

The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law

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ABSTRACT

The U.S. faces a mounting crisis in access to justice. Vast numbers of ordinary Americans represent themselves in routine legal matters daily in our over-burdened courts. Obtaining ex ante legal advice is effectively impossible for almost everyone except larger corporate entities, organizations and governments. In this paper, I explain why, as a matter of economic policy, it is essential that the legal profession abandon the prohibition on the corporate practice of law in order to remedy the access problem. The prohibitions on the corporate practice of law rule out the use of essential organizational and contracting tools widely used in most industries to control costs, improve quality and reduce errors. This keeps prices for legal assistance high by cutting the industry off from the ordinary economic benefits of scale, data analysis, product and process engineering and diversified sources of capital and innovation. Lawyers operating in law firms have not generated these benefits but they have appeared in settings, such as basic document completion, and countries, such as the U.K., where the corporate practice of law doctrine does not prevail. Eliminating restrictions on the corporate practice of law can significantly improve the access ordinary Americans have to legal help in a law-thick world.

* I serve as an advisor for some of the companies discussed in this paper: LegalZoom, Pearl.com, and AttorneyFee.com. Any opinions expressed in this paper are my own, independently reached, and do not necessarily reflect the views of any of the companies I advise. I am grateful to Zach Jones and especially Laura Sucheski for extraordinary research assistance, and to participants in the *Unlocking the Law: Building on the Work of Larry Ribstein* Roundtable at George Mason University School of Law for very helpful comments and feedback on an earlier draft. This paper is dedicated to the memory of Larry Ribstein, who served as a real force for change in the profession and whose energy and ideas are sorely missed.

The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law

I. Introduction

We face a tremendous failure of access to justice in the United States. Vast numbers of ordinary people appear in courts daily without any legal advice or representation. Courts themselves are hugely overburdened with shrinking budgets and growing caseloads, struggling to corral thousands of people through a complex and confusing system. A recent study of New York courts, for example, revealed that over 95% of people in housing, family and consumer debt matters lacked representation¹; close to half of those facing foreclosure did so without legal help to sort through what we have learned are “robo-signed” documents and procedures riddled with error and abuse.² The same is true throughout most of the country. The ordinary family obtains no legal help or advice with legal problems, muddling on its own through the crises of job loss, divorce, bankruptcy, immigration challenges, access to services and benefits, injuries and conflicts with neighbors or schools or health-care providers or local officials. We live in a law-thick world that people are left to navigate largely in the dark.

None of this is news. The legal profession has known for decades that ordinary people are largely shut out from legal assistance; the great majority of legal work is done for corporations, organizations and governments.³ The response of the profession has been to treat this as a

¹ TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (Nov. 2010).

² CONGRESSIONAL OVERSIGHT PANEL, EXAMINING THE CONSEQUENCES OF MORTGAGE IRREGULARITIES FOR FINANCIAL STABILITY AND FORECLOSURE MITIGATION (Nov. 16, 2010), *available at* <http://cybercemetery.unt.edu/archive/cop/20110402010313/http://cop.senate.gov/document/s/cop-111610-report.pdf>; OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF HOUSING AND URBAN AFFAIRS, AUDIT MEMORANDUM OF REVIEW (various, Mar. 12, 2012), *available at* http://www.hudoig.gov/reports/featured_reports.php. “Robo-signing” in debt collection is apparently also widespread—see David Segal, *Debt Collectors Face a Hazard: Writer’s Cramp*, N.Y. TIMES, Oct. 31, 2010,—and so likely affects the 99% of New Yorkers who lack legal representation in response to consumer debt matters as well.

³ John P. Heinz, Edward O. Laumann, Robert L. Nelson & Ethan Michelson, *The Changing Character of Lawyers’ Work: Chicago in 1975 and 1995*, 32 J. LAW & SOC’Y 751 (1998); Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 53 BUFF. L. REV. 1369 (2006); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

problem of poverty, urging governments to devote more money to legal aid and individual lawyers to devote more time to pro bono efforts.

The problem is not fundamentally a problem of poverty. It is not fundamentally a problem of insufficient volunteerism among lawyers. It is not even fundamentally a problem of insufficient government funding—although government funding for legal aid and courts is indeed woefully inadequate in the U.S.⁴ It is fundamentally a problem of economic regulation. And that is a problem that the profession has created, perpetuates and refuses to redress. The profession—ultimately, the judiciary—exercises complete control over the economic regulation of legal work. But it does so without even passing efforts at serious economic policy analysis of how its regulations impact the ability of ordinary Americans to purchase reasonably priced legal assistance.

Dramatic evidence of the inadequacy of the policy work done by the profession has been generated this past year in the context of what should have been an opportunity for serious reevaluation of the regulatory structure of American legal markets. In 2009, the American Bar Association created the Ethics 20/20 Commission to “perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice.”⁵ Initially on the 20/20 agenda was a proposal to reconsider the rules that prohibit the participation of non-lawyers in the financing, ownership or management of law businesses—a doctrine that can be summarized under the heading of the prohibition of the “corporate” practice of law. As I’ll explain in more detail in Part III, below, the corporate practice of law doctrine bans a wide variety of organizational and contractual relationships involving nonlawyers and effectively limits the organizational form of legal practice to traditional office-based law practice. It forbids, for example, consumer oriented companies like Walmart or Target from hiring lawyers to provide legal services in their stores, in the way that they now hire nurse practitioners or physicians to operate in-store medical clinics. It forbids an online legal document and information company—like LegalZoom or Rocket Lawyer—from adding online legal assistance or other innovative products to their repertoire.

The American legal profession invented the doctrine of the corporate practice of law and it could just as directly un-invent it. The Ethics 20/20 Commission provided an opportunity for

⁴ Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129 (2010).

⁵ ABA COMMISSION ON ETHICS 20/20, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Oct. 31, 2012).

serious re-examination of the wisdom of the doctrine. Right out of the gates, however, the Commission declined to examine any of the more ambitious paths for reform, comparable to those recently adopted in other Anglo-American jurisdictions such as the U.K., Australia and Canada. Hence the initial proposal for reconsideration of the rules was minor indeed, a small step in the direction of permitting nonlawyers to participate in the provision of legal goods and services: allowing nonlawyer employees of a law firm to own a minority share of the firm. Even this modest proposal, however, was killed by the Commission four months after the circulation of a discussion draft, never making it to the floor of the House of Delegates.⁶

No report supplying a policy analysis for the decision was released so we can only speculate about the reasoning. Comments received on the discussion draft reveal that lawyers—small firm, large firm and corporate counsel—opposed the proposal, urging that the proposal threatened professional values.⁷ The New York State Bar Association, which had struck a Task Force to supply input to the 20/20 process on this question and which decided to go ahead with their report despite the withdrawal of the proposal by the ABA, released a more fulsome explanation of professional opposition.⁸ The NYSBA report makes clear what is implicit in the 20/20 Commission’s summary disposal of the matter: nonlawyer ownership is a bad idea because lawyers don’t want it. The NYSBA surveyed its members and discovered that 78% of lawyers in New York opposed the 20/20 proposal to allow nonlawyer ownership in law firms. As the Task Force report concluded, there was “no compelling need” for allowing this form of financing and ownership of law firms. The “need” they are referring to, however, appears to be the “need” of lawyers: the evidence they cite for the absence of compelling need is their survey, which failed to uncover *among lawyers* a “groundswell of support to adopt nonlawyer ownership in New York.”⁹ The report then notes that the Task Force members (all lawyers) “are

⁶ ABA 20/20 Commission, ABA Commission Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms, ABA 20/20 Commission (Apr. 16, 2012).

⁷ *See, e.g.*, COMMENTS OF NINE GENERAL COUNSEL ON THE ABA COMMISSION ON ETHICS 20/20’S DISCUSSION PAPER ON ALTERNATIVE LAW PRACTICE STRUCTURES, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/ninegeneralcounselcomments_alpschoiceoflawinitialdraftproposal.authcheckdam.pdf (noting that “allowing any form of non-lawyer ownership of law firms will harm the core values of the American Legal Profession...[making] the practice of law more like other businesses and less like the distinct profession it has always been”).

⁸ The NYSBA report also summarizes the opposition from other state bar associations, including the effort organized by the Illinois State Bar to pass a resolution that would have reaffirmed the ABA’s commitment to the profession’s “core values” and prevented any further discussion of changes in the regulatory structure involving nonlawyers. NEW YORK STATE BAR ASS’N, REPORT OF THE TASK FORCE ON NONLAWYER OWNERSHIP 50–54 (Sept. 10, 2012) [hereinafter NYSBA REPORT].

⁹ *Id.* at 65-66.

not aware of any governmental or *outside* forces pressing for change in law firm ownership structures.”¹⁰ Given this,

the vast majority of Task Force members observed that it was not worth the risk of impacting the core values of the profession by allowing nonlawyers to hold equity interests in law firms. . . . Despite the fact that there may be missed financial opportunities for lawyers and nonlawyers by not taking advantage of nonlawyer ownership, it is more consistent with the core values of the profession to continue to keep the concept that “ownership” of legal practices is an independent right to be exercised only by lawyer.¹¹

This is simply not adequate policy analysis. No judiciary, mindful of its position as the ultimate *economic* regulator of legal markets, should find analysis like this to be competent evidence on which to base regulation. The question is not whether practicing lawyers are generating a “groundswell of support” for a change in regulation; there should be no need for “outsiders” to press for change. The “compelling need” that the profession should be addressing is the compelling need of ordinary people for legal help. But in framing the real issues of policy out of the picture, the NYSBA was in good company; the discussion draft soliciting comments on the 20/20 Commission’s proposal for modest change itself stated that its “work in this area has been guided by three principles: protecting the public; preserving core professional values; and maintaining a strong, independent and self-regulated profession.”¹² Missing from this list is the most important policy principle: ensuring that economic regulation of legal work promotes the welfare of ordinary people. No economists or other nonlawyer policy analysts sat on the Commission; no economic study papers were commissioned; no data was collected; none of the comments received (or solicited?¹³) were from experts in economic policy.

¹⁰ *Id.* at 67 (emphasis added).

¹¹ *Id.* at 68. The House of Delegates of the New York State Bar Association subsequently passed a resolution approving the Task Force report and “reaffirm[ing] its opposition to any form of nonlawyer ownership of law firms.”

<http://www.nylj.com/nylawyer/adgifs/decisions/112312bar.pdf>

¹² ABA COMM’N ON ETHICS 20/20, DISCUSSION PAPER ON ALTERNATIVE LAW PRACTICE STRUCTURES 1 (Dec. 2, 2011), *available at*

http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf.

¹³ It is not clear how the Commission solicited comments on its discussion draft; the practice appears to be posting the draft on the ABA website and inviting submissions. The discussion draft proposing a change in the nonlawyer ownership rules received 30 comments; all but 5 are from lawyers. There are no comments from economists or other policy analysts (although there are comments from the nonlawyer chief executive of Legal Services Board in the U.K., a law professor who supports deregulation, the U.S. Chamber of Commerce Legal Reform

It is tempting to put the profession's failure to engage in serious policy analysis down to craven self-interest.¹⁴ No doubt this is at least part of the story. But there are also many in the profession who truly do care about the lack of access experienced by most ordinary people and certainly a judiciary that is held on a daily basis to exercise objective judgment can and should be expected to transcend the vested financial interests and professional preferences of lawyers. A key reason why these more elevated interests in the profession have not played a more substantial role in the debate about regulatory reform, I believe, is the blinkered view of the economics at the root of the professions current regulatory approach and the tendency to focus on dominant clients—corporations—and dominant law firms—large law firms serving corporate clients.¹⁵ The initial framing of the issue by the Ethics 20/20 Commission almost guaranteed that core economic considerations would not come into play, even assuming a good faith effort to act as a fiduciary for the “outside” interests at stake. “Nonlawyer ownership in law firms” is not the issue. The problem is not financing options available to existing law firms, which do indeed seem to be surviving just fine without equity participation by nonlawyers. The issue, however, is what would be possible with a much more diverse array of permissible organizational and contractual forms to support innovation in the production, pricing and delivery of legal services? How would consumer welfare be affected by such options in the market? For it is only through fairly radical innovation that ordinary Americans can be brought into the markets for legal help from which they are now firmly excluded.

In this paper, I explain why, as a matter of economic policy, it is essential that the legal profession abandon the prohibition on the corporate practice of law. As I will argue, although

Committee (on the letterhead of the law firm of Skadden, Arps—opposing change), Responsive Law—a consumer organization dedicated to opening legal markets—and the National Federation of Paralegal Assistants). Comments available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/alps_working_group_comments_chart.authcheckdam.pdf.

¹⁴ See Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985).

¹⁵ I note that although the proposal for nonlawyer ownership was resoundingly rejected by the NYSBA Task Force on Nonlawyer Ownership (by a vote of 16-1), the question of whether New York lawyers could affiliate with law firms in other jurisdictions such as the District of Columbia and the U.K. that allow nonlawyer ownership and management was considered a much harder question—and was rejected by a narrower 9-6 margin. NYSBA REPORT, *supra* note XX, at 70. Changes to the nonlawyer rules addressing these issues—which can only be relevant to large law firms and mostly those engaged in high-end international practice—are the only ones still on the Ethics 20/20 agenda.

there are market imperfections that raise the price of law above competitive levels¹⁶, the problem of access is primarily a problem of cost—meaning the total cost of identifying, securing and implementing legal help that raises the well-being of an ordinary person as he or she navigates the dense legal environment in which we all live. Under the existing business model—in which legal services for ordinary individuals are provided by solo and small firm practitioners operating in traditional law-office settings—these costs are simply far, far too high. To reduce the cost of law and thus increase access to legal assistance, the form in which legal services are produced and delivered to the market has to change. This will require much larger scale organizations and more creative and complex financial and management relationships between those who provide legal expertise—lawyers—and those who provide many of the other components that go into ultimately delivering legal assistance to people. In this law is just like another modern complex service: medicine. Costs in health care have been controlled only as a result of substantial organizational innovation. By restricting the organizational and contractual structure of law to conventional solo and small firm practice, the legal profession ensures that the changes necessary to make legal help more affordable to ordinary Americans will not occur.

In Part II I set out the case for why the existing strategies propounded by the legal profession to respond to the problem of access to justice—more legal aid and pro bono work—can never meet the demand for legal help. I then turn in Part III to explain what I mean by the “corporate” practice of law and the ways in which the profession currently prevents corporate practice. Part IV examines the sources of the high cost of legal help and Part V then presents the argument that reducing these costs will require forms of organization and contracting that are now prohibited by the corporate practice of law doctrine. Part VI offers some concluding observations.

II. The scale of the access problem and the inadequacy of existing strategies of response

As I noted at the outset, the problem of access to justice is hardly new. Repeated studies and committee reports from both state bar associations and the American Bar Association have worried about the problem since at least the 1980s.¹⁷ In fact, however, we don’t really know

¹⁶ This has been the focus of recent critiques of the regulation of the legal profession. See, e.g., ROBERT W. CRANDALL, CLIFFORD WINSTON & VIKRAM MAHESHRI, *FIRST THING WE DO, LET’S DEREGULATE ALL THE LAWYERS* (2011) (arguing that entry restrictions increase the price of legal services). I explored pricing imperfections in an earlier article: Hadfield, *The Price of Law*, *supra* note XX.

