LETTERS

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

DON'T RAZE THE BAR

As the authors of two articles on the regulation of lawyers (*Journal of Regulatory Economics* 7:63-85, 1995 and *George Mason University Law Review* 14:253-286, 1991), we read with great interest George C. Leef's article, "Lawyer Fees Too High?" (*Regulation*, Vol. 20, No. 1, Winter 1997). While there is, no doubt, some truth to the cartel theory of the legal profession, we believe the article overstates the effects of state bar regulations on the prices of legal services and in the process, oversimplifies the regulation of the legal profession.

Leef's basic thesis—that lawyers have a monopoly on legal services that greatly increases their prices—can and should be taken to task. As we note in our research cited above (not cited by Leef) the most striking thing about the legal profession is the dramatic entry into the profession in the past thirty-five years, more than doubling the number of lawyers per capita in this country. In raw numbers, lawyers increased from 286,000 in 1960 to 757,000 in 1988 and to more than 800,000 by 1991. Indeed, many scholars have lamented that there are too many lawyers, encouraging too many frivolous lawsuits and that, in effect, the standards of "professionalism" have declined. Some economists have gone so far as to argue that economic growth is inversely related to the number of per-capita lawyers in a country (K. Murphy et al. *Quarterly Journal of Economics* 106:503-30, 1991).

In our research, which used data on the prices of various services (adoption, DUI defense, simple divorce, will) from a sample of over five hundred small firms in forty-eight states from 1986-1988, we were impressed by how inexpensive many of those services had become. Lawyers, at least for routine procedures, are no more expensive than a plumber. For example, in our data the average hourly rate was just $55 and the average price of a will was only $48.

Leef implicitly relies on Nobel laureate economist George Stigler's "capture theory," which was, arguably, a crucial starting point in the economic theory of regulation but one that ignores the forces of competing interest groups and the role of bureaucracy. In fact, as we prepared our study, we were struck by the lack of empirical support for the capture theory in the literature on regulation even though it has almost become folklore among many economists. In our own study, we found almost no effect from state bar restrictions on in-state residency requirements, bar exam pass rates, reciprocal licensing rules, or on the prices that lawyers charged for basic legal services. Instead, we found that variables that approximated relative supply and demand forces were the most powerful explanatory forces. It should be noted, however, our study focussed on relatively small firms whose practice was generally concentrated in the provision of routine legal services such as uncontested divorces and simple wills, so our findings may not hold for other, more complex legal services.

Though our study did not support Stigler's simple capture theory, it remains possible that a more complicated interest group story does explain the existence and persistence of legal licensure. For example, it is possible that licensure benefits larger, more specialized law firms at the expense of the small, generalized law firms that are overrepresented in our data. A review of the literature, though, demonstrates that the impact of licensure, both legal and for other professions, has an inconsistent impact upon prices and professional income. At times, or for some professions, licensure has the price/income enhancing effects implied by Stigler's capture theory. At other times, however, as indicated by our study, no such effects are found.

Theoretical extensions of Stigler's early work (e.g., Gary Becker, *Quarterly Journal of Economics*, 98:371-400, 1983 and Sam Peltzman, *Journal of Law and Economics*, 19:211-244, 1976) lend credence to a complex view of licensure where competition among different interest groups, including consumers and lawyers in general, as well as coalitions of lawyers, would be expected to have an impact upon the outcome of licensure. Empirically, it is Becker's and Peltzman's more complex view of licensure, rather than Stigler's simple view, that seems more likely. Their view of licensure is further supported by the observation that lawyers have been less able, in the recent past, to control licensure. Two examples include the recent loss of the ability to restrict advertising for legal services by bar associations as well as the successful attempt by consumer groups, title insurers, and real estate groups to block bar association attempts to extend legal licensing to title searches in many states.

We would be remiss if we did not acknowledge some of the important points made by Leef. For example, he notes how the bar has often, but not always, been able to prevent nonlawyers from providing simple services such as real estate conveyances. Indeed, many recent political battles have been fought over the extent of services for which a lawyer is required. Leef provides a service by indicating how professional associations can limit entry into markets, but he does not carefully consider the benefits of such associations or look in detail

at the tremendous recent entry into the legal profession. He states: "UPL statutes, however, are still a major barrier to competition in legal services." In our view his "Global Warming" style crisis call seems unwarranted mainly because his policy recommendations are not tied to a compelling study of the regulation of the legal profession but, instead, are based upon simplistic theory.

