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Two Ironies of UPL Laws

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It is illegal to practice law without a license, so it would be good to know what practicing law is. Opinions vary. The *Restatement (Third) of the Law Governing Lawyers* says the “definitions and tests employed by courts to delineate unauthorized practice . . . have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas.”¹ The American Bar Association (“ABA”) attempted a model definition several years ago, but its proposal was criticized by the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) on the (correct) ground that it reserved too many tasks for lawyers.² The FTC and DOJ noted that, although almost all states “have statutes that purport to define the practice of law, in reality these statutes tend to be vague in scope and contain broad qualifiers.”³

If anything, these comments understate the case. Definitions of the practice of law tend to be embarrassing. Some states offer definitions so general they say little more than that judges or bar officials will know unlicensed practice when they see it, which was Justice Stewart’s definition of obscenity.⁴ Although unauthorized practice of law (“UPL”) restrictions might present “the task of trying to define what may be indefinable,” as Justice Stewart thought obscenity regulations might, the aptness of the comparison is not cause for optimism.⁵ Other states adopt rules that resemble the securities laws in their extensive categorization, but still leave courts and enforcers broad discretion. Judicial

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¹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000).

² See *Comments on the American Bar Association’s Proposed Model Definition of the Practice of Law*, U.S. DEP’T. OF JUST. (Dec. 20, 2002), <https://www.justice.gov/atr/comments-american-bar-associations-proposed-model-definition-practice-law> [http://perma.cc/2KMG-H3HB].

³ *Id.*

⁴ See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁵ *Id.*

opinions often argue that comprehensive definitions are impossible, which does not help much.

The basic problem is one of design and legal craft. If a concept is “indefinable,” there is no point trying to define it. A definition is not the right tool to regulate the provision of law-related services. No definition will distill the “practice of law” to its essence. There is no essence. The “practice of law” is what we say it is. The problem is not just semantics. A definition-based approach suggests to enforcers and judges that regulating legal services can be and should be done with rules, when standards are better suited to consumer protection. The result is often a muddled combination of the least desirable aspects of both rules and standards.

The definitional approach may harm consumers in three different ways. The practice of law may be defined too narrowly, so consumers are exposed to incompetent (or not-yet-competent) sellers, or too broadly, so consumers are denied the benefits of competition from competent, but unlicensed, sellers. In addition, definitional approaches treat licenses as a solution to the problem of competence. To unsophisticated consumers, a license may imply that a seller has skills he or she may not have. Passing the bar exam does not entail practical competence in any particular field. Allowing licensees to tout a credential even partially divorced from practical skill but which authorizes such advertising, risks misleading consumers. UPL restrictions sometimes state that sellers may not hold themselves out to be lawyers if they are not, but licenses can be a form of holding out as well. In each case, the real concern is competence: does the seller’s expression accurately convey their ability to help a buyer with a problem?

A legal services regulation designed for clients and consumers should work more from the bottom up than from the top down. It should not bother with the definitional problem because there is no essence to define; any definition would either be materially incomplete or unhelpfully vague. Such a regulation should include few, if any, categories that are declared off-limits to non-lawyers. Some amount of stipulation is inevitable—notably for tribunals—but it should be kept to a minimum. The regulation should favor standards over rules and use presumptions tied to competence to distinguish permissible from impermissible practice. The regulation should not try to compare the practice of law with some baseline of average or ordinary intelligence, and it should not conflate prohibitions on misrepresentation of a provider’s skill or qualifications, which are always objectionable, with the scope of permissible practice.

If nothing else, I will argue that this approach lessens two ironies that characterize the concept of unlicensed practice. Definitions of the practice of law mark the set of things only lawyers may do, but the definitions often show little evidence of legal craft, and the licenses that satisfy the definition may present risks similar to the “holding out” concerns reflected in many state laws.

I.

A brief survey of state definitions is instructive. Maine illustrates one end of the spectrum. One Maine court noted that its bar rules “do not explicitly state what constitutes ‘the practice of law,’ nor have we ever defined what constitutes ‘the practice of law.’”⁶ The court found no need to try a definition where a lawyer was disciplined for his conduct in trying to negotiate discounts for a client’s medical bills and track down the biological father of her children, all while starting an affair with her.⁷ (The affair ended badly.) The court simply said, “the term ‘practice of law’ is a ‘term of art connoting much more than merely working with legally-related matter.’”⁸

Other states posit general definitions that work outward from relatively specific core cases, such as appearing before a tribunal or preparing a “legal document.” California does this. The California Supreme Court’s opinion in *Birbrower, Montalbano, Condon & Frank v. Superior Court*⁹ defines the term as “the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.”¹⁰ This definition seems clear (and should not extend to private arbitration, though the court held it did), but California does not stop there. Under California law “any definition of legal practice is, given the complexity and variability of the subject, incapable of universal

⁶ Board of Overseers of the Bar v. Mangan, 763 A.2d 1189, 1193 (Me. 2001). The Court wanted to discipline Mangan, and the case could be written off as a rough justice application of a “holding out” theory: if you call yourself a lawyer, you will be held to that standard. But Mangan was right to say that non-lawyers could have done much, if not all, of what he did. That a desired result may have driven the holding hardly vindicates the definition.

⁷ *Id.* at 1191.

⁸ *Id.* at 1193 (quoting Attorney Grievance Comm. of Maryland v. Shaw, 354 Md. 636, 732 (1985)).

⁹ *Birbrower v. Super. Ct.*, 17 Cal. 4th 119, 128 (1998) (quoting *People ex rel. Lawyers’ Inst. of San Diego v. Merchants’ Protective Corp.*, 189 Cal. 531, 535 (1922)).

¹⁰ *Id.*

application and can provide only a general guide to whether a particular act or activity is the practice of law.”¹¹

Washington has defined the practice of law to include litigating in court but “in a larger sense [it] includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured.”¹² The definition extended to “the selection and completion of form legal documents, or the drafting of such documents, including deeds, mortgages, deeds of trust, promissory notes and agreements modifying these documents,” and may be summarized succinctly: “services that are ordinarily performed by licensed lawyers and that involve legal rights and obligations constitute the practice of law.”¹³ This authority is still cited by Washington courts, but Washington also defines the term for purposes of a criminal statute,¹⁴ and in a rule of court.¹⁵

Some states provide seemingly straightforward definitions that are expanded by judicial caveat. One of New York’s two statutory definitions includes appearing in court or holding oneself out as being entitled to practice in court “or in any other manner,”¹⁶ but the judicial gloss on this definition makes clear that the practice of law includes “legal advice and counsel” as well.¹⁷ “Legal advice and counsel” is not separately defined.

Florida adds two components to its capacious definition, which asks in part whether rights affected by some service are important and which explicitly disclaims the notion that any definition could be fixed in time. In its failed effort to require patent agents to be licensed Florida lawyers, the Florida Supreme Court offered this definition:

[I]f the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such

¹¹ *People v. Landlords’ Prof'l Servs.*, 215 Cal. App. 3d 1599, 1609 (1989) (eviction services constituted UPL).

¹² *Jones v. Allstate Ins. Co.*, 45 P.3d 1068, 1074 (Wash. 2002) (quoting *In re Disciplinary Proceedings Against Droker & Mulholland*, 370 P.2d 242, 248 (Wash. 1962)).

¹³ *Id.*

¹⁴ WASH. REV. CODE ANN. § 2.48.180 (West 2016).

