Book Review. Glass Half Full: The Decline and Rebirth of the Legal Profession by Benjamin H. Barton

William D. Henderson
Indiana University Maurer School of Law, wihender@indiana.edu

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GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION

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Reviewed by William D. Henderson, Indiana University Maurer School of Law. Email: wihender@indiana.edu.

The laws of supply and demand have finally caught up with the modern U.S. legal profession, yet the lawyers that preside over the decaying hierarchy – law professors, BigLaw partners, bar associations, and state and federal judges – are substantially in denial. Why? Because the old order has been too good for too long, blinding its beneficiaries to the core ideals that make a life in the law worth living. But there is good news—those now entering the legal industry will have an opportunity to return to those ideals, albeit this renaissance is borne more out of necessity rather than virtue.

This is the core storyline of Ben Barton’s thoughtful and comprehensive new book, GLASS HALF FULL. The turmoil engulfing law schools and the legal profession are widely known, thanks to numerous stories in the New York Times and Wall Street Journal. Other contemporary authors have offered commentary on its causes (e.g., Trotter 2012; Tamanaha 2012; Harper 2013), though not with a wide-angle view that could plausibly tell the story as part of a broader historical cycle. A handful of capable legal professions scholars have attempted such treatments in the past (e.g., Friedman 1973; Auerbach 1976; Stevens 1983; Abel 1989; Galanter & Palay 1991; Morgan 2010). Barton synthesizes this vast amount of information into digestible narrative that encompasses the post-2008 crisis. To this credit, it also has a substantial ring of truth.

This was not a conventional scholarly project for Barton, who is a chaired professor at the University of Tennessee College of Law. As a fellow tenured professor who earns a good living teaching law at a flagship public law school, I can attest that this is a topic where a little bit of honest reflection can prick your conscience and cause you to lose sleep (primarily due to the debt loads taken on by our students; more on that below).

Many of us who feel this way (and not everyone does) write articles about it or organize conferences or develop new courses that fit the times and are designed to create employment opportunities for our students. One of Barton’s solutions was a write a book that combines a deep factual analysis with a humane, measured tone. As a work of pure scholarship, the book may be judged differently by social scientists. This is because the unstated purpose of GLASS HALF FULL to generate acceptance and hope within a community of professionals prone to skepticism, pessimism, contentiousness and overconfidence. Yes, that's right: lawyers.

Barton’s analysis is organized in three parts: The Market for Lawyers (Part I), Law Schools (Part II), and Big Picture and the Glass Half Full (Part III). Part I is the most substantive, original, and scholarly and develops the core theme of the book: that American lawyers are, as an historical matter, a profoundly resourceful and resilient profession that can ride out waves of crisis. The reason is that lawyers, at least in America, are too valuable for building and maintaining our institutions.

The ultimate purpose of GLASS HALF FULL is not to develop this thesis, but instead to apply it to the crisis at hand. Thus, the threshold task is to swiftly yet credibly summarize nearly 200 years of
history on the U.S. legal profession. And on this very difficult task, Barton largely succeeds.

Most lawyers (and citizens) know that lawyers were the primary architects of the American system of government. As De Tocqueville observed in 1831, lawyers were the closest thing in America to an aristocracy. Yet, it is less widely known that lawyers of that same vintage [*29] were trying to permanently secure their advantage by increasing educational requirements. This resulted in a backlash during the Jacksonian Era, which dismantled barriers to entry and crushed the earning power of lawyers.

After the Civil War, lawyers rebounded by playing an integral role in the nation’s transition to an industrial economy. With the formation of bar associations, including the ABA, new momentum gathered for minimum levels of education and mandatory bar exams. These barriers to entry proved to be far more enduring because state supreme courts began to assert control through a series of constitutional decisions that claimed inherent authority over the regulation of lawyers. The first inherent authority decision came from the Illinois Supreme Court, which mandated, as a condition of practice, a three-year education minimum plus passage of a bar exam.

Disenfranchised lawyers from two-year law schools managed to successfully petition the Illinois legislature for a law exempting them from these requirements. Yet, in IN RE DAY, the Illinois Supreme Court invalidated the law, reasoning that the legislature had assumed power that properly belonged to the courts. IN RE DAY subsequently became the topic of favorable commentary in the HARVARD LAW REVIEW, touching off imitation by other state supreme courts and erecting separation of power as the primary bulwark supporting lawyer self-regulation.

The Great Depression once again decimated lawyer earning power, but by this time, the profession itself had the power to further ratchet up entry requirements (eventually reaching the four-year undergraduate degree plus a three-year JD from an ABA accredited law school just to sit for the bar) and aggressively pursue unauthorized practice of law actions against those who encroached upon the lawyers' monopoly. Thus, when prosperity returned to the nation during the post-World War II years, lawyers were among the biggest beneficiaries, enjoying rising income, influence, and stability.

This mental frame of lawyer influence and prestige has been reinforced by several decades of popular culture. Although this frame is diverging more and more from the facts on the ground, its influence persists because (a) it is a coherent narrative that is attractive to young people entering law school, and (b) it benefits those in positions of power. Part I of Barton’s book makes a powerful case that this version of the American legal profession is in the process of steady, irreversible collapse. In other words, the jig is up. If we (the beneficiaries of the old order) deny it much longer, we will only look more and more foolish to young people entering law school and to the public at large.