¹⁷ AMERICAN BAR ASSOCIATION, *CIVIL JUSTICE: AN AGENDA FOR THE 1990S: REPORT OF THE AMERICAN BAR ASSOCIATION NATIONAL CONFERENCE ON ACCESS TO JUSTICE IN THE 1990S, JUNE 9-11, 1989*, available at

very much about the dimensions of the problem. The ABA in 1993 commissioned a survey of legal needs that documented that approximately half of all American households were experiencing at the time of the survey at least one dispute-related problem that could have been addressed with legal resources but most (60-70%) obtained no legal assistance. Subsequent state-level legal needs surveys have confirmed these findings, showing if anything that dispute-related legal needs are more pervasive and less often met than the ABA survey suggested.¹⁸ As Herbert Kritzer has emphasized,¹⁹ not all of the problems people encounter that could be addressed with legal resources constitute a “demand” for legal help—sometimes people prefer to handle things without legal input or would not consider the cost of help worth the potential benefit, even if they could afford it. But even if only half of those who reported a problem but obtained no legal help would have benefitted from legal assistance, we are talking about some 20 million households who are dealing with a problem that requires legal assistance at any one time. That’s a lot of unmet legal demand.

Here’s another back-of-the-envelope way to get a sense of the scale of the problem, using a calculation I presented elsewhere.²⁰ In 2005, Americans purchased an average of 1.3 hours of legal help, or 3.34 hours per household. State surveys of legal problems around 2005 estimated that on average households experienced two problems that could have benefitted from legal help a year. That’s roughly 1 hour and 40 minutes of legal time, per problem. That’s not very much for problems that include things such as disputes over child custody, wrongful dismissal, personal bankruptcy, criminal charges, housing eviction, small business operations and denial of medical, social, or disability benefits.

Even this estimate vastly overstates the extent to which American households had access to legal assistance when needed. Legal needs surveys mostly ask respondents about “erupted” problems—difficulties that have blossomed into conflicts and dispute. What these surveys don’t ask about is the hidden iceberg: all the decisions individuals make on a regular basis that are law-related and which could be better made with some legal information and advice.²¹ These include things like signing a rental or consumer contract, taking out a (sub-prime)

<http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/accsconf.authcheckdam.pdf> (describing diminishing resources to meet low income legal needs and increasing poverty levels in the 1980s).

¹⁸ For a review, see Hadfield, *Higher Demand, Lower Supply?*, *supra* note XX.

¹⁹ Herbert M. Kritzer, *To Lawyer or Not to Lawyer? Is that the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875, 900 (2008). See also J.J. Prescott, *The Challenges of Calculating the Benefits of Providing Access to Legal Services*, 37 FORDHAM URB. L.J. 303 (2010).

²⁰ Hadfield, *Higher Demand, Lower Supply?*, *supra* note XX, at 145–46.

²¹ For a discussion, see RICHARD SUSSKIND, *THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY* (1996).

mortgage, framing benefit or employment claims, establishing a will or living trust, complying with regulations governing small business, responding to credit difficulties, filling out tax forms, anticipating marital separation, buying a house, lending a car, changing a health plan, and so on. Planning advice like this constitutes the majority of legal work done for the dominant consumers of legal services: corporations. How great is the need among individuals and households? We really have no idea but any of us can easily think through the instances in our own lives when a legal advisor would come in handy. Here's another window, a small sample of the legal questions asked on one legal question-and-answer information service in the U.S.:

I rent my land to a friend. I know you have to notify them if you are not going to rent it to them the next year, this year has been very dry. My question is if they don't pay the rent on time do you still have to notify them that you will not rent to them the next year? Wouldn't that be breaking the contract?

My Mom is disabled and I am [taking] over her affairs. Five years ago my Grandfather came to us and ask if we wanted to buy his house and land. Mom and I discussed it and decided to do it. Because she doesn't draw enough money, I took out the loan and she paid it back. All 18,000.00 dollars. We granted Grandpa a life estate, but he only stayed there a few months at a time every couple years or so. Now, he's come back and made Mom leave saying he still owns the place. We can't figure out how he can take the money and the house and land too! Mom doesn't have the money for a lawyer and she's now without a place to live. Help! We don't know what to do.

I recently loss my job and have no income my husband has left me can I get monetary help if we divorce?

Can a collection agency post a charge off from my business to my personal credit report?

How does a person sue a person in Georgia small claims court when the person being sued is an Indiana resident?

I have been told by multiple sources that in California there is a law which states that both parents pay for 50% of agreed upon extracurricular expenses. Do you have an actual number for that law?

I am an ordained minister. I have been told that I may practice healing touch without the need of a state license. I have been looking for the regulation or law that backs up what I

have been told without success. I would like you to share the code # and a copy of the written code or law or regulation, what ever it is. Thanks.

I was convicted 27 years ago of a misdemeanor in California. I am applying for a position and just found out that they want to conduct a fingerprint background check (livescan) The background check is conducted by a commercial agency for a commercial agency. How far back can they check criminal records? I thought that my records had been expunged. Unfortunately I have a time constraint as I begin the position in 5 days.

Can a child over 18 become emancipated so as to separate them from an adoptive parent's income? My daughter was adopted when she was a baby. I never knew until she was 18 that she had a very bad relationship with her adoptive parents. . . . As soon as she graduated high school they kicked her out of the house and she came to live with me. She is trying to make something of her life and decided to go to a trade school. The problem is, her parents' income is preventing her from getting any type of financial aid. The parents have flat out refused to help her in ANY way, so it is very assumptive to say that because her parents have money that she is not deserving of financial aid. Any help with this?

How do you go about handling partnership business disputes regarding pay/compensation for owners when nothing was ever established in writing prior? My sister and I began a salon 5 years ago.

Ordinary Americans conduct most of their lives in our law-thick world without any legal help and information at all.

It is important to grasp the scale of the demand for legal services by real (as opposed to artificial) persons²² because it is vital for lawyers and judges to come to grips with the absolute inadequacy of the strategies the profession focuses on for meeting this demand. These strategies include conventional paid attorney-client relationships, pro bono services, legal aid and increased court-based services. While all of these strategies could help on the margin, none of these is a plausible response to the scale of the problem. Consider paid attorney-client relationships. We don't have systematic public data on average hourly rates or other fees charged by licensed attorneys but consultant surveys such as the annual Altman-Weil survey of law practitioners indicate that the average hourly rate for a lawyer in solo or small practice (the setting in which almost all lawyers who serve individual as opposed to corporate clients work)

²² Galanter, *Planet of the APs*, *supra* note XX.

was \$190 for associates and \$285 for partners as of January 1, 2012.²³ Few ordinary Americans dealing with the daily legal needs of life can afford many hours of help at that rate; moreover, in many states lawyers face substantial obstacles providing small increments of assistance (unbundled legal services), meaning that the cost of legal services for many problems is in fact on the order of many multiples of those hourly rates.²⁴ Conventional legal services are simply beyond the means of most Americans.

How about subsidized services? Increased public funding of legal aid is clearly not in the cards: at the rates estimated for solo and small firm practitioners, it would cost on the order of \$20 billion annually just to secure one hour of legal help for all the American households with an unmet dispute-related need; the current total expenditure on legal aid in the U.S., counting both public funds and charitable donations, is 5% of that figure: \$1 billion. Moreover, legal aid in the U.S. (unlike most other Western countries²⁵) is only available to those living at or near

²³ THE SURVEY OF LAW FIRM ECONOMICS, THE NATIONAL LAW JOURNAL & ALM LEGAL INTELLIGENCE, Aug. 6, 2012, at 147.

²⁴ See *infra* Part V.C for discussion of changes in regulations of unbundled legal services.

²⁵ For example, in the Netherlands, more than 45% of households qualify for legal aid. In Sweden, 80% of the population is eligible for legal aid. Lua Kamál Yuille, *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. OF TRANSNAT'L L. 863, 888–89 (2004). In the United Kingdom, legal aid is available for a wide range of civil legal matters including criminal, housing, benefits, family, education, employment and consumer debt matters. See <https://www.gov.uk/legal-aid/what-youll-get>. Legal aid is not limited to full-scale representation in court; legal aid can also be used to pay for assistance that includes legal advice, investigative help or legal help at court for those otherwise representing themselves, and family mediation. Income eligibility standards are complex, vary across different types of legal matters and are means-tested based on a calculation of disposable income that subtracts taxes, housing and other costs. All those with gross annual household income below £31,804 (approximately \$51,000, which is median U.S. household income), however, are potentially eligible for some assistance. The Ministry of Justice estimated that in 1998 52% of the population of England and Wales was eligible for civil legal aid but that this number had dropped to 29% by 2007. See Adam Griffith, *Dramatic Drop in Civil Legal Aid Eligibility*, LEGAL ACTION FEATURE/LEGAL AID (Sept. 2008), available at <http://www.asauk.org.uk/fileLibrary/pdf/Dramaticdrop.pdf>. All individuals who are arrested are entitled to free legal assistance at the police station, regardless of income, as are all defendants in criminal proceedings in Crown Court (with maximum penalty in excess of six months—http://www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/courts_of_law.htm); the Ministry of Justice estimated that in 2008 approximately half of those facing less serious criminal charges would be entitled to legal aid. See <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080220/text/80220w0018.htm#080221111000028>. Per capita expenditures on legal aid in England and Wales in 2008

the poverty line or only for those facing extraordinary legal needs such as criminal charges that can result in imprisonment.²⁶ Those eligible for civil legal aid often are unable to obtain assistance: the Legal Services Corporation estimated that in 2005, half of those seeking assistance from LSC-funded services were turned away.²⁷ Public defenders operate under crushing caseloads that make effective assistance almost impossible to deliver.²⁸ All told, the work done by legal aid lawyers and public defenders accounts for just 1% of all legal effort in the U.S. As for pro bono work: just 2% of the total legal work done by American lawyers is pro bono. That averages out to about 40-50 hours per year per lawyer. If every American lawyer in the country did an additional 100 hours per year, that would be enough to secure only an additional 30 minutes per U.S. person or about an hour per dispute-related problem per household.

There is simply no way for the pervasive need for legal services experienced by ordinary Americans to be met through the conventional means advocated by the legal profession. The demand is huge. We need a massive shift in the production technology for legal services, primarily because we need to dramatically reduce the cost of meeting legal demand. The only way to achieve the kind of scale and innovation needed, I will argue, is through the corporate practice of law.

III. The corporate practice of law

American lawyers, along with other like-minded professionals such as doctors, dentists and optometrists, invented the concept of the “corporate practice” of their field in the early twentieth century, when corporations were sweeping into all sectors of the economy as the dominant organizational form for business. The effort to prevent corporate entities from providing legal services was seen as a key element in the professionalizing agenda: establishing licensing and educational requirements for the authorized practice of the profession and drawing a clear divide between the honorable practice of the learned professions and the muck and muddy of the business world. American lawyers have ever since taken it as a central component of their identity that theirs is a profession and not a business.

was \$76; the comparable figure in the U.S. is \$13. See Hadfield, *Higher Demand, Lower Supply?* *supra* note XX.

²⁶ *Turner v. Rodgers*, 131 S.Ct. 2507 (2011), extends the Sixth Amendment right to counsel to some civil cases (such as child support enforcement actions) where there is a risk of imprisonment.

²⁷ LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2005).

²⁸ NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011).

I will use the label of “corporate practice of law” to refer to a wide variety of organizational forms to produce and deliver legal services. I take my cue here from health economist James Robinson. Writing in the context of the medical profession—which, unlike law, has shown significant organizational innovation over the past several decades—Robinson seeks to recapture for medicine the maligned concept of the “corporate practice of medicine.” He uses the term broadly to refer not just to the employment of doctors by hospitals but also to the vast array of complex organizational and contractual mechanisms by which doctors’ services are integrated with the multiple other services that ultimately produce health care. As Robinson explains, in the medical sphere:

corporate practice is the endeavor to bring together, not individual physicians into medical groups, but medical groups into larger health care systems. Physician practice management firms that span multiple markets, physician-hospital organizations that combine multiple facilities, and health plans that design multiple products seek to coordinate physicians in economically more efficient, clinically more effective, or at least financially more profitable ways. These systems are adopting forms of governance, finance, compensation, and marketing from the larger corporate sector into medicine.²⁹

Through its embrace of a robust notion of the corporate practice of medicine, Robinson says,

the future of health care will be defined by new methods of practice and payment, new concepts of oversight and accountability, and new forms of ownership and governance, by innovations in market contracting and corporate organization that have proven their mettle in global manufacturing, deregulated industries, and consumer services.³⁰

In the legal context, corporate practice most obviously refers to the provision of legal services to the public at large by a publicly traded or a privately owned corporation. Drawing on the more expansive connotations of the term, however, it also refers to the provision of services in *any* organizational or contractual form other than fee-for-service practice through a law firm that is exclusively owned and managed by lawyers or salaried services provided to a lawyer’s corporate employer. Under this more expansive definition, non-profit organizations such as foundations or charities that provide legal services are engaged in the corporate practice of law. So are: unions or community organizations that supply lawyers to their constituents; schools that provide legal advice to their students; businesses, large or small, that hire or contract with

²⁹ JAMES C. ROBINSON, *THE CORPORATE PRACTICE OF MEDICINE*, 18-19 (1999).

³⁰ *Id.* at 19-20.

attorneys to provide legal advice or representation to their employees; insurance companies that hire or contract with lawyers to provide representation to the people or companies they insure according; partnerships where one or more of the partners is someone other than a licensed attorney; and online communities or e-businesses that provide legal advice in conjunction with providing other services.

Almost all forms of the corporate practice of law are prohibited in every state. Every state bans the provision of legal services by a for-profit entity that is not wholly owned and managed by lawyers; the District of Columbia alone allows a legal provider to practice in a partnership or other entity that includes non-lawyer owners or managers, provided the non-lawyers are employees of the firm, the firm provides exclusively legal service, and the non-lawyers agree to be bound by lawyers' ethical obligations.³¹ Some states allow a non-profit organization to provide free legal services for the indigent or to perform legal services that are incidental to their non-legal mission. The U.S. Supreme Court has also held that states violate the First and Fourteenth Amendments if they prohibit entities such as unions from providing legal assistance to their members³² or political organizations such as the NAACP from furthering their political objectives by supplying lawyers to represent members of the public.³³

The prohibitions on the corporate practice of law doctrine are embedded in a variety of ethical rules, common law principles and statutes. Some states have an express law on the books that establishes that corporations may not provide legal services. New York's Judiciary Law 495 states, for example, that

No corporation or voluntary association shall

(a) practice or appear as an attorney-at-law for any person in any court in this state or before any judicial body, nor

(b) make it a business to practice as an attorney-at-law, for any person, in any of said courts, nor

(c) hold itself out to the public as being entitled to practice law, or to render legal services or advice, nor

(d) furnish attorneys or counsel, nor

(e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor

(f) assume in any other manner to be entitled to practice law, nor

³¹ D.C. RULES OF PROF'L CONDUCT R. 5.4.

³² *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 221–222 (1967).

³³ *NAACP v. Button*, 371 U.S. 415, 428–429 (1963).

(g) assume, use or advertise the title of lawyer or attorney, attorney-at-law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law or to furnish legal advice, services or counsel, nor

*(h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel.*³⁴

New York is not an exception. Missouri's statute reads "*Nor shall any association, partnership, limited liability company or corporation ... engage in the practice of the law or do law business.*" South Carolina's reads "*It is unlawful for a corporation or voluntary association to . . . hold itself out to the public as being entitled to practice law, render or furnish legal services, advise or to furnish attorneys or counsel, or render legal services in actions or proceedings.*"

The more expansive forms of the doctrine find expression in the rules of professional conduct drafted by bar associations and adopted by state supreme courts and legislatures. Most jurisdictions follow the American Bar Association's Model Rule 5.4 which states:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer...