¹⁵ WASH. ST. CT. R. 24 (2015), http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=gr&ruleid=gagr24 [<http://perma.cc/36XR-VRLY>].

¹⁶ N.Y. JUD. LAW § 478 (McKinney 2016).

¹⁷ *Servidone Const. Corp. v. St. Paul Fire & Marine Ins. Co.*, 911 F. Supp. 560, 565–66 (N.D.N.Y. 1995).

services by one for another as a course of conduct constitute the practice of law.¹⁸

The court in *Florida Bar v. Brumbaugh* cited this definition with approval and stated that it “is given content by this Court only as it applies to specific circumstances of each case.”¹⁹ The court agreed with a Michigan court that “any attempt to formulate a lasting, all-encompassing definition of ‘practice of law’ is doomed to failure ‘for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging [sic] business and social order.’”²⁰ Michigan later backtracked on this statement while holding that a bank’s preparation of mortgage documents was not the practice of law. The court held that “the preparation of ordinary leases, mortgages and deeds do not involve the practice of law. . . . They have become ‘so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training.’”²¹ Florida, however, remains skeptical,²² as does the definition quoted above from Washington. New York’s second statutory definition reserves part of this cookie-cutter work for attorneys as well.²³

Other states provide broad definitions with exclusions that resemble safe harbors. Texas, which had an early and unproductive encounter with interactive software,²⁴ defines the practice of law to include court work “as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge” and has a typical disclaimer of any limitation on the scope of this definition, which “does not deprive the judicial branch of the power and authority . . . to determine whether

¹⁸ State ex rel. Fla. Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962), *vacated sub nom.* Sperry v. State of Fla. ex rel. Fla. Bar, 373 U.S. 379, 404 (1963).

¹⁹ Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1191 (Fla. 1978).

²⁰ *Id.* at 1191–92 (quoting State Bar v. Cramer, 249 N.W.2d 1, 7 (Mich. 1976), *abrogated by* Dressel v. Ameribank, 664 N.W.2d 151, 158 (Mich. 2003)).

²¹ Dressel v. Ameribank, 664 N.W.2d 151, 156 (Mich. 2003) (quoting Hulse v. Criger, 247 S.W.2d 855, 861 (Mo. 1952)).

²² The Fla. Bar re Advisory Opinion–Medicaid Planning Activities, 183 So.3d 276, 286 (Fla. 2015) (holding the preparation of documents relating to Medicaid planning to be the practice of law).

²³ N.Y. JUD. ACT § 484 (McKinney 2016) (“No natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents’ estates . . .” unless admitted to practice.)

²⁴ Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999) (per curiam). I say “unproductive” because Texas’ UPL commission won the case but lost the war, as the definition in the text suggests.

other services and acts not enumerated may constitute the practice of law.”²⁵ But Texas then takes a step back and states that the practice of law does not include written materials such as books or software if the materials “clearly and conspicuously state that the products are not a substitute for the advice of an attorney.”²⁶

Arizona varies this approach. It defines the practice of law broadly through a series of categories that include preparing a document intended to affect or secure legal rights, expressing a legal opinion, representing another in formal dispute resolution (including mediation), or negotiating. Arizona then exempts several specific situations; an employee may designate a personal representative for a board hearing dealing with personnel matters, a corporation may designate an officer or other agent to represent it before the state’s version of the Occupational Safety and Health Administration (“OSHA”), and an ambulance service may do the same for administrative hearings before the Department of Health Services.²⁷ In all, Arizona has twenty-one substantive exceptions.²⁸

Similarly, Connecticut defines the practice of law to include “ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person.”²⁹ The statute provides a non-exclusive list of items, which includes “[g]iving advice or counsel to persons concerning or with respect to their legal rights and responsibilities or with regard to any matter involving the application of legal principles to rights, duties, obligations, or liabilities,” or “drafting any legal document or agreement affecting the legal rights of a person.”³⁰ The statute also includes more specific restrictions on holding out and appearing before a tribunal. It then specifies twelve exceptions, including acting as a real estate agent or broker, acting as an accountant, or “performing such other activities as the courts of Connecticut have determined do not constitute the unlicensed or unauthorized practice of law.”³¹

These definitions vary in detail, but are all, at least in part, defiantly ambiguous. Defiant ambiguity may be a natural response when asked to define the undefinable, to use Justice Stewart’s phrase, but it is not a helpful response.

²⁵ TEX. GOV’T CODE ANN. § 81.101 (West 2016).

²⁶ *Id.*

²⁷ ARIZ. REV. STAT. ANN. SUP. CT. R. 31.

²⁸ *Id.*

²⁹ CONN. PRACTICE BOOK § 2-44A(a).

³⁰ *Id.* § 2.44A(a)(1)–(6).

³¹ *Id.* § 2.44A(b)(1)–(12).

In the 2000s, several states proposed definitions of their own, prompting the ABA's model definition project. The FTC commented on specific state proposals as well as the ABA proposal. Its comments to Connecticut are typical. Connecticut proposed to amend its definition and the FTC weighed in, stating that staff believed “non-attorneys should be permitted to compete with attorneys in areas where no specialized legal knowledge and training is demonstrably necessary to protect the interests of consumers.”³² FTC staff recommended that Connecticut add language the District of Columbia had used to narrow its rule.³³ That definition was similar to the Connecticut definition described above, but included language limiting the definition of the practice of law to “the provision of professional legal advice or services where there is a client relationship of trust or reliance.”³⁴ The rule then listed categories presumed to constitute the practice of law. The comment to the D.C. rule states that this qualification:

[I]s designed to focus first on the two essential elements of the practice of law: The provision of legal advice or services, and a client relationship of trust or reliance. Where one provides such advice or services within such a relationship, there is an implicit representation that the provider is authorized or competent to provide them; just as one who provides any services requiring special skill gives an implied warranty that they are provided in a good and workmanlike manner.³⁵

Connecticut did not adopt this suggestion (nor did Washington in the rule it adopted), but Nebraska did.³⁶ In comments to Hawaii, the FTC emphasized that the D.C. rule utilized rebuttable presumptions to help clarify its definition.³⁷ The D.C. rule lists six categories of work presumed to be the practice of law—such as “preparing any legal document” or “preparing or expressing legal opinions”—and allows that presumption to be rebutted:

³² Letter, Federal Trade Comm'n, Proposed Section 2–44A of the Rules of the Superior Court entitled “Definition of the Practice of Law” (May 17, 2007), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-mr.carl-e.testo-counsel-rules-committee-superior-court-concerning-proposed-rules-definition-practice-law/v070006.pdf.

³³ *Id.* at 6–7.

³⁴ D.C. CT. APP. R. 49(b)(2) (West 2016).

³⁵ *Id.* cmt. to § 49(b)(2).

³⁶ NEB. REV. STAT. ANN. § 3-1001 (West 2016).

³⁷ Letter, Fed. Trade Comm'n, Comments on Revised Proposed Rule Concerning Unauthorized Practice of Law at 1–2 (Apr. 20, 2009), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-supreme-court-hawaii-concerning-proposed-definition-practice-law/v080004hiunauthorized-practiceoflaw.pdf.

The presumption that one's engagement in one of the enumerated activities is the "practice of law" may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent.³⁸

The D.C. rule therefore uses the presumption and rebuttal structure to clarify the definition, which also incorporates the concept of trust and reliance.

