

There's No Time Like the Present for Some Optimism about the Future

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Benjamin H. Barton, [Glass Half Full: The Decline and Rebirth of the Legal Profession](#) (forthcoming 2015).

"When did the future switch from being a promise to a threat?"

–Chuck Palahniuk, *Invisible Monsters: A Novel*

The legal profession is often criticized as disinterested, if not fearful, of innovation in the delivery of legal services. As Benjamin Barton observes in the introductory chapter of his forthcoming book, *Glass Half Full: The Decline and Rebirth of the Legal Profession*: "Law may have changed less than any other area of the economy between 1850 and today. The same basic product is being sold and the same basic service is being performed." But, as Barton quickly notes, "[n]o one dodges the reaper forever." Through the next thirteen chapters, Barton proceeds to provide an insightful parsing of the past, present and potential future course of the American legal profession.

In homage to Larry Ribstein's influential article, ["The Death of Big Law"](#), Barton discusses current challenges faced by American lawyers through four different lens: "death from above", "death from below", "death from the state", and "death from the side". Although space constraints preclude a full exploration of the detailed analysis presented in the book, a brief summary of each of these four "deaths" follows:

- **Death from above:** Here, Barton looks at the current challenges faced by Big Law firms after years of aggressively pursuing profits by increasing billing rates, associate-to-partner ratios and the number of lateral hires. Barton predicts that the instability resulting from these strategies (the fate of Dewey LeBoeuf is presented as a case study) coupled with increased client attention to efficiency and costs, means a future in which Big Law is faced with a significantly narrowed scope of business. While truly specialized "bet the company" legal work will continue to occupy some Big Law lawyers, Barton argues that much of the routine work currently performed will be taken up by cheaper alternative modes of delivery such as outsourcing and new technological solutions.
- **Death from below:** In Barton's view, sole practitioners and small firms will face a similar squeeze in the future as a result of increased computerization. Drawing from Clayton Christensen's work on disruptive innovation, Barton observes that businesses like *LegalZoom* were able to gain an initial foothold in the market by doing work at the lowest margins, like selling legal forms. Although such businesses may not have originally been a source of significant competition (and, thus, concern) for lawyers, they have continued to move up the food-chain by offering more sophisticated products at cheaper prices. The result? Even without a move to deregulation or the introduction of alternative business structures, as has happened in England and Australia, Barton contends that solo practitioners and small firms will see a dramatically decreased market share: he writes, for example, that "[o]utside of court, it seems likely that any work that can be routinized or rationalized will be swallowed up [by competition from machines]." Moreover, it seems doubtful, according to Barton, that the legal profession will be able to continue to take solace in the availability of unauthorized practice of

law prosecutions to defend its turf. He observes that “websites [offering free or very inexpensive legal advice] and virtual law firms have largely avoided prosecution for the unauthorized practice of law (“UPL”), and some, like *LegalZoom*, have grown so large and prevalent that the time to quietly nip them in the bud has passed.” More competition and less protection = death from below for solo practitioners and small firms.

- **Death from the state:** Barton also explores challenges to lawyers’ future livelihoods arising from governmental and judicial efforts to curb litigation. A chapter detailing “death from the state” highlights, among other things, tort reform efforts, moves by the Supreme Court to tighten pleadings standards, and funding cutbacks to programs that provide legal services to impoverished Americans. Taken together, Barton contends that such trends will have an ongoing negative impact on the market for lawyers. One might wonder how much these trends signal a shifting market rather than a sinking market: is this simply about less litigation (and more mediation and arbitration) rather than less lawyering? Although Barton does not address this issue in a general manner, his discussion of the “rise of the settlement mill, where a few lawyers front a mass of non-lawyers who work solely on getting settlements for as many clients as they can, rarely, if ever, litigating” suggests that there are important quantitative changes at work in addition to possible qualitative ones.
- **Death from the side:** One final piece of the puzzle explored is the familiar issue of the oversupply of law school graduates. Although there has been significant publicity on this trend and its consequences, Barton’s account is particularly interesting for its long-term view and his careful parsing of statistics. He notes, for example, that “[c]ontrary to the current focus on the size of law school classes, the steepest increase occurred in the 1970s, not the 1990s or 2000s.” Unsurprisingly, Barton sees the upshot of this trend as compounding the other threats to lawyers’ livelihoods: “When more people compete over less work the cost of that work goes down for consumers and wages also decline.”

In tracing these trends, Barton pulls no punches in setting out a devastating case of how short-sightedness and greed by Big Law partners, law school deans and faculty, and plaintiff-side lawyers has led to inertia and self-destructive decision making. As he elegantly summarizes: “Each has mortgaged the future and sullied their reputations in pursuit of short-term gains and quick cash.” The blame that Barton metes out, however, is balanced by his careful situating of the current gloomy state of affairs in the context of broader historical, cultural, legal, economic and technological trends.

True to the spirit of his title, Barton’s *Glass Half Full* is consciously not all doom and gloom. Accompanying Barton’s clever “four deaths” framework are a number of positive forecasts for the future.

One set of promising predictions concerns consumers, who Barton contends will be major beneficiaries of current trends. Among other things, Barton sets out a case for how technology can improve access to justice. On this topic, he is careful to acknowledge two important caveats: first, that computerization will not help those who are illiterate or who don’t have ready access to a computer and, second, that “technology will not reach all of American legal need equally” (in particular, he notes that providing legal information and drafting of legal documents like wills and divorce papers are things that computers can more easily help with than things like legal advice and in-court litigation work).

Barton also directly addresses the oft-raised concerns about the quality of technology-facilitated legal services. In support of his case, he cites, in part, the general absence of bad publicity or lawsuits against businesses like *LegalZoom* and the wealth of consumer review opportunities on the Internet. To be sure, both of these things are comforting, to a point. An additional issue that might have been usefully

explored is the impact of legal services' status as credence goods (i.e. as goods that consumers have difficulty in assessing the quality of) on how we can meaningfully assess consumer harm when it comes to technological innovations in the delivery of legal services. Nick Robinson's [recent work](#) sounds another note of caution given his observation that "the impact of *LegalZoom* and companies like it so far on access to legal services" is neither well documented nor easy to assess.

The other half of Barton's glass half full argument is that lawyers and law schools ultimately stand to benefit from the impending changes. For lawyers, Barton argues that the current slowdown will bring a brighter future for those who are able to remain employed in the form of alternatives to the often soul-crushing billable hour model and a narrowing of work to more interesting, complex tasks. On the entry side of things, Barton predicts that fewer students will enter law schools in future, resulting in increased competition between law schools and, eventually, better educational opportunities.

Barton's vision of the future is far from utopian. It includes, for example, shrinking salaries, lost jobs and closed law schools. It also bears mentioning that elites of the profession appear to be occupying a healthy share of Barton's half full glass: speaking about the future of BigLaw, for example, he notes that, "at the top of the food chain things are looking rosier than ever." It is, however, a general lack of rose-colored glasses that is precisely this book's strength. Barton offers some plausible positivity without being Pollyannaish. For its comprehensive and accessible (and often entertaining!) account of where we have been, where we are, and where we are headed, this book should be included on the 2015 "must-read" lists of members of the profession.

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