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest ...;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

5.4(d) expresses the prohibition on the for-profit corporate practice of law most explicitly, but the fee-sharing and partnership rules expand the prohibition well beyond banning the provision of legal services to the public by lawyers who are employed by a for-profit corporation. Many organizational forms and contracting methods are prohibited. For example, staff lawyers or

³⁴ N.Y. JUD. LAW § 495. This section goes on to exempt some categories of organization from the proscription against practice by a corporation or voluntary association such as a company providing title insurance, or a prepaid legal plan.

private practitioners under contract with an insurance company may not agree to be bound by litigation guidelines intended to control costs and improve incentives such as protocols limiting discovery, requiring pre-approval for some kinds of motions and demonstration that they have a better than 50-50 chance of success, curtailing research and disallowing bills for routine research.³⁵ Nor may they agree to flat fees if doing so would lead them to curtail “zealous” advocacy.³⁶ Similarly, providers of prepaid legal services plans cannot implement agreements with the lawyers providing covered services about protocols or procedures that will control costs. Innovators who seek to develop new legal delivery models cannot draw on standard forms of venture or private equity financing. Lawyers cannot contract with a company that takes on the job of developing legal products to match consumer demand, building market reputation and scale, and managing advertising and transactions if the company collects anything other than a reasonable fee for its management services. Incentive contracts that involve profit-sharing with any other service providers—such as investigators, financial analysts, case managers, real estate brokers, interpreters or psychologists, for example—are prohibited unless these providers are employees and profit-sharing is not tied to performance on particular matters.³⁷ Lawyers thus cannot form any type of organization—partnership or corporation—with other professionals or service providers. Collaboration with other service providers—such as banks or insurance companies or financial planners—which involve referring clients to a lawyer who is then compensated at a rate that involves sharing a portion of the fees generated from the referral are prohibited. Indeed, in many states, unless the referring entity is a bar association, a not-for-profit organization, or an entity approved by the state bar and which (among other things) must allow all qualified lawyers to participate³⁸, no compensation for referrals (to an entity that specializes in advertising, for example) can be collected even at a fixed rate. An attorney cannot pay to participate in a service that ranks or otherwise evaluates the suitability of lawyers and provides consumers with this information.

In several states the authority to prohibit the corporate practice of law is understood to derive not from express legislation or rulemaking but rather from the judiciary’s exercise of its

³⁵ State Bar of Arizona Comm. on the Rules of Prof’l Conduct Op. 99-08 (1999); for a collection of state bar ethics opinions on efforts to control insurance defense costs by insurance companies, see DRI ETHICS TASK FORCE, A SURVEY OF STATE ETHICS OPINIONS CONCERNING THE TRIPARTITE RELATIONSHIP (July 2002), *available at* <http://ebookbrowse.com/2002-position-statement-a-survey-of-state-ethics-opinions-concerning-the-tripartite-relationship-pdf-d17780645>.

³⁶ See *e.g.*, Utah State Bar Ethics Advisory Opinion Comm. Op. 02-03 (2002).

³⁷ MODEL RULES OF PROF’L CONDUCT R. 5.4.

³⁸ ABA Model Supreme Court Rules Governing Lawyer Referral Services; MODEL RULES OF PROF’L CONDUCT R. 7.2(b).

exclusive authority to control admissions to the bar and to discipline lawyers.³⁹ For example, in an early and influential decision, the New York Court of Appeals held that a corporation that had provided legal services through staff attorneys for subscribers to their service since 1901 was incapable of lawfully engaging in the practice of law even before the New York Assembly passed Penal Law 280 in 1909 (the predecessor to Judiciary Law §495) because

*the practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study...No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.*⁴⁰

Nearly a hundred years later, in 2006, the California Supreme Court reiterated that prohibitions on the corporate practice of law, even if supplemented by legislative enactments, find their root in the inherent powers of the judiciary to regulate the practice of law.⁴¹ The Court cited the reasoning of a 1922 California case that “the profit motive created an inherent conflict of interest for attorneys and would foster inappropriate commercialization of the profession.”⁴² Or, as the 1922 case put it, quoting from the 1910 New York case mentioned above:

The corporation would control the litigation, the money earned would belong to the corporation and the attorney would be responsible to the corporation only...There would be . . . no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The

³⁹ In most states, the state supreme court claims an inherent and often exclusive authority to regulate the practice of law. For more discussion, see *infra* pp. xx.

⁴⁰ *In re Co-operative Law Co.*, 198 N.Y. 479, 483 (1910).

⁴¹ *Frye v. Tenderloin Hous. Clinic, Inc.*, 38 Cal. 4th 23 (2006). In this case the Court relied on the judicial origins of the corporate practice of law doctrine to reject a Court of Appeals decision that treated compliance with statutory provisions authorizing nonprofit corporations to provide services to the poor only if registered with the State Bar and managed exclusively by licensed attorneys as the sole means of lawful operation of a nonprofit legal services provider.

⁴² *Id.* at 37.

*bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a moneymaking corporation.*⁴³

This core set of beliefs, inculcated in generations of lawyers, is what gives the corporate practice of law doctrine such expansive power, effectively locking the practice of law into a 19th century model of in-person law-office practice. Moreover, through its expression in multiple contexts, the corporate practice of law prohibition is enforced on multiple fronts. It strips the nonlawyer owners or members of a corporation or partnership of the right to engage in the business of providing legal services—inviting an injunction and potential criminal prosecution.⁴⁴ It threatens a lawyer who attempts to practice in the context of a prohibited organizational form with disciplinary action and disbarment. And it entitles anyone who enters into a contract with a prohibited organization (including a contract between a lawyer and the organization) to avoid enforcement of the contract on grounds that the contract violates public policy.⁴⁵

The multiple and unclear sources of the doctrine also explains why the doctrine is infrequently challenged, and perhaps why it has evolved so little since its origins in the late 19th and early 20th century. The regulatory framework here is disorganized and hard to track. Can the state legislature pass a law authorizing for-profit provision of legal services? Yes, but it may well have no effect: most state courts assert their right to independently, if not exclusively, regulate the legal profession and as we have seen, caselaw states that the doctrine is judicial not legislative in origin. Moreover, it is not merely an area of common law, which the legislature can displace; it is an exercise of the claimed inherent authority of the judiciary to regulate as a matter of constitutional separation of powers.⁴⁶ Even if the legislature did remove the ban on corporate practice, the ethical codes generated by bar associations and adopted by state

⁴³ *People ex. rel. Lawyers' Inst. of San Diego v. Merchants' Protective Corp.*, 189 Cal. 531, 539 (1922) (quoting *In re Co-operative Law Co.*).

⁴⁴ *See, e.g., Application of New York County Lawyers' Ass'n*, 273 A.D. 524, 527–28 (N.Y. App. Div. 1948), *order aff'd without opinion*, 299 N.Y. 728 (1949).

⁴⁵ Public policy against the unauthorized practice of law allows clients to get out of unenforceable contracts with unauthorized practitioners and entitles them to affirmative relief. *See, e.g., Mlynarik v. Bergantzel*, 675 N.W.2d 584, 588 (Iowa 2004). Note that the Court in *Frye*, however, rejected the plaintiff's claim that he should be released from his contract to share statutory attorney fees awarded when he prevailed with the non-profit organization that litigated his housing claim.

⁴⁶ For an extended discussion of the profession's success in defeating legislative attempts to change the regulatory landscape, see Laurel Rigertas, *Lobbying and Litigating Against 'Legal Bootleggers'—The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 CAL. WEST. L. REV. 65 (2009).

supreme courts would continue to prohibit lawyers from participating in these authorized forms.

The confusing and inadequate state of the regulatory environment governing the corporate practice of law was illuminated by a recent, and rare, challenge. The law firm of Jacoby & Meyers filed suit in federal court in the spring of 2011 against the state supreme court judges (in their regulatory capacity) of New York, New Jersey and Connecticut, claiming that Rule 5.4 was an unenforceable restraint on their ability to obtain nonlawyer financing for their firm. They claimed the rule went beyond the constitutional and/or legislative authorization of the courts to regulate lawyer conduct and, furthermore, violated federal constitutional law.⁴⁷ In the spring of 2012 the District Court for the Southern District of New York dismissed the New York case in a decision that lays bare the problem facing any effort to develop solutions to the access problem that involve changes in the corporate practice of law doctrine. The Court held that since Judiciary Law §495 independently prohibits the practice of law by a for-profit corporation, any opinion on the enforceability of Rule 5.4 would be advisory only: striking down the rule would not be sufficient to allow Jacoby & Meyers lawfully to take on non-lawyer investors. But, as we have seen, had Jacoby & Meyers challenged Judiciary Law §495 they also would have fallen short of their goals: New York caselaw holds that the prohibition on the corporate practice of law is fundamentally judicial in origin. The case is now on appeal. As for the other two challenges, the district court in New Jersey has stayed the federal case and remitted to the New Jersey Supreme Court the question of whether Jacoby & Meyers is prevented by Rule 5.4 from accepting nonlawyer investment; the Connecticut district court has yet to rule.

Perhaps the most striking observation to be made about the Jacoby & Meyers' challenge is that the challenge has to be framed as a violation of rights in the first place. The real question is not whether Jacoby & Meyers is harmed by the ongoing prohibition on the corporate practice of law but whether the prohibition is *good public policy*. But what is the procedure for pressing the policy question? The only way to prompt the court-as-regulator to act is to bring a lawsuit, a lawsuit that can legitimately be dismissed for failure to state a claim of individual harm to the plaintiff. Where is the forum for challenging the judgments courts are making in their regulatory function? Most rulemaking in courts takes place largely out of the public eye.

⁴⁷ The complaints state causes of action for violation of separation of powers, dormant commerce clause, takings, equal protection, due process and rights of free speech and association, and claim Rule 5.4 (specifically the concept of the "practice of law") is void for vagueness and thus chills the exercise of First Amendment rights.

In fact, serious policy analysis of the costs and benefits of different approaches to providing ordinary Americans with the legal help they (and our pro-se-litigant-overburdened courts) need is not to be found in the bar and judicial treatments of the corporate practice of law over the past one hundred years. The rationale for the rule provided by bar associations and courts has been based exclusively on considerations about risks potentially posed by the corporate practice of law to the way in which law will be practiced by lawyers in conventional settings: will lawyers who work with or for nonlawyers be tempted to ignore their duties of loyalty and confidentiality to their clients? Will they exercise their professional judgment free of unlawyerly considerations? Many critics have already articulated the weakness of this rationale, pointing out that the profession has not undertaken to evaluate empirically the magnitude or likelihood of these risks, nor to compare systematically these risks to the risks faced by clients who obtain legal services from conventionally-licensed lawyers operating in solo or small-firm practice.⁴⁸ Nor has the profession explored alternative approaches to minimizing these risks, such as by regulating corporate providers and holding lawyers employed by corporations to their ethical duties regardless of employment status, rather than adopting the blunt instrument of banning corporate practice in all forms.⁴⁹ Critics have also pointed out that the comparison between services provided by a corporate entity and services provided by a conventionally-licensed lawyer operating in private practice is a phantom one: the choice most Americans face is not between these two alternatives, it is between services provided by

⁴⁸ See generally Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 61 (arguing that “parochial perspective is apparent in unauthorized practice enforcement”); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 J. INST. STUDY LEGAL ETHICS 19, 203, 205 (1996) (arguing that the “main danger [of opening access to nonlawyers] lurking in the shadows is the bar’s own interest in restricting competition” and noting that the bar usually relies on “unsupported or anecdotal assertions” about the quality of nonlawyer practice); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985); Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?* 40 HASTINGS L.J. 577 (1989); Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383 (1988); Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1 (1998); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1 (2012).

⁴⁹ For a discussion of how the medical profession has maintained physician obligations of quality care in the face of an increasing role for non-physicians such as hospitals, insurers and health maintenance organizations in structuring care, and how malpractice liability has been extended to these non-physician entities, see George C. Harris and Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn From the Medical Profession’s Shift to a Corporate Paradigm*, 70 FORDHAM URB. L.J. 775 (2001).

some form of corporate entity and no services at all. The profession has recognized at least the latter criticism, which is why bar associations and state courts focus their access to justice concerns on increasing pro bono, legal aid and court funding.

But these strategies, as I have emphasized, cannot even begin to attain the scale necessary to address the problem of access. For that, we need a more serious policy analysis. Although critics generally find it enough to debunk conventional rationales for the doctrine—and assail the bona fides of the profession in the process—if we are to take the profession’s obligations for policymaking seriously, we need to more carefully evaluate what the real choices are.

In what follows, I try to shift the frame of our analysis of the corporate practice of law, from one focused solely on the risks to lawyerly compliance with their ethical obligations to one based on the costs and benefits of legal help supplied in alternative formats. I take it as a basic starting point that protecting the markets of existing lawyers is not a legitimate policy objective for those ultimately responsible for regulating the profession: state supreme court judges and legislatures. Although these regulatory institutions are themselves populated by lawyers who move in legal professional circles and often depend on the support of the practicing bar, the obligation here to ensure independence from improper considerations of attorney benefit is clearly paramount.

IV. The economics of legal services for ordinary Americans

Much of the current discussion about the corporate practice of law has been framed as a matter of allowing outside investment in law firms and possibly publicly traded law firms, and most of this has been concerned with the sector that makes up the great bulk of legal services—the supply of services to corporations by large law firms.⁵⁰ I have written elsewhere about why I think that the provision of legal services to corporations is failing to keep up with changes in technology and globalization and why limitations on capital interfere with the capacity for innovation in corporate legal services.⁵¹ Here I want to focus specifically on the supply of legal services to individuals and households. These are services people need to address issues concerning their families, workplaces, communities, personal finances and small

⁵⁰ See Adams & Matheson, *supra* note xx; Bruce MacEwan, Milton C. Regan & Larry Ribstein, *Law Firms, Ethics, and Equity Capital*, 21 GEO. J. LEGAL ETHICS 61 (2008); Larry Ribstein, *The Death of BigLaw*, 2010 WIS. L. REV. 749 (2010); Andrews, *supra* note xx.

⁵¹ Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008); Gillian K. Hadfield, *Legal Infrastructure and the New Economy*, 8 I/S: J. L. & POL’Y FOR INFO. SOC’Y 1 (2012).

businesses and their relationships with government officials (crime, immigration, regulation, taxes and so on).

A. The crux of the problem: cost

The nature of the problem of access to legal services is not that hard to name: legal services cost more than most people can afford. Why are legal services so expensive? For an economist there are two places to look for an answer: the nature of competition over price and the determinants of product cost. A product might be expensive because there is a lack of competition among providers, so that price exceeds marginal and long-run average costs. Or it might be expensive because costs are high. Or both.

Let's consider the problem of price first. As I have argued elsewhere⁵², pricing in legal markets may well fail to be competitive. Legal services are often a credence good—meaning that their quality cannot be determined even after the good is consumed—and they are offered in a market beset by the imperfections of specialization, sunk costs and winner-take-all dynamics. Price can easily and persistently exceed cost in circumstances such as these. I continue to believe that these imperfections intrude on pricing in legal markets, but they have a much greater impact on pricing at the high end of the legal services market—in the provision of full-scale litigation, regulatory strategizing and dealmaking, for example. As we know, this is the legal market in which we largely find corporate clients and wealthy individuals in personal disputes. But in the legal market where we find the vast majority of individuals—seeking assistance with managing the ordinary legal issues of daily life or supplementing what are of necessity pro se efforts even in family matters and other disputes of great personal consequence—there is reason to believe that among existing providers (lawyers operating in solo or small firm private practice) there is substantial competition over price.⁵³ Here is where we historically have seen significant excess supply of lawyers.⁵⁴ There is no shortage of licensed attorneys willing to fill out wills, process bankruptcy filings, manage a DUI charge, secure a divorce and so on and they are anxious to do so with whatever clients they can find at whatever price they can manage. Even with robust price competition, however, the cost of obtaining

⁵² Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

⁵³ Note, however, that competition in price in the personal services market may not extend to contingent fee lawyering in personal injury matters. See Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Paradox*, --- STAN. L. REV. --- (2013).