II.

Defiant ambiguity is what comes of the choice to employ a general definition. In this Part, I argue that, as a matter of craft, that choice is unwise. Like patent claims, definitions work well when applied to discrete, concrete objects. They work poorly when applied to abstract ideas. They are no good at all when the definiendum is a diffuse concept that changes over time, as is the case with the "practice of law." Then a definition is the wrong tool to use; it does more harm than good in relation to consumer protection.

The definitions surveyed in Part I too often wind up chasing their tails, often trying to clarify vague terms by reference to equally vague terms, and always using broad language that creates ambiguity and wide discretion for enforcement. This Part addresses craft and poses the question of how a UPL restriction should be built. What elements should it have, and how should they fit together? I turn to substance in Part III.

A. Rule or Standard?

The definitions surveyed in Part I take for granted that the practice of law needs to be defined through a written statement of scope. The "challenge" the ABA perceived as the basis for its efforts was cast in definitional terms; the question was "whether to create a model definition of the practice of law that would support the goal to provide the public with better access to legal services, be in concert with governmental concerns about anticompetitive restraints, and provide a basis for effective enforcement of unauthorized practice of law statutes."³⁹ That is a lot of work for a definition.

³⁸ D.C. CT. APP. R. 49(c)(3) (West 2016).

³⁹ *Task Force on the Model Definition of the Practice of Law Challenge Statement*, AM. BAR ASS'N., http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_challenge.html [http://perma.cc/83QR-WHFB].

Definitions of the practice of law do not work well being judged by the goal of consumer protection or by the criteria one should use to assess the design of a law. Definitions try but largely fail to do the job of a rule. In the attempt they either fail to do the job of a standard, which leads to arbitrary decisions, or they incur the costs of a standard but then truncate analysis in an effort to render a formal rather than a substantive decision, which leads to arbitrary decisions that are costly as well.

1. Distinguishing Rules from Standards

The relevant issues may be framed usefully as a question of rules versus standards. The differences and similarities between these two approaches are complex and are the subject of several excellent analyses.⁴⁰ The literature distinguishes rules from standards based on whether the law is given content *ex ante* or *ex post*.⁴¹ I follow that division here, focusing on the points I think most salient to restrictions on UPL.

Most people think of rules as very specific statements and of standards as very general statements that end up being more a question than a prescription: drive no faster than seventy-five miles per hour is a rule, and “drive safely” is a standard. Analytically this common-sense difference reflects a design decision: should the costs necessary to give content to a law be sunk up front and distilled into concise expression or should the cost be deferred to a later time when an issue arises?⁴²

2. Counting Information Costs

Three general types of costs are relevant to this analysis with respect to restrictions on unlicensed practice: creation costs, transmission costs, and application costs.

Creation costs include the cost of investigating the conduct to

⁴⁰ For a general discussion, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 592–96 (5th ed. 1998); Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J. L., ECON. & ORG. 150 (1995); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

⁴¹ Kaplow, *Rules Versus Standards: An Economic Analysis*, *supra* note 40, at 560. Focusing on when a law is given content differs from a proposed distinction in which rules are formally realized, while standards apply the purposes of the law directly to disputed facts, or, relatedly, between individualism and altruism, interpreted as rhetorical approaches to social issues. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

⁴² This description oversimplifies. In principle, a rule may replicate a standard if enough variables are baked into the rule to allow it to replicate the welfare effects of the standard. (The point is similar to one that may be more familiar—act utilitarianism and rule utilitarianism may be equated if the rule includes exceptions sufficient to produce results equivalent to the sum of act-utilitarian choices.) See, e.g., J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 11 (1973).

be regulated, translating the information learned through investigation into language that expresses the desired regulation, and herding the language through the relevant political process. The amount of these costs depends on many things, including whether the conduct in question is engaged in or affects many people, whether it is easy to understand or requires significant expertise, and whether politically powerful groups have a significant stake in any proposed regulation.

Creation costs are complex. They differ in different situations, and in any given situation they interact in complex ways. For example, take the question whether a building code should approve vinyl conduit for use in new construction. Deciding whether vinyl conduit is durable, fire-proof, and otherwise safe requires some expertise and probably testing. The rule on permissible conduit would be part of a larger building code, so possible interactions between vinyl and other building materials would have to be studied. Legislators and even legislative staff are probably not experts in these matters, so expertise would have to be acquired.

It would make little sense for each county or city that has a building code to replicate this study. Vinyl conduit probably is as safe (or not) in Berkeley as in Bakersfield. Economies of scale probably could be achieved, but then governmental units would have an incentive to free ride on other governmental units. Coordination is possible in different ways, such as regional government consortia, but outsourcing is possible as well. In practice, industry associations, which have a greater per capita stake in studying such things, promulgate model building codes, while many legislatures economize on the cost of rule-creation by enacting those codes into law.

But there is a flip side to the fact that industry players have a stake big enough to make it worth their while to study the merits of vinyl conduit. Incumbent firms who make steel but not vinyl conduit have an incentive to fight approval of vinyl conduit, regardless of the merit of that material. Incumbents might try to use local laws to preclude entry that might lower their prices. Such firms might spend money to fight within the association, as well as before governmental bodies. In this example, manufacturers of steel conduit recruited new members to the National Fire Protection Association, stacked a meeting at which the Association decided whether to amend the Association's National Electrical Code to approve the use of vinyl conduit, and

voted against such use.⁴³ The costs of acquiring information necessary to draft a rule were lower because they could be outsourced to the Association's work, but the cost of translating that knowledge into adoption of an efficient rule were high because the economic interests that made industry players willing to acquire information also inclined them to defend entrenched interests.

In other cases, creation of a rule will be simple. The rule may be joined with a standard in ways that make adoption more palatable, but which defers substantial costs to a later stage in enforcement. Copyright law is like that. The rule that copyright inheres in original expression fixed in a tangible medium of expression is simple and cheap to express, at least so long as the originality requirement is drained of any real content (as it is). But the very thinness that makes this rule relatively simple and easy to adopt invites all sorts of particular objections. To make the rule palatable, a legislature might choose to enact a standards-based defense, such as fair use, making the question of liability far murkier than our examples of the speed limit or approval of vinyl conduit. The defense might deflect objections and thereby ease passage through the political process, but the costs are simply deferred at the expense of clarity.

Transmission costs. This idea refers to the cost people subject to the rule incur in learning the rule. (The cost of reproducing and distributing the rule are included, but these costs will almost always be low.)⁴⁴ The question is whether it is easy to understand the law and to translate that understanding into advice or into application by a tribunal, such as by translating the law into legal advice to a client or into jury instructions. These costs are important to deterrence; if a rule is expected to deter behavior, it needs to specify that behavior well enough for informed persons to obey.

This question, too, is complex. One needs to know how many people the rule will affect and what kind of people they are. A speed limit targets everyone who drives, which in many places is at least most adults, so it has to work for large numbers of very different people—both barely numerate drivers and physicists. A building code will be used mostly by builders, inspectors, and insurers, so it is safe to presume a certain amount of audience sophistication, but code violations might be disputed and adjudicated, so the understanding of a potential tribunal matters,

43 *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 496–97 (1988).

44 This concept is akin to identifying the illocutionary meaning of an expression of law.

too.⁴⁵ Excessive complexity or opacity risk disregard of the law and the failure of deterrence. Both over-deterrence and under-deterrence count as failure. Artists puzzled by the fair use factors might simply throw their hands up and proceed with an infringing project or abandon a non-infringing project.

