only very limited empirical research, if any, on basic issues we have raised, including exactly what specific minimum standards are necessary for consumer protection and the precise ways in which lower barriers promote liberal and democratic values. In the absence of definitive research on these topics, we conclude that the weight of liberal and democratic values favors low barriers and requires that any defense of high barriers must satisfy the burden of persuasion.

Determining a more calibrated approach requires further research into both the efficacy of barriers to the delivery of services and their implications for liberal and democratic values. First, research could identify the specific training required to resolve competently different types of legal problem, as well as to promote commitment to ethics and the public good among legal services providers. For example, research could prove or disprove whether an undergraduate liberal arts education is essential to providing all types of legal services or to maintaining a commitment to ethics and the public good. Second, research into jurisdictions that increase or decrease barriers, or between jurisdictions with higher and lower barriers, could help illuminate the extent to which barriers correlate with more equal access to legal or economic power. For example, although England and Wales have historically provided less economic mobility than the United States, they have in recent years surpassed the United States (DeParle, 2012). Economic mobility is, of course, a liberal and democratic goal. Given the importance of lawyers to both political and economic opportunity, our thesis would predict this result in light of the significantly lower barriers to providing legal services in England and Wales. But whether low barriers to legal services have indeed had a meaningful influence on this result requires further investigation.

## Acknowledgments

Russ Pearce presented drafts of this article at the Oñati International Institute for the Sociology of Law workshop on *Too Many Lawyers: Facts, Reasons, Consequences, and Solutions* and a Chicago-Kent Law School faculty workshop. We are very grateful to the participants in these workshops for their extremely helpful comments and suggestions. We also owe a special thanks to John McGinnis for his helpful insights. Last, we

could not have completed this article without the extraordinary contributions of reference librarian Laurence Abraham and research assistants Ross Miller and Ademisope Mojiminiyi.

## Notes

- [1] The legitimacy of liberal and democratic values is beyond the scope of this Article. See, for example, Pearce (2006, pp. 1358–1365).
- [2] Cf. Abel (1987, p. 467), explaining that “[t]o assert a legal claim is to perform a vital civic obligation”.
- [3] See Pearce (2001, pp. 385–387, 2006, pp. 1354–1356), Pearce & Wald (2011), Green & Pearce (2009, p. 1212), Breyer (2000, pp. 8, 11, 15, 16, 18, 21–22), Simon (2000, pp. 63, 80, 118–120), Wendel (2010, pp. 89–92), Ziv (2009, pp. 1767–1770) and Luban (2009, p. 9).
- [4] See also Abel (1987, p. 454), noting that “[l]itigation is an important form of political activity: courts exercise political authority, modify substantive laws, and allocate resources”.
- [5] Of course, minimal standards of consumer protection would also require methods for addressing lawyers’ violation of ethical and legal obligations (Barton, 2011, pp. 147–151).
- [6] Indeed, we note that some commentators, such as Milton Friedman, rejected any occupational licensing requirements on the ground that they artificially increased the price and reduced the quality of professional services (Friedman, 1962, pp. 137–160).
- [7] These barriers would have been even more prohibitive earlier in the twentieth century. The percentage of persons aged 25 years and over with an undergraduate or advanced degree has increased from 2.7% in 1910 to 3.9% in 1930, 7.7% in 1960, and 30.1% in 2011 (National Center for Educational Statistics, 2011).
- [8] Levin & Alkoby (2012) identify similar results in Canada.
- [9] In Fall 2010, only 7.2% of law school matriculants were black (LSAC, 2010), although 12.9% of America’s population was black (<http://www.lsac.org/LSACResources/Data/matrics-by-ethnicity.asp>; Rastogi *et al.*, 2011, p. 3). Similarly, Hispanics and Latinos made up only 6.1% of matriculants (LSAC, 2010) while comprising 16% of the population (Ennis *et al.*, 2011, p. 2).
- [10] Sander’s (1997, p. 475) UCLA study found that for law students at the school, “the median income of student’s parents was more than double the national median”.
- [11] Consider the claim by Halliday & Karpik (1997, p. 53) that the credibility of those who seek to link political goals and the public good may be undermined by a strong commitment to corporate markets and the intense pursuit of material interest.
- [12] See generally Barton (2005) and Winston *et al.* (2011, pp. 83–84: “In the case of legal services, it is not clear that occupational licensing has measurably improved service quality because no evidence exists to justify the ABA’s initial accreditation policies”). Wald & Pearce (2011, p. 405) argue that “Law schools have been instilling a very specific brand of professional identity, forming students into autonomously self-interested lawyers” who “believe that their duties to the public interest and to public service are fulfilled by their representation of private client interests such that they have no other responsibility to further the rule of law and access to justice.” See also Kronman (2000, p. 32) and Hamilton & Monson (2011).
- [13] Even some of the key arguments that helped persuade the ABA to adopt high barriers would be considered bigoted and unpersuasive today. In 1929, Henry Drinker, a leader in the field of legal ethics, argued that higher barriers would ensure that only the “right kind of people” (Levine, 2005, pp. 8–9) entered the legal profession and would exclude potential lawyers who “came up from the gutter”, such as “Russian Jew boys” (ABA, 1929, pp. 605, 621–624).
- [14] See Galanter (1994, pp. 647–656) and Cross (2005, pp. 9–10).
- [15] See Mystal (2011), Robinson (2011), Elefant (2011), NY Times Editorial (2011) and Winston (2011).
- [16] See also Cantrell (2004, pp. 883, 888–891) and Moorhead (2003, pp. 784–789).
- [17] See also Cantrell (2004, pp. 887–888).