⁵⁴ See Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 L. & SOC. INQUIRY 431 (1989). Of course, the last few years have witnessed excess supply creeping up the income distribution to include lawyers who, ten years ago, would have faced few difficulties earning a comfortable living in medium to large-size corporate commercial practices.

useful legal help is prohibitive for most people. Median household income in the U.S. in 2010 was just below \$50,000.⁵⁵ Price competition among solo and small firm practitioners still produces rates that rarely dip below \$150 - \$200 per hour. Flat fee charges by private practitioners (to the extent we know anything reliable and systematic about these figures⁵⁶) for an uncontested divorce or filing a simple personal bankruptcy probably start at about \$300 but likely increase rapidly in practice.⁵⁷

The crux of the access problem is cost. And by cost I mean the all-in cost: the final cost of getting the benefit of legal services—such as information, advice, document completion, or representation—into the utility function of an individual consumer with a legal need. This includes not only the time, research and educational costs incurred by an attorney in producing analysis or advice or representation, but also the cost to the attorney of operating a solo or small firm practice: renting space, hiring assistants, devising a pricing scheme, collecting bills, marketing services. It includes the cost to the consumer of recognizing the need for⁵⁸ and then finding, evaluating, understanding, and implementing the analysis and recommendation. And it includes the costs associated with risk, errors and waste in the provision of services.

Consider an example, based on one of the questions quoted from an online legal information service, above. Suppose you are the person who has asked about whether your criminal record

⁵⁵ U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 5 (2011). The precise figure was \$49,445, a decline of 2.3% from 2009.

⁵⁶ AttorneyFee.com, the source of the flat fee price estimates shown here, is a service that scrapes data from the web using attorney websites, attorney submissions, client postings and so on to generate prices for attorneys in a given location. The reliability of the information is unclear—there is no systematic and validated data collection of attorney charges available.

⁵⁷ The price shown by LegalZoom.com and CompleteCase.com, for example, for an uncontested divorce is \$299 (exclusive of filing fees). LegalZoom charges \$1299 for a Chapter 7 bankruptcy filing with attorney representation in Washington State (not including a Bankruptcy Court filing fee of \$306); Do It Yourself Documents (doityourselfdocuments.com), which provides assistance from legal technicians newly licensed to operate in Washington State as of September 1, 2012, quotes a price of \$224 and states for comparison purposes that local attorneys charge \$400-\$500.

⁵⁸ Strikingly, in a recent legal needs survey conducted in New York, 94% of low-income respondents said “no” when asked the general question “in the past year, did you or anyone in your household have any legal problems, excluding criminal problems or issues, or aren’t you sure?” When presented with a list of specific problems—such as eviction, debt collection, custody or support issues, etc.—however, 47% report having at least one problem. *Task Force to Expand Access to Civil Legal Services in New York*, *supra* note xx, at Appendix 17, 16–17. Difficulty recognizing a “legal” problem may explain why 83% of respondents reported that they did not seek any legal help. *Id.* at 58.

from a misdemeanor conviction 27 years ago will appear if you submit to a fingerprint background check required for a job application. Assume (as the questioner reveals in a follow-up post) that the job is for a teaching position in a public school and that you have already checked “no” to the question about your criminal record on the application (believing that your record has been expunged and that this is the proper answer.) You could gain utility—benefits—in potentially several ways from legal services in your situation. First, you may be able to make an informed decision about whether to drop or even withdraw the application, and whether to submit to the fingerprint scan before or after doing that. You may discover whether you have already generated civil or criminal liability for yourself by checking “no” on the application. You may learn about the cost and possibility of having your record expunged if it has not been. You may obtain advice about how to manage a court appearance if you need to appear in court, including the impact of that existing application on your likelihood of success in court: how to schedule this, where to go, what documents you’ll need to bring with you and how to obtain them, what to say to the judge, what not to say. You may make use of representation for that court appearance. You may learn about rights not to submit to fingerprint background checks for public employment or limits to how the information generated by those checks is used or shared. You may get advice about how to correct an erroneous report. And so on.

Suppose you follow the conventional model for obtaining legal assistance in this situation. What costs are incurred to generate the benefits you’re looking for? First there are the costs you incur figuring out that you are in a situation where some legal assistance might be valuable in the first place—the costs of being sufficiently educated about the legal environment to recognize that there may be consequences to going forward with the application as is or submitting to the fingerprint scan. Once you figure that out, there are the costs associated with identifying possible ways to get some answers about the nature of your legal situation. Who can you call?⁵⁹ What books or brochures can you consult? What websites can you visit? Then you will incur costs to evaluate the quality, cost and usefulness of those different resources. Should you just call the first attorney in the yellow pages or the one with the bus-bench ad you saw on the way to work? The one you’ve seen advertising about mesothelioma cases on TV? How about the bar association? How do you contact them and how do you know how good the attorney is that they refer you to? What about the websites a little internet research brings up—is the information you’ll find there accurate? Usefully tailored to your circumstances? Can you call the courthouse and ask someone there? How do you call the courthouse? Do you have a legal plan with your current employer and if so can you use it for this?

⁵⁹ An Arizona study, for example, found that 81% of people surveyed did not know who to call if they needed help with a civil legal problem. ARIZ. FOUND. FOR LEGAL SERVS. & EDUC., VOICING A NEED FOR JUSTICE: SURVEY RESULTS ON LEGAL AID ACCESS IN ARIZONA (2007).

Once you have identified your options and decided on one of them to start with you'll incur the cost of obtaining that assistance. Suppose you decide to follow the conventional model of legal services. You contact an attorney based on a referral from the bar association, which tells you that their list of practitioners includes all lawyers in your area who have asked to be included on their panel for criminal law and who are properly licensed by the state bar and hold malpractice insurance. The service does not rate lawyers and there are no publicly available reviews. The attorney you pick from the list you're given, a solo practitioner in your town, asks you to make an appointment with her secretary for a consultation. You will have to take time off work or find childcare and pay for public transit or parking to make this appointment. You might not know when you go what the attorney will charge you; even if the secretary told you on the phone that the lawyer's hourly rate is \$180, you are not sure—and the secretary says she can't tell you—how long the help you are looking for will take. You may spend some time before going trying to find this out.

Once you arrive at your appointment, you will be asked to sign a document that says something you don't quite understand about hourly rates and arbitration and perhaps pay some fees upfront. Then you will have to make sense of what the attorney tells you during the consultation. Suppose the attorney advises you that she can research your criminal record for you but that it will probably cost \$1000 to do so, or she could give you some instructions for how to do it yourself. She also advises you about various risks you might be running having already checked off the box on the application. You will have to process all this information and, if you decide to go ahead on your own, carry out those instructions. You are likely to still have questions after you leave and later as you go through the process. There are the costs you will incur as the process unfolds: obtaining documents, perhaps going to court, finding out what happens next, waiting for your phone calls from the attorney to be returned.

How about costs incurred by the attorney in playing her part in this transaction? Of course she has incurred the costs of earning a four-year undergraduate degree and a three-year JD, taking a bar preparation course, and passing the bar. She has incurred the annual cost of continuing legal education requirements necessary to maintain her license in good standing with the state bar and the cost of malpractice insurance. She has spent time and money learning all those things they didn't teach her in law school about how to do things like expunge a criminal record. Indeed, she may be a general practitioner who hasn't done something like this before—maybe ever, or just not in this town, or just not since they changed clerks or procedures in the local courthouse—and she needs to find this out before or after she meets with you. There may be costs associated with figuring out the privacy rules associated with job applications for public employment or other areas of law or policy—which she may not be

aware of. She may incur costs trying to determine if she is meeting minimum standards of competence in extending her advice to include employment or education law matters raised by your circumstances.

Then there are the overhead costs: renting office space and purchasing office equipment, financing her bank loans, employing a secretary and paralegal assistant, subscribing to Westlaw, and so on. There are business decisionmaking costs: deciding where to locate her practice, what hours to operate, what prices to charge and how to manage client demands and payment problems. There are marketing costs to bring in clients through advertising, a webpage, referral relationships, community work—all to be done without violating the ethics rules of her state bar association, which doesn't allow her to advertise criminal law as a specialty, for example, unless she has been certified as a specialist by the bar association.

In addition to these consumer search and provider production and delivery costs, there are intangible and transaction costs associated with the advice and information you receive. There is the cost of error—is the information accurate? The advice sound? Complete? Errors or weaknesses in the advice and strategy you follow can produce significant costs: you may forego the job application in error; you may proceed in error and face later prosecution for falsely completing the job application; you may have trouble getting a job again because you did not effectively expunge the record or exercise your rights to control the disclosure of the information produced. And so on. You know, or worry, that there is the potential for such error and so there is the reduction in utility associated with risk-aversion, as well as the psychic cost of your anxiety.

Finally, there are social costs associated with this legal help transaction. Inaccuracies in your job application can impose costs on the school board. Difficulties expunging misdemeanors that really have no bearing on an applicant's qualifications for a teaching job but that risk-averse school administrators can't ignore reduces the pool of available teachers. Your somewhat bumbling efforts to obtain information about your criminal record imposes costs on the local court administration—the clerk's office needs extra staff to answer the phones or has to seek funds to create a self-help center. If you appear in court without the correct documents or with documents that are incorrectly completed or you misunderstand what's expected of you or you get the filing dates wrong—all of these generate costs for the court system. If you end up using a dishonest lawyer or an online service engaged in a scam and either degrades the reliability of court records, the public bears the cost of fraud, fraud detection and fraud deterrence. Society bears the cost of resources wasted on legal services, documents or attorney time that you don't need. Society bears the cost of the regulatory system that

oversees this entire transaction—such as coming up with court rules, administering bar exams and disciplining lawyers.

I'm quite sure this catalogue is far from complete: but you get the picture. The economics of generating legal assistance that produces benefits for individuals with legal needs go far, far beyond the economics of producing and sharing legal knowledge and expertise. The costs of securing legal assistance go well beyond the costs of educating lawyers and the opportunity costs of allocating a lawyer's time and expertise to an individual's legal problem.

To tackle the problem of the high cost of legal help for individuals, then, we need to be thinking about all the components of that cost. This means not only seeking ways to reduce the cost of educating the people who help individuals meet their legal needs but also ways to reduce all the incidental costs of search, delivery, implementation, error and waste. The corporate practice of law is an essential part of reducing those costs.

V. Reducing the cost of legal services

A. Scale and branding

Many of the costs described above are fixed costs over some range—that is, costs that do not vary as the scale of a practice increases. If a solo practitioner hires an office assistant, for example, it is likely that the assistant can provide services simultaneously to a few other partners as well without a change in wages or benefits. The same is true of other types of office expenses such as office equipment, library holdings, building services, common space such as waiting rooms and conference rooms. Many of these types of fixed costs are probably already largely optimally shared by lawyers forming small partnerships that balance the benefits of sharing fixed costs across a larger practice group against its costs: losses due to congestion, market saturation, the increased costs of coordinating business decisions, and the introduction of reputational, legal and financial risks generated by an independent partner.

Many business costs, however, are information costs: the costs of identifying good locations, optimal hours, setting prices, efficient billing and collection practices, and productive customer service practices. Information costs are optimally shared across as many users as find the information valuable. Advertising and marketing expenses are another category of information costs that could be widely shared: it costs the same to advertise a solo practice as it does to advertise a large firm or network of providers under a shared name or trademark.

A major potential source of savings from increased scale comes from the information costs that are fundamental to legal work: monitoring legal developments such as changes in legislation, regulation and caselaw and learning from practice and experience—with an area of law, a particular agency or court, using particular strategies—to improve legal judgment, analysis and advice. The effective per-client charge for these costs goes down as the volume of clients who benefit from investments in legal knowledge and expertise goes up.

Expanding scale doesn't only reduce the imputed per-client charge for fixed costs, however. It also increases the optimal investment in these aspects of operating a business. This is probably a critical factor for the individual legal services market. Practitioners operating a solo or small firm practice can afford to invest only lightly in learning how to run a business and marketing their services. To justify significant expenditures on improving operational procedures and marketing requires significant scale. The incentive to invest in legal knowledge is supported to some degree by continuing legal education requirements but, in equilibrium, current CLE requirements cannot exceed what it is reasonable to expect from a solo or small firm practitioner on a tight profit margin. If one person in a larger office can attend a program on a given topic and then, at much lower cost, share the new expertise with other lawyers, then the returns to CLE are higher and the scale of CLE can increase.

It is important for the access to justice question to focus on these mundane elements of the cost of running a legal business because the benefits of distributing these costs across a larger scale accrue not only to the bottom-line for practitioners but also, more fundamentally, to the costs incurred elsewhere in the process of delivering effective legal benefits to those with legal needs. Increasing the amount of investment in legal knowledge and expertise by sharing the costs of learning across a larger group of practitioners raises the quality of legal work done and reduces legal errors. Lowering legal error costs benefits both clients and the public—improving the efficiency and functioning of courts and agencies, for example. Reducing errors can also reduce costs associated with risk-aversion and anxiety for clients.

Even cost-savings associated with advertising and marketing expenses have important implications for solving the access to justice problem. Although the profession has worried for more than a century about lawyer advertising and the potential for lawyers to use it to foment litigation, this worry misperceives the nature of legal demand and the gaps in access. Many of those who need legal services need them not to file personal injury suits—they need them to manage a law-thick daily environment: filing a divorce, managing a financial crisis, applying for a job, complying with small business rules, handling a child-support claim or a misdemeanor charge. For these services, advertising and marketing is essential to reduce the search costs

individuals face. These search costs, augmented by perceptions of risk and uncertainty, probably account for a substantial share of the impediment to obtaining legal assistance.

The relationship to scale is important here. “Scale” of practice here implies the volume of demand that can be met by lawyers with a common market presence—operating under a shared name or trademark. Suppose we lived in a world in which lawyers were only permitted to engage in plain vanilla advertising: ads and listings and webpages that only communicated a firm name, location, and areas of specialty, for example—no efforts to sell people. Assume that the principal way in which people located a lawyer and learned about his or her quality and cost was through word-of-mouth and recommendations. Even in this inoffensive advertising environment, the capacity to advertise a firm, operating under a single trademark and capable of serving large numbers of clients, would generate significant search cost savings for individuals with legal needs. The shared brand enables people to share information about their experiences with the brand—rather than an individual attorney. This makes online reviews and recommendations, for example, a potentially potent form of marketing for legal services. This would allow law to harness the benefits of the substantial reductions in consumer search costs generated by the electronic and information revolutions of the past few decades.

The benefits of shared branding go beyond providing those with legal needs with a cheaper way of identifying providers and learning about their reputation. A shared brand can coordinate a wide range of information exchanges that can allow individuals to better identify the types of legal help available and to assess better their own needs. This can improve the matching between services and users. Moreover, by generating data, it can allow providers to improve their services—online discussions about experiences with lawyers can reveal gaps and problems in how lawyers understand and meet their clients’ needs. The volume of information exchange needed to generate these types of benefits is significant: and this requires a legal business that operates at sufficient scale to make contributions to reviews and recommendations potentially valuable to those searching for legal help. The pool of people interested in hearing about lawyer X is much smaller than the pool of people interested in hearing about company X.

B. Innovation and investment in product and process development

The above discussion demonstrates that even if we focus on legal services offered in much the way they are today—in brick-and-mortar offices where clients meet individually with licensed attorneys who exercise their personal judgment in crafting legal advice and strategies—the legal sector serving individual clients operates at a scale that is probably significantly below an optimal level. Costs are probably significantly increased by the small scale of individual services practice.

The most important gains in the costs of serving ordinary people, however, are likely to come from the capacity for increased scale to support substantially increased investment in product and process development. Much of this cost-saving can be achieved with respect to elements of the delivery of legal benefits that do not implicate the exercise of legal judgment per se.

Improvements in product and processes for delivering legal assistance arise from two key sources that are standard in most businesses: research and development.