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REED OLSEN
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MICHAEL RANSOM
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LEEF RESPONDS:
Professors Lueck, Olsen, and Ransom criticize my article on the grounds that I did not develop or defend a more complete theory of regulation, but instead based my attack on the legal profession's UPL barrier to competition on a "simplistic" theory. In fact, it was not my intention to develop any theory of regulation at all, but only to argue that occupational licensure backed up by legal sanctions against individuals who offer their services without having gone through the bar's prescribed pathway into the legal services market is neither necessary nor sufficient to achieve any legitimate public policy objective. Nothing in their letter argues to the contrary.

As I noted—although, I submit, without any hint of "Global Warming style crisis" rhetoric—prior to the days of UPL prohibitions, people desiring to enter the market for legal services could choose among various training options. Until the organized bar succeeded in locking in place the current standard of the three-year law school, many schools offered only one-year to two-year programs. Moreover, a majority of lawyers learned their trade in law offices. In the days when law school had to pass the test of the market, only a tiny percentage of lawyers chose as optimal the now mandatory three-year investment.

My contention is that we would make better use of resources and that the prices for at least some legal services would fall (as was the case in England when nonlawyers were permitted to enter the conveyancing market) if it were not for the mandate that you must be a bar member, with all the human capital investment that entails, before you can legally offer any service. Lueck, et al. may well be correct in finding that the prices of some legal services are no more expensive than hiring a plumber, but that is quite compatible with my argument that they would be lower still if we had a freer market in legal services. They are also indisputably correct in saying that there has been a great deal of entry into the legal profession over the last few decades. That is not surprising, given the enormous volume of legislation and regulation that creates a demand for legal assistance. But again, that fact does nothing to rebut my argument that the nation would have been better off if the training of those legal practitioners had occurred under the efficient standards of the market rather than under arbitrary political standards demanded by the bar.

They maintain further that I failed to consider the benefits of professional associations. The possible benefits of professional associations was beyond the scope of my article, but I did argue that consumers derive no benefit from the restriction on entry into the legal marketplace—UPL prohibitions—that professional associations of lawyers have labored to have enacted. If there are, in fact, benefits to consumers from contracting for services with the members of a professional association, they will pay the price and do so voluntarily. I can see no reason, however, to limit their choices to members of a bar association only. A free market backed by remedies for the occasional instance of incompetence, negligence, breach of contract, or fraud provides consumers with at least as much protection against bad legal practice as do UPL prohibitions, without limiting their options. Beside all of that, UPL enforcement necessarily means the sanctioning of coercion against individuals who have done nothing more than render services to others; services that were sought and willingly paid for. I find that morally repugnant and incompatible with the proper role of government in a free society

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CHECK THE SOURCE
Bridgitte Madrian, in her winter 1998 article, considered in detail the available alternatives for insurance portability under current employment-linked insurance. In conclusion, she demonstrated that there are no good alternatives. She proposed medical savings accounts, but failed to elaborate.

The nature of employment-linked, rather than individual-based insurance, goes against a free market approach to health care and health insurance. Employment-based insurance gives subscribers little or no choice of policies, and shields them from their own expenses. In short, employees get the best deal when they use their employer-sponsored insurance the most. Employers are left to handle the expenses, but are not allowed to discriminate among employees, such that each employee would more closely contribute his own costs.

Portability problems are inherent to an employment-linked system for the simple reason that the employer, not the subscriber, owns the policy. Under employment-based policies, subscribers cannot purchase a policy that would protect them from exorbitant rate hikes following an illness. It is equivalent to having a life insurance policy that could raise rates without limit should the policyholder get a terminal illness.

Employment-based insurance grossly distorts the medical system. The medical customer is essentially split into two entities—the patient who seeks services and the employer who directly pays most of the costs. Employers respond by sharing the costs among all employees, via wage reductions and equally distributed insurance expenses. The incentives are reversed—thrifty patients with illnesses lose out because they cannot get protection from rate hikes, and often

become locked into their job.

Caregivers face distortions as well. They are responsible to patients for care, and to insurers for costs. Rationing of care is done by distant third parties, rather than the caregivers and patients familiar with the situation and circumstances. Similarly, insurers are responsible to subscribers for their coverage, and to employers for costs. Policy selection is based on the employer's situation, in a one-size-fits-all manner, rather than the subscriber's desires.