Application costs. These are the costs of applying the law to a dispute about whether conduct is lawful. They will include the cost of at least minimal factual inquiry—how fast was the car going, did a builder use vinyl conduit—and the inquiry may be extensive. The point of rules is to make application relatively easy by investing in the important work up front, so adjudication is as simple as in these examples.

Legal expressions are not always reliable guides to this cost. Copyright's fair use defense lists four nonexclusive factors, but one of them (whether the defendant sought profit) matters little in any case in which the defense is plausible, and two others (whether use is transformative and whether it usurped the plaintiff's market) are in many cases just two sides of the same coin. And this supposed multi-factor inquiry may reduce to a fact-finder's intuitions about property—was the defendant just free riding or was she trading in substantial part on her own contributions? That might not be a costly case to try, multiple factors notwithstanding. In contrast, some standards sound costly to implement and probably are costly to implement. In most cases, a malpractice plaintiff must establish the standard of care and show breach, and both issues may require costly and contradictory expert testimony. What is the standard of care for underwriter's counsel in a shelf registered offering? Opinions vary.⁴⁶

Error costs and agency costs deserve particular attention with respect to unlicensed practice. Error costs arise when a rule is applied to cases that do not present the risk a rule guards against; a particularly high-performing car may drive more safely at 90 miles per hour than an economy car does at 75, but the former driver violates a 75 mph speed limit and the latter does not. Each case presents an error, but the expected cost of

⁴⁵ Professor Kaplow provides another good example: rules regulating transport of hazardous waste may be complex and thus costly to learn, but few people are in that line of work, and therefore the sum of such learning costs is likely to be low, at least compared to ordinary driving rules such as the speed limit, which in some areas applies to millions of people. See Kaplow, *Rules Versus Standards: An Economic Analysis*, *supra* note 40, at 563.

⁴⁶ See generally *In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628 (S.D.N.Y. 2004) (discussing the question with respect to underwriter's liability, which may be extended to question of what underwriter's counsel should advise underwriters to do to establish diligence with regard to shelf offerings).

each error is probably low—lower than the cost of inquiring whether either driver was driving safely, all things considered. If the error costs of a rule are high, however, inquiry might be worth the effort. This possibility is sometimes summarized in a rule of thumb (pardon the pun): employ rules when information costs exceed error costs, and employ standards when the reverse is true. Assuming for the moment that we can get a handle on these costs (a big assumption), this idea is common sense. The problem is, as it often is, that measuring such costs is hard. Hunches, rules of thumb, and rent seeking play a greater role in reality than they do in this description.

Agency costs relate to discretion in enforcement. Assuming that consumer protection is the goal of restrictions on unlicensed practice, agency costs could take the form of enforcement actions against sellers who pose no real threat to consumers but who may compete effectively with lawyers. The more capacious the content of a rule, the greater discretion enforcement officials have, and the greater the risk that they will use such discretion to prop up lawyers' income rather than to protect consumers.

3. Mixed Models: The Example of Antitrust

Antitrust law provides a useful example of these costs, and its emphasis on competition is relevant to the design of any UPL regulation.⁴⁷ Antitrust employs a *per se* rule of illegality for practices so likely to harm competition that extensive inquiry is not efficient.⁴⁸ Practices whose net effects are not so obvious are subject to a contextual balancing analysis under the rule of reason, which presents a standard in the form of a question: Does a practice restrict competition unreasonably? The rule of reason analysis takes the form of shifting burdens. A plaintiff must show the defendant's actions harm competition. If the plaintiff does, the defendant must show that those actions produce benefits to competition. If the defendant discharges that burden, the plaintiff must show the benefits could be obtained through less restrictive alternatives or that they are outweighed by losses.⁴⁹

The current doctrine is less categorical than it used to be. Rather than assuming that the *per se* analysis and rule of reason analysis are discrete and different things, courts emphasize

⁴⁷ See, e.g., RICHARD A. POSNER, ANTITRUST LAW 39 (2d ed. 2001).

⁴⁸ See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (explaining the *per se* rule extends to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.'").

⁴⁹ See, e.g., O'Bannon v. NCAA, 802 F.3d 1049, 1070–74 (9th Cir. 2015); United States v. Microsoft, 253 F.3d 34, 58–59 (D.C. Cir. 2001).

context. The result is more a continuum of approaches than a series of categories. The continuum ranges from practices that are condemned on sight (price fixing) to those that are condemned after only a “quick look” (certain refusals to deal) to those that require full rule of reason analysis (NCAA restrictions on payment to athletes). The choice of scrutiny is dynamic; practices may move along the continuum as courts become more familiar with them.⁵⁰ Nevertheless, relative information costs and error costs remain the key factors.⁵¹

Taking context and learning into account when selecting the level of inquiry does not prevent error. In *California Dental Ass'n v. FTC*,⁵² which explicitly endorsed contextual rather than categorical analysis, the Court mistakenly required full rule of reason analysis of a dental association's restrictions on advertising by its members.⁵³ The Court was too timid. It allowed itself to be swayed by arguments that price and quality advertising might work differently for dental markets than for other markets. The result was a false negative, particularly because the Ninth Circuit refused to remand for further fact-finding.⁵⁴ But attentiveness to context can avoid the opposite error. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Court held that Broadcast Music's “blanket license” was not unlawful *per se*, even though it effectively eliminated price competition among Broadcast Music members, because the license reduced transaction costs so much that it could be considered a new product and the restraint on (theoretical) price competition would be ancillary to creation of that product.⁵⁵

⁵⁰ See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) (“The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principle tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions.”); *id.* at 779 (categories of analysis are not fixed and may include hybrid forms such as “quick look” rule of reason analysis); *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005) (noting continuum approach); *Microsoft*, 253 F.3d at 84 (finding that tying arrangements that involve platform software products are not subject to *per se* rule because there was too little experience with the effects of such agreements).

⁵¹ “Quick look” rule of reason analysis straddles this line and creates a continuum of analysis rather than discrete categories. See POSNER, *supra* note 47, at 39 (*Per se* analysis, which requires courts to generalize about the utility of a challenged practice, reduces the cost of decision-making, but correspondingly raises the total cost of error by making it more likely some practices will be held unlawful in circumstances where they are harmless or even procompetitive.).

⁵² 526 U.S. 756 (1999).

⁵³ *Id.* at 771. In particular, the restrictions precluded advertising low prices or characterizing quality. *Id.* at 762.

⁵⁴ *Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 959 (9th Cir. 2000).

⁵⁵ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23–25 (1979).

As these examples show, taking information and error costs into account will not solve all problems, but it will solve some. At a minimum, this cost-sensitive approach brings adjudication closer to the purposes of the law—the bad things it is supposed to avoid and the good things it might help achieve. That is more than can be said for formalism (unless a formal approach is the product of such analysis, as is sometimes the case).

4. Costs of UPL Restrictions

Most of the definitions surveyed in Part I fare poorly under analysis based on information and error costs. Maine and Florida sit near one end of the continuum, insisting simultaneously that there is such a thing as the practice of law and that it has not and cannot be defined. California is almost as bad. These vague formulations are not rules because they make so little effort to give content to the notion of the practice of law. The formulations may include a rule—such as the requirement that no one without a license may practice in court—but taken as written, they are not rules but muddles. Because these definitions do not try very hard, their cost of creation is low. It does not take much effort to say that the practice of law consists of appearing in court and doing things that affect the legal rights of persons, or doing things traditionally done by lawyers.