1. Research

Those in the legal sector are likely to think that “research” refers to legal research. But the type of research that I’m referring to here is market research: understanding the nature of what people need, what they can afford and might be willing to pay, and how different types of products would satisfy demand in competition with other options. Of course, ordinary practitioners will learn some of these things incidentally through their anecdotal observations about who comes through their door and the success of the contact. But deliberate market research can do much more than this, and produce much more reliable results.

We understand very little about the dimensions of the demand (need) for legal assistance by ordinary individuals. Take our public school teaching applicant, the one who has to decide how to respond to the request for a fingerprint scan in light of his misdemeanor record of 27 years ago. How rare is that type of problem? How well do people understand it? How often do errors and misunderstandings waste the resources of an applicant, a school board or a court? What strategies do people currently employ to respond to this risk and at what cost? We don’t have reliable systematic answers to these basic questions—or to the similar questions we could raise about the panoply of problems ordinary people encounter on a regular basis. One of the striking features of the emergence of some internet-based legal question and answer sites in the past few years is the impression of deluge that they create, and the wide variety of issues that people face.

Systematic efforts to understand the nature of legal demand for ordinary Americans currently is limited almost exclusively to “legal needs” surveys conducted by bar associations; often these surveys focus exclusively on the access available to the poor.⁶⁰ While valuable, these studies are seriously incomplete as a picture of legal demand: they present respondents with a list of problems and ask if the household or individual is experiencing any of these problems. They then (sometimes) ask what of a proposed list of actions the respondent has taken in response

⁶⁰ I summarize results across several of these studies in Hadfield, *Higher Demand, Lower Supply?*, *supra* note XX.

to the problem. As other commentators have noted⁶¹, the studies do not attempt to evaluate the “cost” of the problem (in personal or financial terms) or assess the detailed options and obstacles available to the respondent. Our public school job applicant, for example, would appear in this survey at best as answering “yes” to the question “have you had a problem with employment” and checking off “sought information from a third-party” on the list of “steps taken.” Indeed, because these studies focus on erupted problems, our job applicant might not register at all because he may decide to forego the application and required fingerprint scan and hence may see himself as having avoided a possible legal problem rather than experiencing one.

Legal needs surveys also are woefully inadequate to assess legal demand because they do not investigate what the landscape of options, alternatives and relative costs and benefits looks like to a person facing a legal situation.⁶² Nor do they consider what type of help, at what cost, could make a difference. What will work best to minimize the risk of misunderstanding—of the problem by the provider and of the advice and recommended strategy by the client. What features of a client’s situation can mitigate or exacerbate the nature of a particular problem. What features make a standardized solution adequate and what features indicate the need for a tailored solution. And so on.

Legal providers operating on large scale can afford to direct resources to researching these aspects of consumer demand in legal markets. The importance of this to cost reduction for legal services can be substantial. Consider for example the potential for research to identify the factors that make individuals anxious or reluctant to seek legal assistance. Maybe these anxieties are rationally based in the absence of reliable signals of quality or information about what the process will involve or what it will cost, all told. Similarly, it is highly likely that errors in understanding and implementing legal advice are related to lawyers’ lack of appreciation or awareness of the ways in which nonlawyers—educated or not—perceive legal issues: as with any profession that involves jargon and expertise but perhaps even more so in law, there is a widespread tendency to speak past the person you’re trying to help. Lawyers, moreover, are neither trained nor selected for their understanding or empathy of the realities of ordinary people’s lives. This is not to say they cannot acquire such understanding and empathy, but

⁶¹ Herbert M. Kritzer, *Examining the Real Demand for Legal Service*, 37 *FORDHAM URB. L.J.* 255, 255–59 (noting that studies on unmet legal need have not adequately identified variables besides “cost” that factor into a person’s decision to obtain legal assistance).

⁶² J.J. Prescott, *The Challenges of Calculating the Benefits of Providing Access to Legal Services*, 37 *FORDHAM URB. L.J.* 303, 319 (criticizing existing studies that “make no attempt to quantify the benefits of providing representation for common legal problems” but rather focus on meeting needs if they would provide “any benefit at all’ to low income individuals”).

rather to say that there is substantial room for improved research into these aspects of lawyer-client communication and relationships.

Lawyerly misunderstanding of the consumer experience in markets is particularly evident with respect to beliefs about how individuals process and deploy information. For decades, lawyers have advocated warnings and disclosures as a means of overcoming risks in the context of consumer protection—despite the counterintuitiveness of solving a problem rooted in information costs by increasing the volume of information that needs processing.⁶³ The availability, per se, of information is not sufficient to ensure that information is absorbed, remembered, understood and deployed to improve consumer decisionmaking. This is the flaw in the line of reasoning we often hear from those who oppose the introduction of online services that supply legal documents or answers to legal questions for a fee that are available for free from other sources. There are numerous attributes of a delivery system for information—content, word-choice, word-density, style, design, source and so on—that affect the likelihood that information is understood and implemented to improve decisionmaking.⁶⁴ In studies from the 1970s involving information about the relationship between different foods and disease, for example, researchers discovered that information conveyed by profit-oriented consumer product firms—trying to sell more cereal by advertising the health benefits of fiber or promoting the sale of low-fat items⁶⁵—was more effectively understood and implemented than information provided by trusted sources such as doctors’ organizations or government health agencies. A key feature of the improved efficacy of information transmission by private firms motivated to sell products was the increased tailoring of messages to the different abilities and contexts of different segments of the population—tailoring made feasible by market research into the types of messages that were effective with different segments. We badly need increased research into the elements of legal communication that affect the cost and efficacy of legal advice and implementation of proposed strategies—particularly in the individual consumer market where strategies are so often implemented by the individual him or herself.

2. Development

The value of improved research into the nature of legal demand is the capacity for improved understanding of how people need and make use of alternative legal resources to spur the

⁶³ For a discussion, see Gillian K. Hadfield, Robert Howse & Michael Trebilcock, *Information-Based Principles for Rethinking Consumer Protection Policy*, 21 J. CONSUMER POL’Y 131 (1998).

⁶⁴ See W. Kip Viscusi, *Efficacy of Labeling Foods and Pharmaceuticals*, 15 ANN. REV. PUB. HEALTH 325 (1994) (showing that “clutter” on labels reduces the impact of information conveyed).

⁶⁵ Pauline M. Ippolito & Alan D. Mathios, *Information, Advertising and Health Choices: A Study of the Cereal Market*, 21 RAND J. ECON. 459 (1990); Pauline M. Ippolito & Alan D. Mathios, *Information and Advertising: The Case of Fat Consumption in the United States*, 85 AM. ECON. REV. 91 (1995).

development of less costly and more effective alternative ways of meeting demand. This is probably the most potent means of improving access to justice.

The type of development I want to focus on is product design and process development. I mean by this, in the context of legal services, the way in which legal services are packaged and delivered—as distinct from the development of the content of legal advice per se. That is, I want to hold constant the state of legal knowledge (about the possible risks generated by a failure to adapt language in a legal document to take account of recent caselaw, the likelihood that a court will award custody to a parent in a family law case or the legal options available to a person facing foreclosure, for example).⁶⁶ My focus on the potential to deploy product and process improvements to reduce elements of cost other than the content of legal advice per se stems from my goal of demonstrating that the profession’s prohibition on the corporate practice of law—with its exclusive rationale focused on the impact of the corporate form on the exercise of individual lawyerly judgment—seriously limits the capacity for reducing legal costs and increasing access in aspects of legal services that do not depend on the exercise of legal judgment.

Product and process development in law involves both deliberate and incidental efforts to design, experiment with and modify the way legal goods and services are made available to those who need them. Focused attention on the readability of a document, for example, can lead to changes in word choice, presentation and length, perhaps even tailored across different segments of the market. An evaluation of the marginal benefit that different potential clients are likely to derive from a standardized versus a customized document or advice can inform marketing decisions about how to make each type available and at what price. More detailed knowledge of the context, location and time at which particular legal needs arise can prompt the development of services that anticipate these needs—staffing advice booths at job fairs, for example, or bundling legal advisory services with banking or real estate services. Providing legal assistance in retail locations—whether through standalone legal storefronts or counters or kiosks in larger retail outlets (as banking, medical, optical or watch repair services are now offered in some large stores)—by adapting to consumer search and travel patterns, can significantly reduce the costs of finding and securing legal help. Understanding the anxiety and concerns of individuals with legal questions and needs can motivate the development of service attributes that build confidence and mastery, such as by providing an easy method of contacting a provider for reassurance during the completion of forms or procedures, following up to ensure procedures are followed and timelines met, and fast phone-response times. In

⁶⁶ I believe there is considerable scope for development in legal expertise per se as well—I analyze this in the context of the corporate legal services market in Hadfield, *Legal Barriers to Innovation*, *supra* note xx.

the delivery of medical services there is increasing recognition that outcomes are significantly affected by non-medical delivery components such as follow-up calls or community support services.⁶⁷

The big news here, of course, is the Internet and more generally a web-based platform for legal goods and services. The web introduces tremendous opportunities for changing the structure and process by which ordinary individuals identify legal providers, learn about their legal needs, and obtain legal assistance. Online systems provide the opportunity for using electronic question-and-answer services, community discussions, email, chat, video calling and more as means of conveying legal information, advice and support to individuals as they manage legal situations. Online providers can also complete documents and serve as an interface with legal entities such as courts, regulatory bodies and entitlement agencies. A student in my Legal Innovation class last year, for example, began work on a smart-phone based system for supporting veterans who are applying for veterans' benefits—imagining the potential for a web-based service provider to provide visually effective and targeted assistance to a veteran who needs to determine the nature of the disability to claim⁶⁸ and to integrate the entire process with the documents, medical examinations, interviews, appeals and so on involved in the Veterans' Administration's procedures. Online triage systems—perhaps aided by large-scale data analysis and artificial intelligence systems—could help an individual analyze the nature of their legal problem, evaluate what kind of help they might need, what's available, what it might cost, how long it would take and how soon the help should be sought—with what consequences for delay. We can imagine mobile applications that could help pro se litigants or claimants navigate procedures and filing requirements, in real-time as they are waiting for their case to be called or talking to the clerk at the courthouse. In a world where you can deposit checks or submit health care reimbursements by photographing or scanning a document with your smartphone, it is easy to imagine ways in which legal help could be delivered at much lower cost, with lower error and higher value. Video-calling provides the opportunity for those involved with legal systems to obtain face-to-face advice from an attorney when needed, without the costs of brick-and-mortar offices and transportation. The job applicant whose problem we reviewed earlier could, in a different world, have sought advice about how to

⁶⁷ Atul Gawande, *The Hot Spotters*, THE NEW YORKER, Jan. 24, 2011 (describing efforts in the medical profession to deliver targeted primary care to individuals with exceptionally high medical expenses).

⁶⁸ As this student—himself a veteran—pointed out in his presentation, a lot of veterans don't know exactly what to claim as a disability. They know "my knee hurts." His system would have provided veterans with a picture of the body and allowed veterans to identify and then provide more detail about their symptoms—the type of utility one finds on online medical advice systems, for example—to help focus their application.

complete his application form and whether to submit to the fingerprint scan immediately when presented with the situation, rather than burning the short window of time available to resolve the problem on trying to figure out who to ask and how. The opportunities for vastly reducing the costs of legal help and thus significantly increasing access through web-enabled systems are, as Richard Susskind has envisioned for the U.K.⁶⁹ and any observer of the last decade in other types of markets—including traditional face-to-face services such as banking, financial advice and medical care—transformed by the internet can attest, tremendous.

C. Specialization

A major source of economic benefits from increased scale arises from the potential for increased specialization. Scale here can refer both to the scale of an individual business and scale of the market as a whole. Expanding access to justice by reducing the multiple sources of the costs of securing legal help can have knock-on effects: with a larger pool of available consumers, legal providers can take advantage of the potential cost-savings that arise from specialization, which will spur even further expansions in access.

Consider first specialization across firms. Solo and small firm practitioners serving individuals often engage in a general practice—taking on matters involving divorce, wills, misdemeanors, taxes, torts, etc. This is in response to the small scale of practice: there are simply not enough potential clients in a given practice area to support the costs of running an office. With increased access and increased scale, however, firms can specialize in different legal services. This generates substantial reductions in legal costs. Repeat engagement with similar issues allows providers to build expertise, routines and judgment about when standardized approaches will be sufficient and when a situation calls for more tailored legal work. The larger scale of specialized practice spreads the cost of monitoring developments in the law and changes in personnel and procedures—at a courthouse or agency, for example. These features can reduce the direct cost of providing service, but they can also reduce the costs incurred by clients who turn to a provider for help: with greater expertise and experience comes improved quality and hence reduced error, waste and uncertainty. Indeed, studies in the UK have demonstrated that individuals who receive services from specialized providers—legal services dedicated to assisting with housing problems or immigration cases, for example—receive higher quality service than do those who are helped by traditional general-practice lawyers.⁷⁰

⁶⁹ RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008).

⁷⁰ Richard Moorhead, Avrom Sherr & Alan Paterson, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 L. & Soc’y Rev. 765 (2003). For further discussion in the U.S. context, see HERBERT M. KRITZER, *LEGAL ADVOCACY* 202–216 (1998).

Specialization can also occur internally within a firm if there is sufficient scale. The conventional form of specialization in legal services is specialization across practice areas—this is what characterizes the large corporate law firm, for example. With shared branding, specialization across practice area could link the benefits described above from area specialization with the benefits of scale even for individuals who are less likely than corporations to require service in multiple areas at a time. But the opportunities for cost-reduction through specialization in services for individuals are probably more likely to arise from two different types of specialization: first, specialization in the different economic activities involved in delivering a final legal good or service, and second, specialization in different market segments.

Richard Susskind refers to the first type of specialization as the “decomposition and multi-sourcing” of legal work. We have already noted several of the component parts of ultimately connecting an individual with a legal need with legal benefits: identifying and diagnosing needs, identifying and evaluating alternative providers and solutions, managing uncertainty and error, acquiring knowledge about a person’s legal situation, communicating advice and strategy, ensuring consistent implementation of strategy and follow-up, producing documents, designing marketing materials and methods, and so on. Costs are generated at all phases of the process of connecting a person with a legal problem with a result that generates benefits. Specialization in these component parts can thus produce cost-savings that ultimately lower the total cost of obtaining access to legal services. Moreover, a deliberate focus on the component parts of the process of generating a legal benefit for someone can identify ways in which processes can be re-engineered to reduce costs: systems analysis is itself a component task. In the small or solo practice office, the practicing lawyer is responsible for all of these tasks, perhaps with the help of an administrative assistant or paralegal. Only a larger-scale entity is capable of devoting significant resources to more specialized production of the individual components of delivering effective legal assistance.

It is also important to recognize that many of the components of successful delivery of the benefits of legal assistance draw on expertise different from conventional legal expertise of the type that determines eligibility for licensure (that is, the expertise that is learned in law schools and tested on bar exams.) Assessment of the nature of legal demand in different segments of the market, for example, is at least in part a product of market research and expertise about various substantive areas such as real estate markets, family dynamics, immigration, small business etc. Improved communication and reduced error in the interpretation of legal information, advice and strategy requires expertise about cognitive processes, design, and consumer behavior. The development of web-based services—like the integrated phone-based application to support veterans filing disability claims I described above, for example—requires

expertise in software engineering as well as medical and military expertise. Online document production draws on expertise in web-enabled processes, web programming and design, supply chain coordination and customer service. Large-scale document analysis requires expertise in computer processing and organizational design and management. Even a conventional law practice requires expertise in finance, business management, billing and collection, customer service and so on to support a successful and efficient office.