The system is inherently flawed. Regulations cannot change these incentives—an overhaul of the system is necessary. Current regulations have served to worsen the situation, with major breaks given for group policies (primarily ERISA protections and tax treatment), which are denied to ordinary citizens.

Medical Savings Accounts answer those problems well. When individually owned, policies are selected and owned by subscribers, who are financially rewarded for thrift, and can purchase protection from rate hikes. Caregivers and insurers are then responsible to subscribers for both care and costs. MSA's would promote competition to provide value.

The transition from employer-based to individual responsibility for health care (MSA's) would leave the ill, without rate hike protections, in a bind. That transition, instead of propagation of employer-based health care, should be the focus of policy analysis.

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BAH HUMBUG!

Like Dickens in his Christmas Carol, Calfee tells tales of "The Ghost of Cigarette Advertising Past" (*Regulation*, Spring 1997, Vol. 20, No. 3) to scare us into reforming our ways. He would have us be more charitable toward the tobacco industry, rejecting regulatory restraints on their advertising to allow them to engage in "unbridled" activity. Using experiences four decades old, he holds that: (1) deregulated competition will produce "fear" advertising, (2) driving consumers to lower tar and nicotine (T/N) yield products, (3) advancing public health as the result. Each of those three necessary premises is in serious doubt. When the industry and its advocates sing "Hallelujah," others should shout "Humbug!"

Because the author has consulted with R. J. Reynolds has been on the FTC staff, and has been active in, and recognized by, consumer behavior and marketing academic associations, readers might wrongly suppose that his is a well informed, thoughtful argument, integrating and balancing supplemental perspectives. His evidence is flawed and there are serious omissions in his argument. He errs in describing cigarettes as a "mature" market in the 1920s, when sales to women were just taking off and would grow substantially over the next decades. He also ignores recent low-tar competition. But more important than those sorts of errors is what in his article is misconstrued or totally missing. He misconstrues the health benefits of low yield tobacco products. Most amazingly, he ignores addiction and related consumer behavior, the oligopolistic and collusive nature of this industry, and the dynamic and adaptive nature of its marketing strategies. Industrial organization and marketing, and consumer behavior would seem to be domains of his expertise, but apparently are not.

Calfee ignores recent low tar ads. Low-tar advertising in the 1980s by brands such as Now, Cambridge, and Carlton did not seem to have the effects he finds salutary. Some of those campaigns were misleading in an ingenious and invidious way—by advertising a product variety with very low tar and nicotine data for image purposes, e.g. 70mm in a hard box, but then selling consumers other varieties soft packs with literally hundreds of times as much T/N e.g. 100mm.

Calfee ignores consumer behavior. He fails to recognize the addictiveness of nicotine and the resulting well documented set of compensation behaviors that maintain nicotine intake for smokers even when they use lower yield products. Examples of compensation behavior include: smoking more, faster, closer to the butt; pinching and defeating the filter effectiveness; and covering filter vent holes (often invisible and placed were fingers naturally fall). Those product designs and compensation behavior undermine any potential health benefit that otherwise might result from low yield products.

Calfee ignores all health consequences but lung cancer. The narrow focus helps make any movement toward lower T/N products more intuitively appealing, but we now know that is an illusion. He ignores the more numerous rates of death and disease from circulatory effects (strokes and heart attacks), and other lung diseases like emphysema, and cancers in myriad sites other than the lungs. Smoking low T/N products may change the relative incidence of those various afflictions, but Calfee never establishes any public health benefit for that. Calfee naively accepts, like countless millions of duped smokers, the premise that lower yield products are healthy, or least healthier than higher yield products. He is grievously inconsistent on that point, however, admitting at one point to "no epidemiological evidence that reduced tar meant improved health" while none-the-less holding elsewhere that lower yield product forms were "improvements."

Calfee ignores current policy preferences. The public health community has seen the folly of simply switching smokers to lower T/N products. That policy objective was always conditional upon the premise that if, and only if, smokers were too addicted to quit that they might be better served by smoking lower yield products. That hopeful conditional advice is now dated, as the evidence accumulates on the high incidence of diseases among smokers of such products. Only the industry prefers that smokers switch rather than quit.