For the same reason, the transmission costs of these prohibitions are high. These vague phrases are cheap to repeat, but they do not inform potential entrants whether a particular service is likely to be prohibited. Do the definitions of Maine, California, Florida, or Michigan preclude real estate agents from helping clients sign form offers? Do they prevent a senior employee from assisting a younger employee in drafting a grievance? These laws do not say. Neither do they provide a principle from which potential entrants could reliably discern the scope of prohibited conduct. So many things affect legal rights that a literal interpretation would be absurd (a driving instructor does not practice law when she tells a student to obey the speed limit), and counter-examples of permitted activity (real estate agents, bank clerks) are plentiful.

A prospective entrant could do some research to get a sense of what bar officials or courts would use to fill in the content of the law, but that would take time and in many cases any conclusion would be uncertain. In holding that an eviction assistance service unlawfully practiced law, a California court commented that “ascertaining whether a particular activity falls

within this general definition [of the practice of law] may be a formidable endeavor,”⁵⁶ and that is as true for prospective entrants as for courts. Hiring a lawyer would be ironic and in many cases would be pointless. Some lawyers would give a clear recommendation based on intuition, but many lawyers would hedge their letters so much that little useful information would survive.

Application costs may be high as well. When a restriction is given so little content up front, tribunals and parties generally will incur costs to create a record and argue about how it fits into the capacious language of the restriction. Florida, for example, took the time to investigate Marilyn Brumbaugh’s “typing service,” in which she helped consumers fill out divorce forms.⁵⁷ A referee heard evidence and issued findings of fact, which the Florida Supreme Court then sifted so it could draw a line: Ms. Brumbaugh could sell legal forms and type them up for clients, “provided that she only copy the information given to her in writing by her clients.”⁵⁸ She could not “make inquiries nor answer questions from her clients as to the particular forms which might be necessary, how best to fill out such forms, where to properly file such forms, and how to present necessary evidence at the court hearings.”⁵⁹ Whatever one thinks about whether this was a good use of anyone’s time, the high *ex post* costs involved are unsurprising given the small effort put into specification *ex ante*.

Application costs need not be high, however. Even if the law gets no content up front, courts may take shortcuts in application. *Birbrower* provides an example.⁶⁰ Rather than asking whether a licensed New York lawyer could provide adequate representation in arbitration in California, thus tying the scope of the UPL restriction to consumer protection, the court simply framed the question as being whether arbitration was an exception to the definition of the practice of law, even though the state’s core definition referred to “performing services in a court of justice,” which is not arbitration.⁶¹ It is at least plausible that the relative informality of arbitration would have eliminated any procedural quirks unique to California, such that an out-of-state lawyer could do as good a job as anyone. Relative to the goal of consumer protection, *Birbrower* is a false positive, and illustrates

56 *People v. Landlords Profl Serv’s.*, 264 Cal. Rptr. 548, 551 (Cal. Ct. App. 1989).

57 *Fla. Bar v. Brumbaugh*, 355 So. 2d 1186, 1189 (Fla. 1978).

58 *Id.* at 1194.

59 *Id.* at 1193.

60 *See generally* *Birbrower v. Super. Ct.*, 17 Cal. 4th 119 (Cal. 1998).

61 *Id.* at 128.

the point that economizing on application through the use of shortcuts poses the risk of high error costs.⁶²

Which brings us to agency costs—the risk that officials will bring enforcement actions to protect lawyers rather than consumers. As in *Brumbaugh*, UPL complaints are often made by lawyers who want to eliminate low-priced competition. The restrictions are then investigated and applied by lawyers—albeit lawyers who act in a different role than the complainants, and who presumably do not compete with the defendant. The concurring opinion in *Brumbaugh* was sensitive to how this might look:

There is a popular notion that every attempt to define the practice of law and restrict the activities within the definition to those who are authorized to practice law is nothing more than a method of providing economic protection for lawyers . . . regardless of motive, any law or rule that stakes out an area “for lawyers only” will result in some incidental benefit to those who are authorized to practice law—a form of serendipity for them.⁶³

The concurrence goes on to argue that this view overlooks the risk that consumers will be harmed by “pseudo-lawyers” who advise “without being competent to do so and without being subject to restraint and punishment if they cause damage to some unsuspecting and uninformed persons in the process.”⁶⁴ This argument itself overlooks the obvious risk that when lawyers rather than clients complain about non-lawyer services, the benefit to lawyers will be the primary object and consumer protection concerns will be “incidental.”

When enforcement officials pursue sellers who have harmed no clients, the costs of enforcement are agency costs, at least as judged by the goal of consumer protection. If the true goal of a UPL restriction is to benefit lawyers, then enforcement officials who pursue that goal are faithful agents and this argument would not apply. However, no restriction claims protectionism as its purpose. Nor could an enforcer avoid the charge by resorting to positivism. Enforcers generally have discretion even when a law is given content *ex ante*. The capacious provisions discussed in Part I leave ample room for discretion, and it is fair to judge

⁶² This point must be qualified by the facts of *Birbrower*: the client accused the lawyers of UPL in order to avoid the client’s fee obligation. *Birbrower*, 949 P.2d at 4. The Court’s holding lowered the client’s bill because the lawyers were allowed to collect only for work done in New York (their licensing jurisdiction) and not California. *Id.* at 13. Notwithstanding this idiosyncratic (and opportunistic) client benefit, one would expect the net client effect of the holding in *Birbrower* to be negative.

⁶³ *Brumbaugh*, 355 So. 2d at 1194 (Karl, J., concurring).

⁶⁴ *Id.*

enforcement by how that discretion is exercised relative to the stated purpose of the law.

The agency cost analysis applies in part to laws such as Arizona's, which are far more specific than Maine's or Florida's. Arizona's extensive list of exemptions provides some *ex ante* content for its laws—a senior employee interested in helping a junior employee dispute a personnel action could read the rule and be assured that she would not be practicing law in doing so—unless she charged a fee.⁶⁵ One might argue that this rule's relation to consumer protection is oblique—the senior employee is no less competent for charging a fee, though the junior employee might be wasting money—but it is clear enough and a bar official enforcing the rule would have a partial defense against any charge that enforcement was at odds with the purpose of the law (the defense would be only partial so long as enforcement of the clear rule is still discretionary).

B. The Baseline of Protection

As noted above, Florida poses the question whether work requires “legal skill and a knowledge of the law greater than that possessed by the average citizen,”⁶⁶ and Michigan distinguishes between “ordinary intelligence” and “legal training.”⁶⁷ These statements are at least compatible with a more standards-based approach. They also squarely present the problem of choosing a baseline for a UPL restriction: should the question be whether an ordinary, untrained person could do the job well; whether only a trained lawyer could do the job well; or something else?

UPL definitions tend to compare lawyers with ordinary persons who lack any legal training. That baseline sets up a false dichotomy, and the restrictions that rest on it are both too broad and too narrow (I discuss narrowness in the next section). Such restrictions are too broad because people learn by doing. Common sense and experience support the point, not to mention an important body of economics⁶⁸ and legal doctrine. The comments to the ABA's Model Rule of Professional Conduct 1.1 (and thus the comments of many adopted rules) state that lawyers who are

⁶⁵ ARIZ. REV. STAT. ANN SUP. CT. R. 31(d)(2) (“An employee may designate a representative, not necessarily an attorney, before any board hearing or any quasi-judicial hearing dealing with personnel matters, providing that no fee may be charged for any services rendered in connection with such hearing by any such designated representative not an attorney admitted to practice.”).