Lawyers have traditionally approached the need for expertise in areas other than legal expertise by either learning it themselves or retaining the services of a non-lawyer expert. Both approaches are inherently limited. It is fairly obvious that lawyers cannot just become experts in multiple areas at once. Nor can they be expected consistently to have the expertise to recognize what other experts could potentially do for the ultimate delivery of legal goods and services. A lawyer who does disability benefits work isn't going to hire programmers and medical experts to build a smartphone-based benefits filing system unless that lawyer him or herself has the expertise to recognize that such a system is possible and that it would be an improvement on established delivery systems. There's just no reason to expect lawyers to be particularly good at that aspect of innovation. The ones who will see the potential for disruptive innovations in non-legal dimensions of legal service delivery are likely to be those with expertise in non-legal dimensions.⁷¹ Even if lawyers can learn enough office management expertise to handle a small business, they cannot become experts in consumer research, graphic design, computer programming, web-based services, and so on. More to the point, if there's a basic lesson from economics to be taken to heart here, it is that there are great returns to specialization in the division of labor—even if lawyers can learn all these things, their time is better spent being lawyers and not programmers, consumer experts or graphic designers. Even innovation is a form of specialization. Lawyer effort is probably better spent on innovating legal reasoning and analysis; the project of innovation in the non-legal dimensions of delivering the ultimate good of legal services is better left to other specialists.

The second type of non-area specialization that can help to reduce costs is specialization across different market segments. As much as practicing lawyers might bemoan the commoditization of law practice and oppose the development of 'one-size-fits-all' legal services, in fact it is the

⁷¹ Moreover, it is highly unlikely that established lawyers will undermine the continuity of their professional work with the kind of disruptive innovation that is necessary to substantially redesign the delivery of legal goods and services and thus substantially reduce costs. This is one of the key lessons of how major innovation occurs, as Clay Christensen has emphasized. Disruptive innovation threatens the established way of doing things. Lawyers are not likely to reinvent their own practice, at least not without the threat that if they do not do it, someone else will. CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA* (2011).

commitment to a one-size-fits-all mode of delivery for legal services that generates tremendous barriers to access for ordinary people. This one-size-fits-all mode is the mode of individualized face-to-face services structured around an encompassing attorney-client relationship. Clearly there are many settings in which this is exactly the form in which legal services are best provided. But just as clearly, this is a form of assistance that is poorly differentiated to accommodate differences in need and resources. Most importantly, this form of assistance puts individuals in an all-or-nothing position: if they can afford the traditional mode of delivery, they get assistance; if they cannot afford the traditional mode of delivery, they get nothing. This excludes large segments of demand in any given setting.

The legal profession has made some modifications in this approach in the past decade or so, with steps taken to authorize and facilitate the provision of “unbundled” legal services.⁷² Unbundled services generally involve assistance that a lawyer provides to a pro se litigant involved in litigation—such as by reviewing documents, offering strategic advice, ghostwriting pleadings, arguing a single motion or communicating with an opposing attorney on a single element of the case.⁷³ Unbundled services are also at the heart of recent efforts to expand the reach of virtual law offices—solo or small practice attorneys who operate completely online, without in-person interaction with a client.⁷⁴ These attorneys specialize in serving a segment of the market that cannot afford full-scale representation, and thus have the opportunity to generate the benefits of specialization by gaining expertise in understanding the nature of demand in this segment and developing strategies for lower-cost servicing of demand. The extent of these benefits, however, is limited by the continued reliance on small-scale practice.

With larger scale practices, further specialization across different segments of the market could differentiate even more fully from the traditional model of legal assistance: focusing on the specific legal needs—whether advice, planning, dispute resolution or adjudicative in nature—of different segments of the market broken down both by income and circumstances. We see this

⁷² For a review of developments, see D. James Greiner & Molly M. Jennings, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, DENV. U. L. REV. (forthcoming ____). Manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038616###.

⁷³ As Jennings and Greiner point out, the definition of “unbundled” services is ambiguous precisely because there have long been services available in non-litigation settings that are only a piece of a transaction—such as having a lawyer draft or review a contract but not be involved in negotiation.

⁷⁴ For example, see Stephanie Kimbro’s blog dedicated to ethics issues related to unbundled legal services and online legal services delivery, VIRTUAL LAW PRACTICE, www.virtuallawpractice.org (last visited Oct. 17, 2012), and STEPHANIE KIMBRO, VIRTUAL LAW PRACTICE: HOW TO DELIVER LEGAL SERVICES ONLINE (2011).

in the model of legal aid clinics. Separate law school-based clinics, for example, focus on assisting low-income immigrants, victims of domestic violence, tenants, artists, small business operators, and more.

VI. Why we need the corporate practice of law

The economics of reducing the cost of legal services for ordinary individuals makes clear that the scale of legal service delivery needs to expand dramatically. Expanded scale is necessary to accommodate branding, to support investment in the research and development of products and processes, and to increase significantly the scope for specialization in the component elements of legal service delivery and across different market segments. Innovation and specialization need to extend to the many non-legal dimensions involved in ultimately producing the benefits of legal assistance for an individual facing a legal situation.

Is it possible to achieve these changes in the economics of legal services using the model of traditional law practice with partnerships or professional corporations that are completely financed, owned and managed exclusively by lawyers and that do not use contracts with other service providers that can be characterized as fee-sharing?

Clearly the answer is, yes: in some settings and in some respects. Law firms serving large corporate clients are organized as partnerships (or professional corporations wholly owned by their senior lawyers) and they have achieved relatively large scale, display elements of branding, and engage in specialization to various degrees. Whether they have achieved optimal levels of scale, branding, specialization and innovation is another question, one that I do not take up here.⁷⁵ It is important to note, however, that in other professional business services such as consulting, accounting and banking—where there are no professional regulations limiting the choice of organizational form—we see a diversity of form choice. (Table 1)

Table 1: Forms of Governance in Top 100 Professional Service Firms Globally

Professional Sector	Partnerships	Private Corporations	Public Corporations
Law	100	0	0
Accounting	56	42	2
Management Consulting	17	44	39
Advertising	0	77	23

⁷⁵ I address this question in part in Hadfield, *Legal Barriers to Innovation*, *supra* note xx.

Architecture	18	73	9
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Source: Greenwood & Empson "The Professional Partnership" 2003

In the personal services market, however, the achievement of scale and shared branding with the traditional model of service delivery is very rare. This is precisely what it means to say that most lawyers serving individuals work in solo or small firm practice. The only examples of scale and shared branding we find in this sector grew out of the experiment with "franchised" law offices that emerged in the 1970s. Today, the only recognizable national name in personal legal services is Jacoby & Myers, which operated as a chain of affiliated offices in the 1980s. Hyatt Legal Services also operated as a chain—and was at one time the second-largest law firm in the country—but is now devoted to the provision of services via a network of attorneys approved for servicing their pre-paid legal plans.⁷⁶

The fact that we have not seen the emergence of larger scale in personal service practices using the exclusively lawyer-owned, financed and managed professional corporation or partnership form is an indicator that the prohibition on corporate practice is a roadblock to reducing the cost of legal services. It's not proof: perhaps the failure to take up the opportunity for expanding scale with the existing partnership form is a consequence of lawyer conservatism or preferences for the autonomy and personal involvement that solo or small firm practice allows. Professional identity in the American legal profession clearly is tightly bound up with the idea that this is the way law is meant to be practiced.⁷⁷ But there are many reasons to think that the prohibition on alternative organizational and contractual structures is a key reason legal services continue to be delivered in forms that make them so expensive as to be of no use to millions of those with legal needs.

A. The theory of organizational and contractual governance

1. Organizational tradeoffs: risk-sharing, expertise and control

The emergence of the corporate form of organization was a key development in the evolution of commercial law.⁷⁸ Indeed, Timur Kuran has argued extensively that the absence of the corporate form in Islamic law was an important factor contributing to slowed economic development in the Middle East.⁷⁹ Although there is substantial debate in the literature about

⁷⁶ See *infra* at XX.

⁷⁷ See, e.g., Carroll Seron, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* (1996) 10–18.

⁷⁸ Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1351 (2006).

⁷⁹ See *generally* TIMUR KURAN, *THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST* (2011).

the relative merits of partnership and corporate forms⁸⁰, in the modern economy it is clear that the partnership form is rare in large-scale businesses outside of professional services.⁸¹

Several scholars have sought to explain the (at least, historical⁸²) dominance of the partnership in professional services.⁸³ These accounts emphasize that in human-capital intensive industries the partnership form provides a means of motivating individuals to contribute their expertise to the joint enterprise⁸⁴, can improve the quality of service when insiders outperform markets in monitoring quality⁸⁵, and can optimally vest control over firm decisions in the experts who are also best placed to implement decisions.⁸⁶ The partnership form relies on collegial as opposed to hierarchical control over the actions of participants in the firm.⁸⁷

The benefits of the partnership form, however, come at a cost. The capital available to the firm is limited to the capital brought by the partners themselves. This implies not merely a limit on the supply of capital. It also limits risk-sharing. Monitoring of participants is limited to active monitoring by partners and other employees of the firm. Decisionmaking processes are costly, requiring a large number of people whose primary value is based on their expertise in substantive delivery of services also to be knowledgeable about firm performance and governance. Collegial decisionmaking relies on political processes rather than managerial or bureaucratic procedures. Decisions are influenced by the preferences of individual partners—senior partners approaching retirement, for example, have a different horizon for decision payoffs than do younger partners.⁸⁸

⁸⁰ See, e.g., Timothy Guinnane et al., *Putting the Corporation in its Place*, 8 ENTERPRISE & SOC'Y 687 (2007).

⁸¹ Royston Greenwood & Laura Empson, *The Professional Partnership: Relic or Exemplary Form of Governance?* 24 ORGANIZATIONAL STUD. 909 (2003).

⁸² As Table 1 shows, *supra* p. xx, partnerships are less prevalent today in the top 100 firms in some professional service sectors.

⁸³ Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 301 (1983); Jonathan Levin & Steven Tadelis, *Profit Sharing and the Role of Professional Partnerships*, 120 Q. J. ECON. 131 (2005); Greenwood & Empson, *supra* note xx.

⁸⁴ Greenwood & Empson, *supra* note xx.

⁸⁵ Levin & Tadelis, *supra* note xx. The profit-sharing rules of partnerships raise the minimal level of quality required before admitting a participant to the firm; this is suboptimal relative to the first best (participants who would raise total firm profits but reduce average profits are not admitted), but this incentive can counter the incentive to degrade average quality when quality is difficult for the market to observe.

⁸⁶ Fama & Jensen, *supra* note xx.

⁸⁷ Greenwood & Empson, *supra* note XX.

⁸⁸ *Id.*; Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

As scale and complexity in an enterprise increases, the costs of the partnership form increase.⁸⁹ Increased size (scale) makes collegial decisionmaking processes more costly, in terms of time diverted from the work of the firm, personal conflict, and delay (as decisions take longer to reach because of the need to educate more decisionmakers and to build consensus). Large professional service partnerships thus often tend to add formal hierarchical structures for decisionmaking—such as powerful executive committees.⁹⁰ This may reduce some decision costs but at the expense of introducing others, as partners outside executive management continue to play a formal role in firm decisionmaking but are increasingly excluded from information and participation in key decisions.⁹¹

Increased size is not the only reason larger partnerships will need to move towards hierarchical and formalized control mechanisms. Several of the cost-reducing strategies that scale supports will independently prompt a reliance on hierarchical control. Building a brand, and hence collective reputation, requires a greater capacity for a small group of monitors to coordinate and control individual decisions. Even in a world where individual legal judgment resides with individual practitioners, the other elements of legal service delivery—such as customer service, use of technology, the format in which legal assistance is delivered, and so on—need consistent control to build brand identity. Increased specialization within a firm across a greater variety of legal and non-legal forms of expertise also implicates a greater reliance on hierarchical control, as individual participants become less knowledgeable about the circumstances facing their colleagues, making collegial decisionmaking both lower quality and higher cost. Heterogeneity in expertise also raises heterogeneity in preferences, resulting in different firm planning horizons and priorities. Specialization across market segments is also likely to produce increasingly standardized solutions and services for the segment of the market where the marginal value of customization falls below the cost of customization. Standardization, in turn, can only be achieved through consistent formal control over products and processes.

⁸⁹ Greenwood & Empson, *supra* note xx.

⁹⁰ *Id.*; Laura Empson & Chris Chapman, *Partnership Versus Corporation: Implications of Alternative Forms of Governance in Professional Service Firms*, in 24 RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS: PROFESSIONAL SERVICE ORGANIZATIONS 139–170 (Royston Greenwood & Roy Suddaby eds., 2006).

⁹¹ Governance failures arguably contributed to the May 2012 collapse of “biglaw” firm Dewey & LeBoeuf. See, e.g., Edwin B. Reeser, *The Dewey Disaster: Lessons Learned*, ABOVE THE LAW (May 31, 2012, 3:28 PM), <http://abovethelaw.com/2012/05/dewey-know-what-led-to-the-collapse-and-what-lessons-can-be-learned/>; Edwin B. Reeser, *The Real Story: Spin, Truth, and Law Firms*, OF COUNSEL (May 2009) 11–14; Edwin B. Reeser *The Big Law Firm Demise: It Happens Like This*, OF COUNSEL (July 2009) 5–8; Edwin B. Reeser, *Bring Me Another Plate of Leeches: Do Partners Really Want to Save Their Law Firms?* OF COUNSEL (Aug. 2009) 5–9.

As a professional partnership comes to rely more heavily on formalized and hierarchical control systems, there is an increase in agency costs. In the prototypical (small) partnership, partners supply the key monitoring of the decisions made by other firm participants. With hierarchical control superimposed on the partnership, however, partners outside a key decisionmaking circle are less able to monitor decisions. The effective control group shrinks to a subset of partners and may be inadequate to provide good incentives; hierarchical control mechanisms in corporations are supported by the disclosure and audit functions and by the market for corporate control. Hierarchical control systems also diminish the motivational benefits of partnership. Professionals with a taste for autonomy and personal performance will be less likely to remain with and may produce lower quality for a firm that exercises more formalized control over their work and in which they are largely outside the sphere of operational decisionmaking. These effects will be exacerbated by differentiation in the categories of partnership that reduces the likelihood of ultimately achieving true partnership status in the firm.

The costs of the partnership form of governance also increase as the risks to which a business is exposed increase.⁹² Partnerships are funded with a high-cost form of capital: the undiversified investments made by partners. The cost of relying on this source of capital increases as the risks of the business increase; put differently, partners with their capital at risk will be more reluctant to take on risk than a comparable business that can fund risk with investments from a broader pool of investors. Several of the strategies for reducing the cost of legal services, however, will generate greater risk. First, there is the risk associated with increased scale and complexity and the implications of both for firm decisionmaking and incentives, discussed above. Partners in a large professional partnership who have less information about firm decisions and who have less capacity to monitor or participate in decisionmaking will perceive this as an increase in the risk to which their capital is exposed.

More fundamentally, many of the cost-reducing strategies discussed above involve moving into novel forms of service delivery and will require investments in research and development to generate new products and processes, as well as new organizational forms. Innovation involves significant risk. Non-traditional pricing models—particularly fixed fees or package prices—also generate added risk as a legal business takes a gamble on getting the fixed fee right relative to the costs of service.

⁹² Greenwood & Empson consider this in terms of malpractice (litigation) risk, *supra* note xx.