Barton identifies four “deaths” of the modern legal profession, each getting its own chapter.
1. Death from Above (Chapter 4) focuses on the relentless consolidation of BigLaw driven by individual lawyers seeking to maximize their income. This model does not benefit clients, so clients are slowly finding substitutes, such as bringing work in-house or hiring managed services providers like Axiom.
2. Death from Below (Chapter 5) is occurring because poor and middle-class citizens cannot afford lawyers to solve their legal problems. This has opened the door to venture-capital and private equity-backed companies like Rocket Lawyer and LegalZoom that specialize in self-service legal forms with a user-friendly interface similar to Turbo Tax.
3. Death from the State (Chapter 6) includes several decades of tort reform and packing the judiciary with judges hostile to consumer rights, class action litigation, and federal fee-shifting statutes. The State has also cut back on legal aid and general funding of the courts. In effect, the State is controlling legal costs by knocking out grounds for relief and undercutting the economics of plaintiffs' work. This hostile environment has given rise to settlement mills that focus on speed and volume rather than quality.
4. Death from the Side (Chapter 7) is the consequence of an oversupply of law [*30] school graduates, thus depressing wages and causing many to leave the profession. Trend lines spanning more than 50 years provide persuasive evidence that it is getting harder and harder to make a living as a lawyer.
Part II (Chapters 8-9) focuses on law schools. If the temperature was slowly getting turned up on practicing bar over the course of several decades, it wasn’t until recently that legal education felt the heat. Barton suggests that the demand for law school is substantially driven by a pop culture that has consistently portrays lawyers as attractive, articulate urban professionals making a good living doing interesting and meaningful work. In 2010, a large counterweight arrived in the form of relentless negative news coverage on law schools and the entry level market, thus pushing applications down to levels not seen since 1977.

Yet, this market correction is probably not what is bothering Barton. More likely, it is the unprecedented debt loads taken on by the smaller number of students who do enroll—debt loads with relatively high interest rates set by the federal government. The high interest rates are designed to finance relatively generous Department of Education programs that cap monthly payments based on a law grad’s earnings. They also include loan forgiveness after 10 years for public sector workers and 20 to 25 years for those in the private sector.

Barton questions the morality of loading up young people with large debt balances that may not go away until late middle-age. He is also skeptical (as am I) that this financing model is sustainable. Why? Because there is a large, unhedged risk that the volume of loan forgiveness will exceed the amount of loans that get paid in full with interest, thus putting law schools on a collision course with the federal deficit. That time of reckoning is likely a decade or more off, but history will harshly judge a learned profession that failed to head it off in a timely and responsible way. In fairness, this same problem is endemic to all of higher ed. Barton quotes his Tennessee Law colleague Glenn Reynolds (author of the Higher Education Bubble (2012)) that “law school is the canary in the coal mine” for the rest of the university (p. 22). So even for social scientists, this may be more than academic reading.

Part III (Chapters 10-13) pulls back for the wide-angle view. In Chapter 10, titled “Big Picture and Parallels,” Barton asks the question, “Why have BigLaw and law schools pursued the same self-destructive strategies” (p. 218)? He is referring to the relentless pursuit of higher profits by large law firms (as ranked by The American Lawyer) and higher prestige by law schools (as ranked by U.S. News & World Report). Barton writes:

[In reading this book,] you have probably noticed some similarities in the self-destructive behavior of Big Law and legal academia. You have also probably wondered by judges, law professors, or bar associations have not stepped in to ameliorate the situation. There is a simple reason for both of these trends: all of these institutions are dominated by roughly the same people, trained and selected from the top of the class at the same elite law schools (p. 218).

If one combines a lifetime of academic privilege with decades of institutional prosperity, the result is an inbred way of viewing the world that is incapable of seeing its own foibles. As Barton points out, this is not an unusual storyline. This is Kodak. This is General Motors. Now hubris is claiming elite lawyers as its victim. Barton makes this point, but not in a heavy-handed way, as his goal is not to judge or blame but to bring about self-awareness and acceptance among those clinging to a dying model.

Alas, Part III also covers the rebirth of the legal profession, but here I think Barton’s relentless focus on facts gives way to some wishful thinking. The primary evidence of rebirth is LegalZoom and many other tech-enabled new entrants who are lowering the per-unit cost of solving or preventing legal problems. Yet, members of the organized bar have had precious little to do with these innovations. This is, in fact, a venture capital and private equity-backed legal industry that is growing up around, and potentially crowding out, the traditional legal profession. In Chapter 13, Barton asks, “Whither American lawyers?” The answer is no because “lawyers have faced much worse and triumphed” (p. 293). Well, this time might be different.

A close reading of Barton’s analysis suggests that the rebirth of the legal profession is not based on lawyers changing their views. In fact, Barton is arguing that the next generation of law school graduates—whether they be licensed lawyers or legal professionals working for a company like LegalZoom or Axiom—are going to rediscover the power and joy of focusing on clients and the public interest. This is going to happen, at least in part, because the seductions of the old order are fading away. Regardless of its cause, however, this new ethos will embrace technology for the
benefit of clients and will vanquish the billable hour for most legal work, enabling lawyers to sell solutions rather than time. So yes, the glass might very well be half full.

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IN RE DAY, 54 N.E. 646 (1899).

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