⁶⁶ State ex rel. Fla. Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962), *vacated sub nom.* Sperry v. State of Fla. ex rel. Fla. Bar, 373 U.S. 379, 404 (1963).

⁶⁷ Dressel v. Ameribank, 664 N.W.2d 151, 156 (Mich. 2003).

⁶⁸ See, e.g., Kenneth J. Arrow, *The Economic Implications of Learning by Doing*, 29 REV. ECON. STUD. 155, 156–58 (1962).

not competent to handle a matter acquire that competence on the job, either by studying hard or by associating with an experienced lawyer.⁶⁹ Where states are attentive to learning by doing, real estate agents may be allowed to help clients buy and sell houses because they have shown themselves competent to do so, as have tax accountants, car dealers, and others. From a consumer protection perspective, it is perverse to ignore such a basic and easily observed fact of life. As Professor Perlman has written, if we focus “attention on whether the provider is competent to deliver a service, we can more effectively achieve what really matters: protecting the public.”⁷⁰

The definitional approach makes it hard to get away from baselines like this because definitions aim at a supposedly unitary concept—the practice of law. That makes it seem as though a single baseline could be used. But there is no reason to think the varied types of work that might fall within a definition have a single relationship to intelligence or training. The importance of learning by doing counsels that skill and knowledge should be related to the particular task at hand rather than to vague abstractions. The inquiry should be factual, not conceptual. That is how malpractice law deals with the question of competence among lawyers—the standard of care compares a practitioner to a reasonably prudent practitioner who can do the job in question. No other baseline is relevant, but the definitional approach obscures that fact. UPL restrictions and the standard of care both aim to protect consumers, and they should not operate differently. They should be made to work together, pointing toward their common goal.

C. “Holding Out” and the Meaning of a Law License

The ordinary person baseline supports restrictions that are too narrow because licenses do not entail competence. Even if a person of ordinary intelligence could not do a law-related job, it does not follow that anyone with a law license can. Persons of ordinary intelligence, but no legal training, probably would be daunted by the Security and Exchange Commission’s “free writing” prospectus rules, but many, if not most, lawyers would as well. Licenses do not entail competence to help clients with real-world problems.

The need for learning by doing—or “experiential” learning, to use the ugly phrase popular right now—is a premise of many

⁶⁹ MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 2, 4 (AM. BAR ASS’N 2015).

⁷⁰ Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 89 (2015).

critiques of legal education. For some years now the media and legal commentators have complained that newly minted lawyers cannot practice law. The theme has been repeated so much it approaches conventional wisdom even within the academy. The point is not that law school teaches nothing about lawyering—most schools do a good job of teaching many skills most lawyers need—but most schools do not teach many skills that matter to clients, and therefore matter to consumer protection. Some sophisticated clients refuse to pay for first or second-year lawyers at all, and their judgment is telling.⁷¹ These clients will not be misled by the implication that a license entails competence, but ordinary consumers, who are most in need of protection both from over-pricing and from incompetence, might be.

Licenses are a form of holding out and, depending on the facts, could mislead consumers just as a non-lawyer's claim to expertise could mislead them. Nevertheless, a newly admitted lawyer does not violate a UPL restriction by holding himself out as qualified to practice law. A licensed lawyer who accepts a matter and plans to learn by doing does not violate any UPL restriction, while an experienced legal assistant who is competent to handle the matter would. Some lawyers might admit to clients that they plan to learn on the job,⁷² but no rule requires such an admission, and few lawyers are likely to stress their inexperience. Licenses thus pose to some degree the same risk commonly attacked by prohibitions on non-lawyers holding themselves out to be lawyers.

Consumer protection is not well served by such formal analysis, which is why a bar card is not a conclusive defense to malpractice. A cogent UPL restriction would address this risk as a way of improving the fit between the restriction and consumer protection. It would not make holding out a part of the definition of the practice of law, but instead tie the concept to competence for both lawyers and non-lawyer providers of law-related services.⁷³

⁷¹ See Ashby Jones & Joseph Palazzolo, *What's A First-Year Lawyer Worth?*, WALL ST. J. (Oct. 17, 2011), <http://www.wsj.com/articles/SB10001424052970204774604576631360989675324>. It is hard to say exactly how widespread this refusal is, either in terms of clients or in terms of the tasks they will not pay to have a junior lawyer perform.

⁷² See, e.g., *In re Fordham*, 668 N.E.2d 816, 819 (Mass. 1996) (attorney admitting to client his inexperience in criminal law before agreeing to the representation).

⁷³ For example, the D.C. definition incorporates holding out into the basic rule. See D.C.R. APP. CT. 49(a).

D. Trust and Confidence

As noted above, the FTC has suggested that UPL definitions may be improved by limiting the practice of law to relationships involving trust and confidence in relation to legal expertise. The FTC's suggestions do improve on the proposed definitions it has reviewed and the FTC should be applauded for doing what it can, but I think these suggestions ameliorate rather than cure the ills that beset the definitional approach to UPL.

The trust and confidence concept the FTC has recommended invokes the law of fiduciary obligations. Not all fiduciaries are lawyers, so the concept of trust and confidence is too broad to help on its own. It has to be tied to the law in a way that clarifies rather than replicates the ambiguity of the definitions it is supposed to limit. That is not as easy as it might seem.

What makes a fiduciary a fiduciary? Categorical definitions provide part of the answer. Trustees, physicians, and lawyers are fiduciaries by judicial declaration. But that fact does not help clarify judicial declarations defining the practice of law. Using one judicial declaration to define another does not bring the law closer to consumer welfare.

Peering beneath such categorical declarations, one sees some complexity. The California Supreme Court made this point in *City of Hope National Medical Center v. Genentech, Inc.*⁷⁴ The case involved a contract relating to the commercialization of patented technology.⁷⁵ The plaintiff claimed the defendant owed it fiduciary duties under a proposed test embodying four elements:

- (1) one party entrusts its affairs, interests or property to another; (2) there is a grant of broad discretion to another, generally because of a disparity in expertise or knowledge; (3) the two parties have an "asymmetrical access to information," meaning one party has little ability to monitor the other and must rely on the truth of the other party's representations; and (4) one party is vulnerable and dependent upon the other.⁷⁶

The court rejected this test as inadequate because these four elements are common to contractual relationships.⁷⁷ It offered an example of a car mechanic:

[T]he four characteristics articulated by *City of Hope* and discussed above are common in many a contractual arrangement, yet do not necessarily give rise to a fiduciary relationship. For example, a person who takes a car to a garage for repairs has entrusted property to

⁷⁴ 43 Cal. 4th 375, 398 (Cal. 2008).

⁷⁵ *Id.* at 380.

⁷⁶ *Id.* at 387–88.