Innovation in legal services is also subject to high levels of regulatory risk. This follows from the highly fragmented and unclear framework of regulation in the legal profession. Regulation is largely state-by-state⁹³, resulting in a patchwork of regulations. The capacity to operate as a limited liability partnership or corporation, for example, varies state to state, both in terms of the law on the books and the willingness of courts to implement statutory provisions that may allow lawyers to escape malpractice liability in contravention of judicial rules about professional responsibility.⁹⁴ Even within individual states, the location of regulatory authority is murky. In most states, state supreme courts assert an inherent and exclusive authority to regulate the practice of law—include the business form in which lawyers operate and the definition of the practice of law—but the relationship between legislative authority and judicial authority is sometimes unclear, even to legislatures and judiciaries. Moreover, judicial regulation of the bar has consistently refused to provide clear rules determining what counts as the practice of law—leaving any entity that attempts to diversify the components of legal delivery across a wider range of professionals or processes exposed to substantial uncertainty about the likelihood it violates unauthorized practice of law rules and statutes. Policymaking within the judiciary is also unsystematic and opaque, not subject to the standard procedures of notice-and-comment rulemaking, for example, or legislative hearing. Finally, bar associations—which operate on political models—play a major role in the design and implementation of policy. This generates the risks associated with the politics of trade associations. It also produces the risks associated with the reactions of individual lawyers to the advisory opinions issued by the ethics committees of local bar associations: if an entity’s business model depends on participation by lawyers, an ethics opinion by a small group of local practitioners operating in an ad hoc and opaque procedure can scare lawyers away from the model despite the lack of systematic and formal policy at the judicial or legislative level. Challenging these rules and opinions (including their legitimacy under the antitrust laws) is a high-risk endeavor.

Innovation of novel ways of meeting legal needs also requires increased capital relative to what is required for traditional legal practice. Research and development requires resources—notably capital to sustain the organization until a profitable business model is built and stabilized. Increased scale and complexity requires increased resources for overhead devoted to management structures—services that are not directly fee-producing. Increased standardization of products and processes requires increased investments in information technology. A web-based service, for example, requires substantial expenditure on hardware,

⁹³ See generally Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyers Licensing*, 69 Mo. L. REV. 299 (2004). The few exceptions to state-by-state regulation involve some aspects of federal practice, including tax, bankruptcy, securities (Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245 (Supp. 2003)), and patent practice.

⁹⁴ See Hillman, *supra* note xx.

software engineering and other professional services. Consumer-oriented services and the building of a retail brand require up-front investments—advertising, free services, promotional offers and so on—to generate to sufficient volume to cover costs. A partnership’s capacity to invest, however, is limited by the liquidity of its partners and the willingness of banks to lend to an entrepreneurial legal business. Regulatory risks compound the access to bank financing.

Finally, the move toward greater standardization in legal service delivery—including greater use of standardized non-legal components such as approaches to customer communication and service, product (document) design, user interfaces, support and follow-up procedures—diminishes one of the key benefits of the partnership form of governance. As a general rule, partnerships have too few partners.⁹⁵ The reason is the following: Under any profit-sharing rule that commits to distributing a positive share of profits to each partner, the partnership brings in new partners up to the point at which the marginal partner generates profits equal to the average profit share of existing members. This means the marginal partner generates strictly positive marginal profit. At the first-best size, however, the firm would continue to hire partners until their marginal profit was zero. Compared to a firm that pays employees a fixed wage (perhaps including discretionary bonuses) as opposed to a guaranteed percentage of profits, a partnership will have fewer partners but they will be of higher average quality. As Levin and Tadelis show, this excessive quality produces higher overall profit (and client welfare) if the market is particularly poor at judging quality, because the incentive to exploit poor consumer knowledge of quality—which will tend to cause a firm to hire workers of excessively low quality, passing them off as high quality—is counterbalanced by the incentive to restrict the size of the partnership. This effect disappears, however, in markets where consumers are better able to judge quality. In those markets, the corporate form in which employees are not guaranteed profit-shares produces higher profits and client welfare.

Legal markets in which products and processes are subject to greater standardization and brand uniformity are ones in which consumers will be better able to judge quality. A provider who offers a standard-form will, for example, does not promise to optimize across a wide range of variables for an individual client. The extent to which the will produced meets the promised level of quality is thus easier to judge, even in the abstract. But even if individuals feel unable to assess quality, the market is better able to assess quality because standardization allows comparison and supports investments by some individuals in evaluating quality and sharing information about quality. If the standardized will is invalidated in some jurisdiction, for example, online reviews and competitor advertising about such failures will share this information about quality with others in the jurisdiction. These considerations apply with even

⁹⁵ The following is from Levin & Tadelis, *supra* note xx.

greater force to the non-legal dimensions on which legal businesses might compete to reduce overall legal costs: ease and reliability of the user interface, for example, or the availability of customer support. Given a greater capacity for market monitoring, the optimal form of governance shifts from partnership to corporation.

2. Finance and Contracting: Incentives and Risk-Sharing

The corporate practice of law doctrine prohibits much more than the use of a particularly robust formal legal structure for a legal enterprise. It also restricts the sources of finance for the entity and the payment relationships with other entities—whether the law business is structured as a partnership or a corporation. The doctrine, with only narrow exceptions⁹⁶, prohibits lawyers from being employed by entities that provide legal services to others: this is a restriction on the form of contract that a lawyer can enter into with others. Limits on fee-sharing and referral fees also restrict the types of contractual arrangements that lawyers can enter into with non-lawyers. For example, according to ethics committees and courts, the following constitute prohibited fee-sharing:

- A contract between a corporation that uses staff lawyers to perform legal research whereby the corporation receives a share of any contingent legal fees earned by the lawyer; only payment on an hourly basis for research (presumably from fees earned by the lawyer on this and other cases) is permitted.⁹⁷
- A contract between a non-lawyer estate planning firm and an elder law specialist who prepares legal documents for clients of the firm and is paid one-third of the fees collected by the firm.⁹⁸
- An employment arrangement within a personal injury law firm whereby case managers are compensated on the basis of a percentage of fees collected in cases assigned to them that settle.⁹⁹
- An arrangement between a nonlawyer and a lawyer operating a bankruptcy services firm whereby the nonlawyer handles the client and paperwork business of the firm and

⁹⁶ For example, some states allow non-profit organizations that provide services to the indigent to use employed lawyers to serve these clients. In addition, First Amendment principles have been used to strike down restrictions on the capacity of unions and public interest organizations to use employed lawyers to act for their members or members of the public with cases raising the political issues to which the organizations are dedicated. *See United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967); *see also NAACP v. Button*, 371 U.S. 415 (1963).

⁹⁷ ABA Comm. on Ethics & Prof'l Responsibility Informal Op. 86-1519 (1986)

⁹⁸ *In re Deddish*, 557 S.E.2d 655 (S.C. 2001).

⁹⁹ *In re Guirard*, 11 So. 3d 1017 (La. 2009).

the lawyer is paid a flat fee monthly to complete bankruptcy files and appear in court on matters for the clients of the firm.¹⁰⁰

- A lawyer's use of online "daily deal" websites (such as Groupon) in which the website retains a portion of the amount paid by the customer for a coupon redeemable for services provided by the lawyer.¹⁰¹
- Any compensation of any non-law entity based on a percentage of either specific or general law firm profits.¹⁰²
- An online service that collects legal questions from users and routes questions to lawyers who participate in the service and who agree to pay the service a one-time sign-up fee, a fixed fee per question routed and a bonus to the service calculated as between 1 and 5% of any revenues received by the lawyer from the client.¹⁰³
- An agreement between a non-lawyer firm and a law firm under which the non-lawyer firm provides financing for products liability litigation conducted by the firm in exchange for one-half of fees collected from any litigation.¹⁰⁴

Restrictions on the contracts that legal businesses can enter into with others limits the use of standard contractual mechanisms to generate incentives and share risk. Variable compensation tied to quality is routinely used to generate incentives to provide quality and control costs. More complex compensation terms are also used to address problems of moral hazard and adverse selection in many markets. By limiting lawyers to fixed payments for services received from others who contribute to the ultimate value delivered to a client—investigators, translators, social workers, business managers, legal researchers, and so on—undercuts the ability for the relationship to achieve higher value and lower costs. Restrictions on financing arrangements, which prohibit rewarding an investor with a share of the value generated by a legal business, both limit access to capital and undercut incentives to deploy the many other forms of expertise that go into devising a successful business model. Contractual restrictions on variable compensation also limit the capacity to shift risk to those better able to pool, evaluate or manage risk and thus reduce the overall economic cost of risk.

¹⁰⁰ In re Whatley, 621 S.E.2d 732 (Ga. 2005).

¹⁰¹ Alabama State Bar Office of Gen. Counsel Op. 2012-01 (2012); Indiana State Bar Ass'n Legal Ethics Comm. Op. 1 of 2012. Other states have found such arrangements not to constitute fee-sharing. See New York State Ethics Op. 897 (2011), North Carolina Ethics Op. 2011-01 (2011), and Indiana State Bar Ass'n Legal Ethics Comm. Op. 1 of 2012.

¹⁰² Iowa State Bar Ass'n Comm. on Ethics and Practice Guidelines Op. 10-04 (2010).

¹⁰³ State Bar of Arizona Comm. on the Rules of Prof'l Conduct Op. 99-06 (1999); see also Maryland Ethics Opinion 01-03 (2001).

¹⁰⁴ In re Matter of Disciplinary Proceedings Against Mark. X. Van Cura, 504 N.W. 2d. 610 (Wis. 1993).

The corporate practice of law doctrine cuts law off from the standard tools that economic theory demonstrates are available to reduce costs, improve quality and spur innovation.

B. Empirical Experience

The theoretical considerations canvassed above generate several reasons to think that a restriction on the organizational and contractual forms that can be used in legal services imposes costs and generates barriers to innovative service delivery models that could cut costs for ordinary Americans with legal needs. Ultimately, however, the question of how important it is to remove the restriction on the corporate practice of law in order to generate cost reductions is an empirical one: as Table 1 indicates, even in professional services industries that do not restrict the form of organization, we see a mix of forms with some large and successful firms continuing to choose traditional partnerships even when corporate forms are available. Indeed, in all professional services other than law, diversity of form is a key characteristic. This suggests not that all legal practice should be shifting from partnership to corporate forms, but rather that there are likely to be significant forms of service and cost structures that are underrepresented in the mix of options available to those with legal needs.

In this section I turn to some empirical evidence on the question of how important it is to make the corporate form and more complex contracting tools available to spur the development of cost-cutting changes in legal service delivery. The empirical evidence is anecdotal: no one has studied this question systematically and, indeed, doing so is highly problematic given the pervasive restrictions on the corporate practice of law in the United States.¹⁰⁵ But the empirical evidence we have nonetheless buttresses the theoretical basis for believing that it is essential to allow corporate organization and more complex contractual relationships to produce significant change in legal markets for ordinary Americans.

1. Franchised law firms

The 1970s and 80s saw the emergence of franchised law firms—also known as legal clinics—whereby local law offices operated under a single national brand and sought to standardize procedures and pricing in the delivery of basic legal services. There appears to be little systematic data on this phenomenon. Jerry van Hoy studied two well-known franchised law

¹⁰⁵ This is a central flaw in the stance taken by bar associations in connection with the aborted proposal to relax some of the rules governing nonlawyer participation in law firms as part of the ABA's Ethics 20/20 review. The New York State Bar Association Task Force on Nonlawyer Ownership, for example, cites the lack of data about the impact of nonlawyer ownership on access and professionalism as a reason to oppose change. However, there is no data because the bar's rules ensure that the U.S. has almost no experience with nonlawyer participation. Moreover, bar associations do not engage in data collection or analysis to address this gap.

firms in his 1997 study, but he uses pseudonyms for the firms, leaving us to guess as to their actual identity.¹⁰⁶ Van Hoy defined a “franchise law firm” as a chain of law offices operating under a common firm name, located in shopping malls, strip malls and other retail districts, and providing a limited menu of standardized services, generating substantial uniformity across offices.¹⁰⁷ Van Hoy does not provide much detail about the formal organizational structure of these firms: one required attorneys to “buy into the firm and pay[] royalties on their earnings;” branch offices in the other firm were “entirely owned by its founding partners.”¹⁰⁸

The franchised law firms studied by Van Hoy shared several of the features we considered above as potential methods of reducing costs: national branding, standardization, use of technology, retail location and an emphasis on customer service including fixed pricing and a commitment to prompt responses to customers.¹⁰⁹ As Van Hoy reports, they showed in particular a shift towards greater use of non-legal delivery components, including standardized documents and the services of secretaries who performed substantial amounts of customer service. Indeed, Van Hoy’s focus in his book is on the relatively limited role for the attorneys in these offices: given standardization, they largely played the role of providing an attorney face to the process of providing standardized documents and services, and closing sales.¹¹⁰

¹⁰⁶ The most likely candidates are Jacoby & Myers and Hyatt Legal Services. Van Hoy suggests there were several other firms fitting the franchise description when he did his study (1990-1991) but he does not provide data on numbers or names of firms so-categorized. Jerry van Hoy, *Selling and Processing Law: Legal Work at Franchise Law Firms*, 29 L. & Soc. REV. 703 (1995). For more history of the emergence and disappearance of legal clinics, see Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Paradox*, --- STANFORD L. REV. -- (2013).

¹⁰⁷ This is not the definition of a franchise used in the retail industry more generally. The term “franchise” is generally restricted to outlets that are wholly owned by a franchisee, and not by the franchisor. Many franchise systems contain both franchise and company-owned outlets. For more background, see Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990).

¹⁰⁸ JERRY VAN HOY, FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES 28.

¹⁰⁹ For a closer look at how for-profit national legal service firms operate, see Carroll Seron, *Managing Entrepreneurial Legal Services: The Transformation of Small-Firm Practice*, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES 68–73 (Nelson et al. eds., 1992).

¹¹⁰ Van Hoy provides an anecdote about one lawyer who, asked by a young couple about how long it would take for them to get a will—indicating some urgency—made the mistake of revealing that he had little legal work to do in producing a will for them. He told the clients “Let me see how busy the girl is. If she isn’t too busy you can come back in fifteen or twenty minutes.” As Van Hoy reports, “the couple was clearly stunned. The woman exclaimed, ‘Tonight? That fast?’ The attorney, realizing his mistake, quickly said, ‘Well, ahh, I guess it might take a little longer really. How about tomorrow afternoon?’” *Id.* at 74.

The emergence of nationally known franchise law firms in the 1970s and 1980s potentially evidences two facts. One, there is some demand for lower-cost legal services that can be delivered using cost-reducing methods such as branding and standardization to a significant segment of the market. Two, the demand can potentially be met, at least to some extent, by law firms or entities that are wholly lawyer-owned, -managed and -financed, consistent with existing limitations on the corporate practice of law. The subsequent history of the franchise law firm, however, suggests that traditional organizational structures in law have significantly limited the growth of lower-cost legal services.

The franchised law firm has not survived; the phenomenon largely collapsed in the mid-1990s.¹¹¹ Jacoby & Meyers shuttered most of its offices and focused on personal injury practice. Hyatt Legal Services—at one time the second-largest law firm in the country—transformed into a prepaid legal services plan which was eventually bought out by MetLife. Legal services to purchasers of the plan are supplied by affiliated plan attorneys but it appears there is little in the way of standardized procedures or uniformity in the services themselves.¹¹² Indeed, many bar associations have rules requiring that prepaid legal services plans exercise relatively little oversight over attorney practice or quality, requiring that the participation in the plan as a provider be open to any appropriately licensed and insured attorney.¹¹³

The lack of growth in nationally-branded law firms with lower-cost services to meet ordinary legal needs could be evidence that there is little demand for such services, but this is at odds with the clear evidence of large scale unmet needs for legal advice and services that we considered earlier. Indeed, founder Stephen Meyers attributed the decline of the business model he had pioneered with Leonard Jacoby to competition: many personal service lawyers adopted the model of selling computer-produced standardized documents for flat fees.¹¹⁴ Moreover, it is clear that the model did not expand much beyond the production of basic documents and representation in routine personal injury settlements.

¹¹¹ See, e.g., Carl M. Selinger, *The Retention of Limitations on the Out-of-Court Practice of Law by Independent Paralegals*, 9 GEO. J. LEGAL ETHICS 879, 892–93 (1996) (describing the 1990s decline of franchised law firms Jacoby & Meyers and Hyatt Legal Services).

¹¹² HYATT LEGAL PLANS: A METLIFE COMPANY, www.legalplans.com (last visited Oct. 17, 2012).

