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Uncapturing Law School Regulation

Saul Levmore

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I agree with most of what the previous speaker has said, and I doubt that I would have said it as well. I will instead talk a bit about the regulatory environment in which we find ourselves, as well as the prospect of change. It is one thing to feel outrage, and quite another to imagine the world as different from the way it is at present. Regulatory capture may be nearly inevitable.

It is unsurprising that most people affected by law, here and elsewhere, are uncomfortable with the idea of anybody simply self-identifying as a lawyer, engineer, doctor, or nurse, without formal training and licensing. We can imagine a competitive world, with many well-informed consumers and no expectation of licensing, in which people develop brand names in order to convey information. But that world, with ease of entry and reputation as a controlling mechanism, seems surreal. The question is, then, how do we regulate in the world we know? One possibility is to measure output. State, national, or private exams could be used, much as they are used for drivers' licenses. But once we move to air conditioning engineers and beyond, political activity is everywhere.

Think, for instance, of The University of Chicago and its great students. Much as I resist sounding like Stanley Kaplan, of test preparation fame, I do not think any state bar can come up with an exam that our students could not pass at a 98 or 99 percent rate, so long as the intention is for well-equipped graduates of local law schools to pass as well. The students at elite law schools have a great many skills, and one of those skills is being very, very good at taking exams. It is, after all, part of what was needed to gain entry to such schools in the first place. We might think that some elite law schools could do a much better job training lawyers and educating students. But it is unlikely or even

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impossible for a bar exam to have much affect on the legal education at these elite schools, because any exam that works for the mass of applicants will be easily passed by those masters of exam taking. In developing an exam that works for a broader population of bar applicants, the testmakers lose their ability (at least through an output test) to have much influence on what Yale Law School or another elite law school does. If they wish to control legal education, they must therefore regulate the elite law school's inputs.

As a result, regulators, if empowered, will naturally seek to affect (even) the elite law schools through direct regulation of their inputs. There will develop rules about what ought to be taught and for how many hours, and so forth. I call this "natural" because when well-meaning people get together to certify members of a profession, it is inevitable that they will try to improve the profession in the process. Each regulator has a view of what the profession requires, and those views will be reflected in instructions to the law schools and applicants.

Of course, potential regulators could choose not to regulate. They might decide to rely on the ABA or some national quasi-accrediting agency to certify law school graduates as fit to practice. Some who sit for the bar will have been self-educated. But I think this is politically unrealistic.

In the real world, people affiliated with the ABA and other organizations, either professionally or in a volunteer capacity, start thinking, "What would make a law school reputable and trustworthy?" We do not want just anyone, or especially someone who is "trained" outside of established schools to call himself a lawyer or an engineer. This is where the ABA and the Section on Legal Education are at present. They start out by saying that everyone should not be able to call themselves a lawyer, and before long they find themselves at meetings with other well-intentioned people, saying "I guess it was too much to require 7.3 linear feet of space for each ten students in the library. Oh, we'll cut back on that a little bit and then we'll add this and that."[1] There is constant regulation and re-regulation. The

1. For the current library facility regulations, which are now more general than the specific requirements in the past, see AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, 2006–2007 STANDARDS AND RULES OF PROCEDURE at Standard 702 (2006), *available at* http://www.abanet.org/legaled/standards/2006-2007StandardsBookMaster.PDF.

regulators begin to think how they might have been better educated, or how they might ensure that lawyers are trustworthy and reputable. They begin by agreeing that not everyone ought to be able to self-identify as a lawyer, and they move to a scene in which there is an ABA and a Section on Legal Education with frequent meetings and proposals and requests from interest groups. They come to require blackboards of certain sizes, faculty with certain length contracts, and much more. Each step seems reasonable, or at least responsive to some particular concern, and each is a testament to process. But the overall product is a regulatory code that is long, subjective, open to constant lobbying, and capable of disparate and strategic interpretation. In turn, the regulated entities, which are the law schools for the most part, must prepare mountains of paperwork—in anticipation of and then in response to each site visit. It is an enormous regulatory apparatus, all done, presumably, in order to seem evenhanded in saying to a few start-up schools, "You know, you look a little too much like some guy in his living room trying to turn out lawyers left and right." I do not know that we will find an easy solution to this problem, but you have to understand that what I describe is reality, and a perfectly predictable though unpleasant picture.

I am [at the time of this conference] the President of the American Law Deans Association, which might also sound like an interest group. But when we are having a meeting and there are 150 people in the room going on about sending letters to the Department of Education and the Department of Justice to complain about regulations, no dean stands up to say, "No, stop complaining about the regulatory requirements because I love the present system." But a few come close. Some might say "I like the present system. It has been good for me as a dean of five law schools over my career. Sometimes it has helped me convince my university's president to authorize funds for construction; sometimes it has helped by barring an incompetent new law school from starting up down the road from me, after all the hard work we put in." These, of course, are the words of anti-competitiveness. They are the complaints of someone who has leaped over the regulatory barrier and resents the idea or unfairness that the next institution in line might face a lower barrier. One you have a library of the "right" size, diversity of the right kind and degree, a legal writing program that meets

someone else's (normally extant, very senior legal writing instructors themselves) idea of minimum standards, and an "appropriate" clinical program, you do not want that new fellow opening up a law school that could compete without having to meet all of these requirements. Suddenly, those who were burdened by input regulation in the past become the biggest fans of regulation. The deans of secure, major law schools with a 95 percent bar passage rate have no interest in this regulatory apparatus. This should warn us that the regulatory system is anti-competitive.

As described thus far, it would be unsurprising if university provosts and presidents reported that the accreditation of law schools was no different from that of schools established to certify engineers, doctors, and architects. But by all accounts the comparison suggests that we lawyers win the prize for overregulation. Presidents of universities do not hear from their engineering, nursing, or medical school deans that they must hire faculty in a certain way or find their accreditation threatened. The market seems to work well for those professions, and perhaps the influence of insurers plays some role. If one wants to take an exam to be a pediatrician, that exam—the output measure—seems to be effective. It is only law schools that are constantly burdening their central administrations with regulations. This fact suggests a bureaucracy out of control, instituted by well-meaning people but bogged down by interest groups that have brought about a large number of the regulations and standards currently in place.

I suggest that skeptics attend a meeting of the Section on Legal Education. The room will be circled with representatives of interest groups, all insisting that they know what is good for the profession and the country. Somehow the good is always to have more regulation and legislation. Good luck in the attempt at deregulation.