⁷⁷ *Id.* at 388–89.

another (factor 1 of City of Hope's test). Because the garage operator has expertise in the field of automotive repair but the car owner does not, the car owner must grant the garage operator broad discretion to carry out the necessary work (factor 2) and must rely on the truth of the garage operator's representations about what repairs are needed and how they should be done (factor 3), leaving the car owner vulnerable and dependent on the garage operator (factor 4).⁷⁸

The court was right on this score. Taken in their ordinary meaning, trust and confidence are common features of relationships. Adding "with respect to legal matters" to these terms adds nothing meaningful to the definition of the practice of law, which presumes that the services on offer relate to the law. Consumers have trust and confidence in real estate agents, accountants, TurboTax and other forms of interactive software, bank clerks who help fill out forms, and so on. Otherwise they would not transact with such sellers.⁷⁹

This concept may be salvaged in part by modifying the second element in the test recited above and by replacing the fourth element with a new one: the absence of objective criteria to measure the fiduciary's performance. When such criteria exist, a disparity of knowledge does not imply a need for a grant of discretion nor implies that the principal is vulnerable to the agent. The criteria will constrain the fiduciary's performance notwithstanding this disparity. The fiduciary will either follow the dictates of the criteria or be exposed to liability.

Suppose, for example, that a car's brakes are always safe if the pads are at or above a certain thickness and are not safe below that thickness. A driver may know nothing about brakes or about this fact, but the mechanic is constrained to one of two choices nonetheless. She has no discretion on this point because to replace pads above the safe line would be wasteful and not to

⁷⁸ *Id.*

⁷⁹ This point is illustrated by a particularly strained application of UPL restrictions in *Prof'l Adjusters, Inc. v. Tandon*, 433 N.E.2d 779, 781 (Ind. 1982), which held unconstitutional a statute authorizing non-lawyers to act as private adjusters negotiating insurance settlements on behalf of insureds. The court recited a definition of the practice of law that held "[t]he core element of practicing law is the giving of legal advice to a client and the placing of oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney." *Id.* at 782-83. Disciplinary rules, such as the ABA's Model Rule 1.2(a), require that ultimate decisions regarding the management of a client's affairs, at least with respect to the objectives of representation, rest with the client, not the lawyer. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2015). More to the point raised in the text, as the dissent in *Tandon* noted, insurance companies employed non-lawyer adjusters and seemed to have no trouble forming satisfactory relationships with them. *Tandon*, 433 N.E.2d at 786-87 (Hunter, J., dissenting). The upshot of the Court's decision was to deprive insureds, but not insurers, of the benefits of competition, the exact opposite of what UPL laws are supposed to do.

replace thinner pads would be negligent. Something like this is what Michigan had in mind when it excluded from the definition of the practice of law work that was “so standardized” in forms that completing them “requires only ordinary intelligence rather than legal training.”⁸⁰ That is not quite right—a person might need to be smarter than average to understand the forms—but the point is materially similar.

By focusing on relationships, the FTC’s recommendation presumably excludes written material (including interactive software) from the “practice of law,” and that is good. But from a general point of view, the FTC’s reliance on trust and confidence is best understood as a wise resort to a second-best solution that has a chance of being adopted. That chance justifies the recommendations on the ground that the impossible best should not defeat the possible good, but the trust and confidence recommendation works within the definitional structure and thus suffers from the problems of that structure. It relies on concepts that are too broad, and narrowing those concepts would replicate too much of the debate the recommendation is intended to clarify. There is a better way.

III.

In light of the preceding analysis, I find the appeal of licensing hard to understand.⁸¹ Assuming for present purposes that licensing is here to stay, however, this analysis suggests that a law addressing provision of legal services should: (1) minimize the aggregate costs of information, error, and enforcement; (2) tie the scope of the prohibition to competence; and (3) tie the scope of inquiry to the novelty and complexity of a situation. Each of these features should aim to enhance consumer protection from both incompetence and overpricing. The preceding critique also suggests that such a law should not (4) attempt to define the practice of law; (5) relate legal services to some baseline conception of intelligence; or (6) take a categorical approach to “holding out” violations.

Different structures could accommodate these lessons, but taken together they argue strongly for standards as a default matter, with the selective use of some rules to economize on

⁸⁰ *Dressel v. Ameribank*, 664 N.W.2d 151, 156 (Mich. 2003).

⁸¹ Even so powerful an advocate of increased access to legal services as Professor Rhode envisions non-lawyer provision of services subject to “licensing and certification systems that impose competence qualifications, ethical standards, and effective malpractice remedies.” DEBORAH L. RHODE, *ACCESS TO JUSTICE* 21 (2004). However, Professor Rhode leaves open the possibility of simple registration and voluntary certification regimes, *id.* at 90, which seems to me a more desirable approach.

costs. The following is one such structure. (If you are not interested in the detail, skip to section (B).)

A. A Proposed UPL Law

Title N: Legal service providers

1. Definitions

A. “Adjudicative body” means one or more neutral officials who hear evidence or argument offered by a party or parties and who render a judgment affecting a party’s interests in a particular matter.

B. “Competent,” “competence,” and “competently” refer to possession of the skill of an ordinarily prudent person qualified to perform a service or task and to the exercise of that skill in such performance.

C. “Hold out” and “holding out” refer to any expression that would convey to a reasonable consumer of the services offered that the service provider possesses a level of skill, qualification, or credential.

D. “Lawyer” means a person licensed to practice law in this State.

E. “Provider” means a person or entity, including but not limited to a Lawyer, offering to assist another with respect to any matter involving or affecting legal rights or obligations, regardless whether a fee is sought.

F. “Tribunal” means a court or other adjudicative body created by a governmental entity; the term does not extend to means of dispute resolution established by consent of the parties, such as private arbitration or mediation.

2. Provision of legal services

A. *Holding out:* No Provider shall hold itself out as having any skill, qualification, or credential it does not have at the time the expression constituting holding out is made.

B. *Tribunals:* No Provider may appear before a Tribunal except in accordance with all rules adopted by the Tribunal.

C. *Competence:* No Provider shall offer any service the Provider is not competent to perform at the time the service is to be rendered.

(1) A Lawyer is presumed competent to offer legal services. This presumption may be rebutted by evidence that the Lawyer has offered to perform or has performed services the Lawyer is not competent to perform.

(2) *A non-Lawyer Provider bears the burden of producing evidence that, on its face, tends to show that the Provider is competent to perform the services the Provider offers. Such evidence need not relate solely to the specific Provider whose competence is at issue but may include, without limitation, evidence tending to show that the services the Provider offers are provided competently by other non-Lawyer Providers. A Provider who has met this burden of production shall be presumed competent. This presumption may be rebutted by evidence that the Provider has offered to perform or has performed services the Provider is not competent to perform.*

(3) *A Provider who proposes to become competent in the course of representation violates this subsection unless, prior to retention, the Provider informs the client or customer, in a writing signed by the client or customer, of (i) the Provider's intention to acquire such competence in the course of the representation, (ii) the means by which the Provider proposes to acquire such competence, and (iii) whether the client or customer will be charged for time spent acquiring such competence.*

3. Remedies

(A) *Any Provider who violates Section 2(A) through expression directed to a general audience shall be fined \$[N] per communication. For purposes of this subsection a "communication" refers to the content that constitutes a violation. Repetition or continued display of the same or materially similar content, such as, without limitation, persistent display on a website or multiple publications of the same advertisement, constitutes one violation.*

(B) *Any Provider who violates Section 2(A) through person-to-person communication with a client or consumer shall be fined \$[N] per client or consumer to whom such communication is made, regardless whether the client or consumer hires the Provider for any work. A client or consumer to whom a communication is made in violation of Section 2(A) may sue such Provider for any damages caused by such violation; a client or consumer who prevails in such a suit shall be awarded attorney's fees and costs of suit including, without limitation, expert fees.*

(C) *A Provider who violates Section 2(B) is subject to sanction or other punishment by the Tribunal.*

(D) *[State entity] may sue in any court to enforce Section 2(C). In any such proceeding a court shall have discretion to fine a Provider found to have violated Section 2(C) no more than \$[N] for each violation proved; for each violation the amount*

of such fine shall be proportionate to the risk of harm created by such violation. In any such proceeding the court may enjoin continuing violations of Section 2(C).