Calfee ignores industry learning. He takes no account of the possibility that industry learned lessons from "The Ghost of Cigarette Advertising Past." The tobacco and advertising trade presses both exhorted the industry to recognize the folly of hectoring the public with

health claims. Their commissioned motivation research studies taught them that verbal health claims were akin to saying, "I don't beat my wife." They mean to reassure, but ultimately they raise doubt and keep the health criterion salient. Far better, they counseled, to use pictures of health and implied healthfulness that are taken in at a glance with minimal cognitive processing and counter-argumentation. Small wonder that in their "secret negotiations" the industry lawyers drafted and agreed to advertising regulations to create a cease fire in the tar wars. Since then, industry lawyers (not the FTC) have killed health ad claims and new product development projects lest they impugn the balance of the products by implication.

Calfee ignores potential collusion. With only five current participants, this oligopoly finds it relatively easy to act in concert. That is illustrated by their history pricing, the jointly acquired PR activities of Hill and Knowlton, the industry wide Tobacco Institute, the Center for Tobacco Research, their lobbying activities, their shared defense strategies against law suits, the phalanx of CEOs asserting the nonaddictiveness of nicotine to Congress, and on and on. In the rare event of defections, such as Ligget's recent admissions regarding standard industry practices, the industry can punish the renegade. Clauses punitive only to "nonsigners," i.e. only Liggett, is part of the draft national settlement agreement being considered for congressional endorsement.

Calfee ignores primary demand effects. That was then—this is now. How confidently can we expect the transient changes seen four decades ago to be replicated today? In the 1950s filters were a novel technology just becoming a popular product form. Today filters already totally dominate the market. In the 1950s the majority of adults were smokers, whereas today a far smaller and harder core of smokers persists.

Think—for God's sake. Enactment of Calfee's position would allow the industry total license to engage in the most misleading and egregious of health claims for cigarettes. Cigarette advertising and promotion, is, by definition, drug pushing with deadly delayed consequences. If done expertly and with media weight, much less with license to lie, how can we expect the net consequence to be beneficial? Consider the following satirical ad copy (written in the Christmas season) glorifying a low tar product.

GLORY TO THE LOW-TAR KING
Hark! The herald angels sing:
Glory to the Low-Tar King
Best on earth, and oh so mild
Health and pleasure reconciled.

Joy! The brand we sanctify.
Joy! The triumph of our lie.
Joy! Angelic ads proclaim
Smoke in peace—no fear, no phlegm.

Hark! The herald angels sing:
For God's sake smoke the Low-Tar King.

There are lessons to be learned. Calfee is or should be highly familiar with tobacco industry structure, marketing practices, and relevant consumer behavior. Ignoring those seems to be a willful blindness and a dereliction of intellectual and public duty. Those sorts of errors and omissions have been pointed out to Calfee by others and myself in response to other publications a decade ago, giving him ample time to at least attempt an improved analysis.

Despite my utter rejection of Calfee's limited analysis and interpretation, I agree that the history of the tar wars might have important lessons for us today. The industry played the FTC process like a fiddle, just as they have frequently befuddled Congress. They frustrated the FTC complaints of the 40s with very protracted litigation, resulting in trivial fines and sorely belated decisions with limited precedent value. They co-opted to the agency in the 1950s through its Bureau of Consultation, so that the FTC ended up being the mechanism for the establishment and enforcement of the cartel-like advertising standards drafted by the industry committee of Washington lawyers for what Calfee calls "secret negotiations."

A bottom line policy question is who is more likely to advance the public interest—the cigarette industry or public health regulators. We shouldn't conclude from the regulatory failures of the 1950s that all regulations from the FTC or others are inevitably doomed, however. Perhaps only those regulations the industry willingly accepts are flawed. Regulation endorsed by the industry is almost certain to be in its self-interest and necessarily in conflict with the public interest. That simple fact is all too easily overlooked in the rush to legislate the current national settlement.

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WRONGING THE RIGHTS

We recently read the informative and interesting piece on "The Politics of Public Lands" by Dale Arthur Oesterle in the fall 1997 issue of *Regulation.* However, we were surprised to read, at the very end, the characterization of the bulldozing of roadways through wilderness study areas ordered by County Commissioners in three Utah counties as a "blatant trespass on federal land" and that the Commissioners' arguments concerning their justification for bulldozing those roads were based upon an "obscure statute from the Civil War era." The article then suggested that "torturing the language of old statutes is a game all can play."