- [18] For example, the ABA has opposed the use of some self-help services for consumers, professing worry about their quality: “The stated concern is that ignorant consumers will suffer from assistance offered by individuals who do not meet the competence and ethical standards established for licensed attorneys.” The upshot of this resistance “is that a majority of surveyed courts lack formal services to assist pro se litigants” (Rhode, 2004, p. 83).
- [19] See, for example, Rampell (2011: “The climate is hard partly because of the weak economy, but also partly because the nation’s law schools are churning out more lawyers than the economy needs even in the long run”); Greenbaum (2010: “[T]housands of lawyers now find themselves drowning in the unemployment line as the legal sector is being badly saturated with attorneys”); Lowrey (2011: “The demand for lawyers has fallen off a cliff, both due to the short-term crisis of the recession and long-term changes to the industry, and is only starting to rebound”); and Lat (2010: “I share the concern that perhaps too many schools are cranking out too many debt-saddled graduates, releasing them into an already saturated legal job market”).
- [20] See Grassley (2011) and Mystal (2010).
- [21] See Greenbaum (2010) and Mystal (2010).
- [22] See Winston *et al.* (2011, p. 94), Somin (2011) and McGinnis & Mangas (2012).
- [23] Notwithstanding these lower barriers, the United Kingdom continues to face challenges in providing women and people of color with equal access to becoming a lawyer (Sommerlad *et al.*, 2010).
- [24] Although Tesco had previously “experimented over the years in offering legal services by contracting with outside lawyers” (Knake, 2012, pp. 6, 40), the 2007 Legal Services Act allowed them to start providing these services themselves. For a consumer-oriented comparison between various forms of will-writing, including do-it-yourself wills and hiring a lawyer, see Legal Services Board (2011).
- [25] See Whelan (2009, pp. 472–75) and Webb (2004, p. 81).
- [26] For example, Avrom Sherr (1998, p. 2) writes that “deregulation . . . [and] competition within and among the professions” are responsible for the legal profession’s “move away from the altruism of the professional ideal towards a more open commercialism”. Moorhead (2010, p. 227). argues that changing norms of legal practice, marked by deregulation and greater specialisation, bring negative consequences for both lawyers and clients: “Work is de-skilled and broken up into different activities which can be handled by lower level operatives. Many working within this new system find it easier to begin areas of highly complex work. However, long hours and the repetitive nature of the work have caused many young solicitors stress and worries about whether they have made the right choice of career.” He further suggests that the new approaches result in multiple lawyers handling the various elements of a client’s case and undercut the possibility of a sustained relationship between lawyer and client that can inform the lawyer’s advocacy.
- [27] Mark (2009, p. 47) defines legal practitioners as those with a full license to practice law. See also Knake (2012, pp. 10, 39).
- [28] See Mark (2009, p. 55), Knake (2012, p. 39) and also Grech & Morrison (2009).
- [29] Interestingly, in systems that require apprenticeship, commentators have noted that such a requirement tends to favor those who are privileged on the basis of class, gender, race, or national origin (Levin & Alkoby, 2012, pp. 15–16; Sommerlad *et al.*, 2010, pp. 31–36; Sommerlad & Stapleford, 2009).
- [30] Knake (2012, pp. 37–38) notes the contributions of Edward Adams, John Matheson, Mitt Regan, and Charles Wolfram.
- [31] To Knake (2012, p. 7), “It is not difficult to imagine other alternative law delivery models that might be developed if a company like Google could take the next step to directly own or invest in a law practice, or if Wal-Mart could add a legal assistance window next to the banking center or health care provider located in its stores.”

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