(E) Any person harmed by a violation of Section 2(C) may sue to recover any harm caused by such violation and, upon prevailing, shall be awarded attorney's fees and costs of suit including, without limitation, expert fees.

B. Why the Proposed Law Makes Sense

Competence is the central principle of this proposal. Rather than comparing a given activity to a partial definition of the practice of law, with one exception the proposed rule asks only two questions: Is the seller lying about what it is selling, and is the seller competent to do the job undertaken? Competence is defined operationally and mimics the standard of care used in malpractice cases. That standard is basically horizontal; it asks not whether a defendant provided some Platonic ideal of service, but whether the defendant did as good a job as reasonably prudent people in the field would do.

Because the proposal rests on standards, its application costs are high.⁸² I think it is preferable to current approaches, however, on two grounds. First, to the extent definitional approaches avoid the cost of finding out what a defendant is doing and how they are doing it, those approaches will tend to be arbitrary. The definitions themselves provide little notice as to their scope, so there is no reduction in information costs to offset this inevitable arbitrariness. The proposal will tend not to produce arbitrary decisions, though of course some mistakes would be made under this regime as under any other.

Second, to the extent that definitional approaches invite inquiry and the creation of a record, they then compare this record to definitional categories rather than to performance. *Brumbaugh* is a good example of this point. Having spent the time to create a record, the Court did not take the obvious next step and ask whether Ms. Brumbaugh did a good job. Did she pick the right forms? Did she hurt anyone? What bad thing would happen if she were allowed to keep doing what she had been doing? The costs of inquiry should be used to reduce error costs, relative to a baseline of consumer protection, by assessing the record in terms of consumer welfare. Definitional approaches tend not to do that; the proposal does exactly that.

⁸² The only exception pertains to tribunals, which are just taken off the table on the grounds that they will do what they want anyway, and there is no point trying to fight about whether non-lawyers could do as good a job in court as lawyers.

The proposal uses presumptions to limit the costs somewhat. Lawyers are presumed competent by reason of their knowledge though the presumption may be rebutted by proof of the kind commonly submitted in malpractice cases. Competence is contextual, as it should be. In each case the level of inquiry needed would depend on context and experience, as it does with respect to the antitrust inquiries discussed above. Other than tribunals, the proposal does not create *per se* categories, but one would expect courts to develop various versions of “quick look” scrutiny for different types of work.

Holding out is treated as a problem that is distinct from competence and which does not turn on definitions. Lawyers may hold out as well as non-lawyers; judged from the perspective of competence a license should not deflect attention from this fact. To some extent, this provision will overlap with advertising restrictions, but I do not think that is a point against it. The related idea of learning by doing is captured by an affirmative disclosure requirement for lawyers planning to train on the client’s job.

A few follow-up issues should be noted. The proposal effectively opens the door to interstate practice because a lawyer not licensed in a state could do work as a provider, subject to the requirement that he or she not claim to be licensed in the state and that he or she perform his or her work competently. That is currently the case with respect to whatever states exclude from their definitions of unlicensed practice. If the provider needed to learn state-specific procedures, then the learning-by-doing disclosure would apply and the out of state lawyer still would have to deal with tribunals. Agency law would apply to all providers, and I would extend privilege to all providers. Just as a lawyer’s malpractice does not vitiate privilege, a provider found to act incompetently would not vitiate a client’s privilege. Finally, though some rules of professional conduct are simple protectionism, such as the prohibition on lawyers buying claims,⁸³ I would leave in place whatever rules a state might have. One step at a time.

C. Antitrust Enforcement as an Alternative

The Supreme Court’s recent opinion in *North Carolina State Board of Dental Examiners v. FTC*⁸⁴ has suggested to some that current antitrust doctrine might be used to trim some of the anticompetitive aspects of UPL regulations. The *Dental Examiners* opinion applied the Supreme Court’s rule of immunity

⁸³ MODEL RULES OF PROF’L CONDUCT r. 1.8(e) (AM. BAR ASS’N 2015).

⁸⁴ 135 S. Ct. 1101 (2015).

for state-imposed restraints on trade to a letter sent by North Carolina's board of dental examiners that suggested the service of teeth-whitening was the practice of dentistry and therefore could be provided only by licensed dentists.⁸⁵ The rule of immunity traces to *Parker v. Brown*,⁸⁶ and exempts from antitrust scrutiny restraints on trade a state adopts "as sovereign."⁸⁷ If a state delegates regulation to a body staffed by members actively participating in the regulated industry, immunity applies if the body enforces a clear state policy to restrain trade and the body is subject to active supervision by the state.⁸⁸

Most UPL restrictions should satisfy the sovereignty requirement, either because they are expressed in legislation or are adopted by a state supreme court acting in a legislative capacity.⁸⁹ But these restrictions tend to be written generally, as the survey in Part I illustrates. The devil is in the details, and where enforcement of a clear policy is delegated to a board controlled by market participants, the state must "review and approve interstitial policies made by the entity claiming immunity."⁹⁰ This "active supervision" requirement is vague:

Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests."⁹¹

The Court's nonexclusive list of what the requirement entails states that state review must be actual not potential, focus on substance and not form, and that the reviewer have the power to veto a decision by a competitor-controlled board.⁹²

Nothing in these requirements actually keeps a state employee from rubber-stamping anticompetitive restrictions. Particularly in light of the professional courtesy that wisps its way through opinions in this field, I do not see the *Federation of Dentists* decision as promising much in the way of UPL reform. It would be better to focus on the state policies themselves.

⁸⁵ *Id.* at 1110.

⁸⁶ 317 U.S. 341 (1943).

⁸⁷ *Id.* at 352.

⁸⁸ See *Dental Exam'rs*, 135 S. Ct. at 1110; *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631–32 (1992); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

⁸⁹ *Dental Exam'rs*, 135 S. Ct. at 1110.

⁹⁰ *Id.* at 1112.

⁹¹ *Id.* at 1116.

⁹² *Id.*

CONCLUSION

States should stop trying to define the indefinable, and stop trying to treat competence as a deductive, conceptual issue rather than a factual issue. They should not propound vague definitions and pretend the definitions are rules when in fact they convey little information and, even when used well, incur the costs of standards. This approach is wasteful, frustrating, and does a poor job of protecting consumers from the harm of overpricing as well as the harm of incompetence.

An open embrace of standards tied to competence would be preferable. Restrictions on unlicensed practice and the standard of care are both meant to protect consumers. The two concepts should be harmonized and merged. Rather than trying to define a concept in one breath, while proclaiming with the next that definition is impossible, the law should dispense with definitions and keep its eye on consumers, who need protection from both incompetence and over-pricing. Basic antitrust doctrine provides an example of how this goal might be achieved, and the conventional means of comparing rules against standards suggests it should be achieved with respect to the provision of law-related services.