We believe the article refers to public rights of way established across public lands under RS-2477. We live in rural Nevada and are very familiar with RS-2477 rights of way, public roads established through public use and custom under Revised Statute 2477 (recodified as 43 U.S.C.§ 932). That Act of 26 July 1866 stated simply that "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." This right to create public rights of way over public lands by use and custom was in effect until the passage by Congress, in 1976, of the Federal Land Policy and Management

Act (FLPMA). Though, under the FLPMA, new roads can no longer be created over the public lands under RS-2477, public rights to continue to use all RS-2477 rights of way established prior to 1976 were explicitly preserved under the "savings provision" of the FLPMA.

Since wilderness areas must be, by definition, roadless, the existence of an extensive crisscrossing of the public lands of the West by tens of thousands of RS-2477 roads established by use and custom prior to 1976 is a serious hindrance to the creation of more wilderness areas. If the Commissioners of the three Utah Counties referred to in the Oesterle article bulldozed to reopen RS-2477 public rights of way that were illegally bulldozed closed (as many are) by one of the U.S. government land agencies, then they were entirely justified in doing so. If the roads the Commissioners had bulldozed were new roads, not used as RS-2477 rights of way prior to 1976, then they could not justify their actions under RS-2477 and the "savings provision" of the FLPMA.

There is nothing obscure about RS-2477. Many court decisions into the 1990s upheld the public right to use RS-2477 rights of way over federally controlled lands and defined what constitutes RS-2477 rights of way. There are ongoing attempts by the Bureau of Land Management, the Forest Service, and other federal land agencies to extinguish those rights unilaterally, in defiance of an explicit Congressional ban—Sec. 108 of the 1996 Department of the Interior appropriations bill—by, for example, requiring that roads be maintained by a public agency or by mechanical means. Perhaps that is why the Commissioners called out the bulldozers. There are no such requirements in RS-2477 or in the court decisions concerning RS-2477 rights-of-way. In arid Nevada, there is usually no need for mechanical maintenance. Moreover, RS-2477 roads are generally maintained informally by the users of such roads rather than by a public agency.

In the West, much of the vital infrastructure, such as rights of way for telephone lines, electric power lines, water pipelines, access to private property, and privately owned water, consists of rights of way created under RS-2477 prior to 1976. If the federal government is able to gain control of those rights of way by extinguishing those rights (without compensation), it would be a catastrophic blow to the independence of most towns and cities of the West. That applies to many towns and cities in the East as well, though it is not as well known there. The feds could hold all those towns and cities up for ransom by demanding all sorts of concessions in order for the feds "allow" them to continue using the RS-2477 rights of way.

The legal and constitutional battle over the status of RS-2477 roads is far from over. Since 1994, we have made public comments over a series of Bureau of Land Management and U.S. Forest Service proposed new rules published in the Federal Register concerning RS-2477 rights of way that are designed to extinguish roughly 95 percent of such rights of way. In early 1997, Bruce Babbitt, the Secretary of the Department of the Interior, tried to change the definition of RS-2477 by internal memo, not even bothering with the requirements of the Administrative Procedure Act for publishing proposed rules in the Federal Register and allowing for public comment. This year, the U.S. Forest Service is also using an internal memo to attempt to extinguish RS-2477 rights of way. We are fighting those unlawful and unconstitutional acts and shall continue to do so.

DURK PEARSON AND SANDY SHAW
People for the Constitution

OESTERLE RESPONDS:
The letter is correct, I was referring to Section 8 of the Act of 26 July 1866, 14 Stat. 253. The 1866 Act granted rights of way for the construction of highways over public lands and any rights of way established before the repeal of the statute in 1976 survive. At issue is what rights of way predated the 1976 Act. The counties are taking a very liberal view of what is a preestablished right of way and asserting that anywhere there is currently evidence of a vehicle track a right of way was established in 1976. Even if they are correct on th existence of the right-of-ways, the counties have no right to expand them. Moreover, the counties are not content to await a judicial hearing on whether their controversial claims are correct, they are using self-help and blading all roads they claim, which of course destroys the evidence on the character of the tracks that they have enlarged.