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Licensure: A Protection Racket for Attorneys

by Jacob G. Hornberger

One of the most popularly held beliefs in American society is that state licensing of attorneys is necessary to ensure that they are competent. But you'd have a hard time convincing people accused of crimes in Virginia of that. In an editorial entitled "[A System Still in Crisis](#)", the *Washington Post* describes in excruciating detail how so many criminal defendants in Virginia have been and are being inadequately represented by attorneys.

"Between April and September the state court of appeals dismissed at least 165 criminal appeals not because they lacked merit but because people appealing convictions missed key filing deadlines. Attorneys committed most of these errors, not clients representing themselves, and the bulk of those errors were committed by court-appointed lawyers or public defenders named to represent defendants who could not afford to hire lawyers on their own. Such numbers are shocking, but also depressingly typical, as we reported earlier. In 2003, the Virginia Court of Appeals threw out more than 10 percent of its criminal docket because of calendar errors committed overwhelmingly by attorneys."

Unfortunately, most people believe that the solution is simply to discipline those state licensed attorneys more harshly. Failing to think outside the box, they fail to ask the critical question, Does occupational licensure of attorneys ensure competent attorneys and if not, why do we need it?

As the criminal-justice crisis in Virginia perfectly reflects, occupational licensure does not ensure competence or, for that matter, ethics. Instead, it seduces the public into believing that because a lawyer is licensed by the state, he must be competent and ethical.

So what is the purpose and effect of occupational licensure? It's very simple — licensure operates as a protection racket for attorneys, protecting them from unbridled competition. By limiting the supply of attorneys through a rigorous and expensive system involving getting into and attending law schools and then passing an extremely difficult, state administered bar exam difficult, [state-administered bar exam](#), lawyers are able to keep the number of practitioners artificially low, thereby enabling them to charge higher prices to the public. In fact, as J. Gordon

Hylton, professor of law at Marquette University, [pointed out](#) at a law conference at the University of Virginia School of Law, the reason Virginia imposed bar exams in the first place as a prerequisite to practicing law was to impede blacks from becoming attorneys, especially since the number of black attorneys was increasing during Reconstruction, when there were no state-imposed impediments to practicing law.

By repealing occupational licensure laws, we would still have, of course, incompetent and unethical attorneys, but at least consumers would be much more wary about the particular attorney they retained. Local and state bar associations could help consumers choose among a broad array of legal services by publishing lists of recommended attorneys and services. Prices for legal assistance would be likely to plummet, so that consumers would have more-reasonably priced legal services.

Of course, repeal of occupational licensure would entail overcoming vehement resistance from the bar, including all those incompetent attorneys whom the Commonwealth of Virginia has licensed to practice law.

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