¹¹³ See, e.g., ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 87-355 (1987), Colorado Bar Ass'n Ethics Comm. Op. 81 (1989).

¹¹⁴ Randy Kennedy, *Groundbreaking Law Firm Shifts Its Focus to Personal-Injury Cases*, N.Y. TIMES, May 12, 1995, at A29.

Other evidence about the experience of franchise law firms suggests that in fact the aborted development of lower-cost legal services was indeed in significant part due to the limitations of the organizational form imposed by professional regulation of lawyers. Several bar associations in the mid to later 1990s issued ethics opinions stating flatly that lawyers who participated in franchised law firms—operating under a shared brand name—were in violation of professional rules against operating under a trade name other than the name of a partner or partners in the firm.¹¹⁵ Van Hoy focuses in his study on the problem of motivating professionals to participate in the delivery of services that, in fact, require little in the way of legal work. He notes that the secretaries who worked in these firms—who in fact did most of the work, ranging from client intake and customer service to document production—were very satisfied with their roles; the lawyers, on the other hand, were dissatisfied. But delivery of the service within the limits imposed by the corporate practice of law required that licensed attorneys head the offices of these providers. Not only was this an overinvestment in expensive personnel, attorneys were poorly motivated to participate. The only real legal work necessary here resided in the work of designing and selecting the standardized legal procedures and templates that local offices were required to follow. A lack of success in this model is what our theory predicted above: standardization and resort to formalized and hierarchical control methods undermines the motivation of professionals and diminishes the benefits to the partnership mode of governance.

There are also strong reasons to suspect that limitations on capital and risk-sharing to support investment in novel methods and procedures and the use of fixed-fee pricing models has played a role in stunting the development of this form of service delivery. Van Hoy suggests that many franchised firms had successfully circumvented the ABA rules about non-lawyer investment by spinning off management companies to provide funds for capital improvement and expansion.¹¹⁶ Bar associations, however, were unlikely to agree: any relationship with a non-lawyer owned management company that generated profits for nonlawyer owners would have to have involved sharing fees given that all revenues for the firm were derived from clients who purchased legal services. And, indeed, while Jacoby & Meyers has survived since the heyday of franchised law firms (and refers to itself as “a network of affiliated law offices across the country”¹¹⁷) this year it filed suit in federal court in New York, New Jersey and Connecticut, alleging that Rule 5.4—prohibiting the sharing of fees with non-lawyers—constrained their ability to expand their delivery of lower-cost legal services by limiting their access to equity.¹¹⁸

¹¹⁵ See, e.g., Ohio Bd. of Comm’rs on Grievances & Discipline Op. 97-1. (Feb. 14, 1997).

¹¹⁶ VAN HOY, *supra* note XX, at 20.

¹¹⁷ Complaint at 9, *Jacoby & Meyers Law Offices, LLP v. Justices of the Supreme Court of New Jersey*, No. 11-2866 (D.N.J May 18, 2011).

¹¹⁸ *Id.* at 2.

The New York case , was initially dismissed for lack of standing, but has been remanded after an appeal to allow Jacoby & Meyers to amend their complaint and overcome the standing objection. The New Jersey case has been remitted to state court and the Connecticut court has not as yet ruled and as a consequence there is no evidence yet on the record about the foundation for the claim. But the fact that Jacoby & Meyers has bothered to incur the costs of filing these lawsuits suggests at least some plausible basis for believing that one of the few personal services firms that is still seeking to expand its lower-cost model finds itself limited by the prohibition on the corporate practice of law.

2. Innovations by non-lawyer-owned corporations

Another source of evidence that significant innovations to reduce the cost of legal services require access to benefits provided by corporate form comes from the emergence of corporations owned and financed by non-lawyers, seeking to fill pockets of legal demand within the constraints of what current professional regulation allows.

The standardized document production that firms like Jacoby & Meyers and Hyatt Legal Services pioneered has now largely been taken over by corporations with access to the capital needed to build large-scale web-based consumer-oriented platforms. Corporations such as USLegal, LegalZoom, LawPivot, RocketLawyer, Nolo, Trademarkia and LawDepot, offer online, generally interview-based, services for the production of legal documents such as wills and trusts, the court documents necessary to file an uncontested divorce and the administrative documents necessary to incorporate a business or file for a patent or trademark. Some of these services link document production to a pre-paid legal plan where for a monthly fee members can obtain no-fee services (such as reviewing documents and providing one-time consultation on a legal problem) and contracted-fee services on other legal problems from a lawyer affiliated with the plan; contact with the lawyer is organized on a 'click to consult' basis through the company's website.

Legal information companies are also emerging. JustAnswer.com, now operating as Pearl.com, is a San-Francisco-based company that allows members to post questions to be answered by experts who join the system. The member selects a proposed price for an answer and experts choose whether to answer at that price. The expert is paid when the member indicates satisfaction with the answer received; the company also receives payment for hosting the communication. The system includes experts in a wide variety areas including car repair, finance, medical issues, veterinary care, as well as legal problems. LawPivot.com is a law-only system where questions are posed to the system and then funneled to lawyers affiliated with the system and paid for on a per-question satisfaction-guaranteed basis. Questions can be

asked either in a public forum or confidential setting.¹¹⁹ Unlike Pearl.com, lawyers on LawPivot are identified by name and can be contacted outside the system; Pearl.com experts are identified by username only. LawGuru.com provides free answers to legal questions through its network of affiliated lawyers; it appears that the business model is, as with many other Internet services, based on ad-revenues.¹²⁰ Similar services are offered by online companies such as LawQA.com, Avvo.com and StandardLegal.com.

Other emerging innovations in the legal market online include AttorneyFee.com, a website that scrapes the web to generate information about the fees charged by lawyers in a particular field and location designated by the user. The system also provides contact information for these lawyers. MyLawsuit.com is an online company that allows people with personal injury claims to post their case on the website and receive potentially competing offers for representation from attorneys who become members of the site. Clients pay a fee to MyLawsuit.com, calculated as a percentage of any amounts received in a successful case, for the service. Although operating in different spheres, both companies thus help to cut search costs for those in need of legal help. They also potentially provide a means of generating public shared information about quality, thereby reducing the costs associated with risk.

These corporate ventures, often involving lawyers as founders but not funded exclusively by lawyers, demonstrate that the possibilities for cost-reduction in legal services we canvassed earlier in the paper are clearly within reach. All of these U.S. ventures, however, face limitations on their business model—and hence on the opportunity for cost reduction—as a result of professional limitations on the corporate practice of law. Document providers such as LegalZoom and RocketLawyer, for example, run the state-by-state risk¹²¹ of being found to have engaged in the unauthorized practice of law if their service is deemed by an ethics committee or court to go beyond a scrivener role; legal help is not available to choose what documents to

¹¹⁹ Users pay a fee to LawPivot, which claims that “[n]o fee sharing arrangement exists” between the company and participating attorneys. Lawyers are not compensated for answering questions, but rather participate in order to generate leads with potential new clients. Attorneys may perform defined legal services for LawPivot Users in return for a fixed cost, which includes an “estimated flat attorney’s fee, and transaction cost to be paid to [LawPivot] for handling of administrative tasks and details and maintenance of the Website.” See LAWPIVOT TERMS OF USE, PARTS VIII, X, XI, <https://www.lawpivot.com/staticcontent/terms/> (last visited Oct. 17, 2012).

¹²⁰ Attorneys list themselves for free on LawGuru.com. LAWGURU FOR ATTORNEYS, http://www.lawguru.com/answers/atty_profile/ (last visited Oct. 17, 2012).

¹²¹ See *Janson v. Legalzoom.com, Inc.*, 802 F.Supp. 2d 1053 (W.D. Mo. 2011); Connecticut Bar Ass’n Unauthorized Practice of Law Comm. Informal Op. 2008-01 (2008); Pennsylvania Bar Ass’n Unauthorized Practice of Law Comm. Formal Op. 2010-01 (2010).

complete or how to complete them except through a pre-paid legal plan that refers clients to conventional legal practitioners who cannot be contractually bound to follow protocols established by the company. Legal question-and-answer services such as Pearl.com and LawPivot must be careful to either ensure they are only directing users into traditional and confidential lawyer-client relationships or providing access to only generic legal information in response to questions. An ethics committee of the South Carolina bar association recently opined that South Carolina lawyers who participated in Pearl.com’s system would be in violation of professional ethics by assisting a corporation in the (unauthorized) practice of law.¹²² This generates risk for these companies as well as limiting their capacity to provide a more valuable service.

Comparable corporate ventures in the U.K. do not face these limitations as a result of the longstanding acceptance of lay practitioners in law—who frequently practice, in fact, as part of profit and non-profit organizations—as well as the recent reforms of the Legal Services Act which allowed licensed solicitors to be employed by organizations with non-lawyer ownership. A U.K. website called Expert Answers, for example, is operated by a corporate entity; like Pearl.com and LawPivot, it provides users with access to legal information; but it is able to go further and provide full-scale legal advice online.¹²³ A sample answer to a question about how to manage a ticket received in a private parking lot operated by a retail store, for example, gives specific advice about next steps, tailored to the particular circumstances indicated by the questioner. U.S. sites, on the other hand, are limited to providing only generic legal information and specifically prohibited from providing advice based on the particular circumstances of the user. The U.K. service Divorce Online provides the documents needed to file an uncontested “DIY” divorce, as do U.S. services like LegalZoom and RocketLawyer. In addition, however, the U.K. service offers legal advice about completing documents online. There are also additional tiers of fixed-fee service, involving progressively more assistance from lay legal advisors, solicitors or barristers: users can have the service fill out and file all documents and appear in court or speak to the opposing side’s lawyer if necessary.¹²⁴ The system also provides assistance to individuals representing themselves in divorce proceedings. Someone who wants to file for a modification of a support order, for example, can (for £199)

¹²² South Carolina Bar Ethics Advisory Comm. Op. 12-03 (2012). The opinion states that it is improper for a South Carolina lawyer to answer questions on JustAnswer.com (the former name of Pearl.com). The company was not contacted by the advisory committee for any input or information to confirm the relevant facts about its business model prior to the issuing of this opinion.

¹²³ EXPERT ANSWERS, www.expertanswers.co.uk (last visited Oct. 17, 2012).

¹²⁴ *Legal Advice from Qualified Barristers*, DIVORCE ONLINE, <http://www.divorce-online.co.uk/contemplating/legal-advice.asp> (last visited Oct. 17, 2012).

have licensed solicitors working with the company prepare the application and an affidavit; the solicitors then also provide support and advice by phone and email “throughout the proceedings up to and including any final hearing.”¹²⁵ The company also has a paid referral arrangement with another innovative provider, ClickLaw 24. ClickLaw 24 is the name under which a traditional solicitors firm offers a fixed-fee online legal advice service. Users pay £99, complete an information sheet and upload any documents relevant to their situation. ClickLaw 24 then obtains a formal written opinion from licensed barristers (operating in a separate practice but affiliated with the law firm that operates ClickLaw 24.) DivorceOnline receives 15% of the fee charged by ClickLaw 24 for referrals that come through their site.¹²⁶ The website includes a “View Feedback” button that displays about 1,200 comments from users with the legend that “all entries on this page are user generated without any intervention from Divorce Online”¹²⁷ and a page showing over 200 testimonials.¹²⁸ The company was founded by a solicitor practicing family law but is staffed by non-solicitors: “Although we are not Solicitors our staff are trained in the same way as staff in law firms and attend the same training courses and are supervised by managers with over 20 years experience in dealing with divorce cases.”¹²⁹ The company is a corporate member of the Institute of Certified Paralegals¹³⁰ and carries professional indemnity (malpractice) insurance.

¹²⁵ *Application to Vary Maintenance*, DIVORCE ONLINE, http://www.divorce-online.co.uk/services/children/application_to_vary_maintenance.asp (last visited Oct. 17, 2012).

¹²⁶ *Legal Advice from Qualified Barristers*, *supra* note XX.

¹²⁷ *Our Clients Divorce Online Reviews*, DIVORCE ONLINE, <http://www.divorce-online.co.uk/FeedbackDisplay.asp> (last visited Oct. 17, 2012).

¹²⁸ *A Selection of Testimonials from Our Satisfied Clients*, DIVORCE ONLINE, <http://www.divorce-online.co.uk/testimonial.asp> (last visited Oct. 17, 2012).

¹²⁹ *About the UK’s Leading Uncontested Divorce Service*, DIVORCE ONLINE, http://www.divorce-online.co.uk/about_us.asp (last visited Oct. 17, 2012).

¹³⁰ Under the U.K. regulatory scheme, paralegals (like other non-lawyers) are authorized to provide anything other than specific legal services that require either registration or licensing by one of the eight regulatory bodies that supervise legal work (such as the Solicitor’s Regulatory Authority, the Bar Standards Board, the Institute of Legal Executives Professional Standards Board and the Council for Licensed Conveyancers). Registration is required to receive payments under the Legal Aid scheme for work, to engage in immigration advice or assistance, or manage personal injury claims. Reserved work that requires licensing by a legal regulatory body includes appearing in most courts, conducting litigation, and signing and lodging certain documents related to probate or transferring land or property.

3. Medicine

Like law, the medical profession in the early years of the 20th Century was successful in prohibiting the practice of medicine by corporations. Unlike law, however, the corporate practice of medicine doctrine has been substantially narrowed and reshaped as medicine has responded to growing specialization and complexity in medical practice and the pressure to reduce costs and extend health insurance coverage. The best evidence of the importance of lifting limitations on organizational and contractual form to spur cost-reduction in a professional field thus comes from our colleagues in medicine.

The last three decades have seen extensive experimentation and diversification in the organizational structures in which medicine is practiced, leaving behind the “cottage industry of professional dominance”¹³¹ by doctors, operating in solo or small practices, who secured informal privileges at local hospitals and collected their fees from patients who, if insured at all, sought indemnity from an insurance company. Today the medical landscape is dominated by a combination of large-scale health care systems and networks that integrate the services of hospitals, doctors and other health care professionals, insurers and professional managers. Although several states still have corporate practice of medicine laws on the books that prohibit hospitals or other corporations from hiring doctors¹³², a wide variety of arrangements between doctors and corporate entities have flourished through de jure or de facto exceptions. These arrangements include outright employment of physicians by hospitals or non-physician owned businesses, contractual relationships between physician groups and hospitals that involve sharing of gross revenues from patient and insurer payments, and referral relationships within more decentralized networks of hospitals and medical groups.

One of the earliest innovators was Kaiser Permanente in California, established as a pre-paid plan in 1942 to provide health care for Kaiser shipyard workers during World War II. Today Kaiser Permanente is structured with exclusive contracting relationships between the non-profit Kaiser Foundation Health Plans on the one hand and non-profit Kaiser Hospitals and regional for-profit Permanente Medical Groups of physicians on the other. The Permanente Medical Group (TPMG) for Northern California, for example, is organized as a professional

¹³¹ JAMES C. ROBINSON, *THE CORPORATE PRACTICE OF MEDICINE: COMPETITION AND INNOVATION IN HEALTH CARE* 216 (1999).

¹³² Only 5 states (California, Colorado, Iowa, Ohio, and Texas) prohibit hospital employment of doctors. ALLEGRA KIM, *THE CORPORATE PRACTICE OF MEDICINE DOCTRINE* 17 (2007). As of 2006, 14 states had laws on the books that prohibited non-physician ownership of a business in which physicians provide medical treatment; several other states had caselaw or attorney general opinions suggesting that there were limits on non-physician ownership of medical practices. Mary Michal et al., *Corporate Practice of Medicine Doctrine: 50 State Survey Summary* (2006).

corporation owned and managed by physicians. TPMG enters into annual exclusive contracts with the Health Plan and negotiates a fixed per capita payment based on memberships in the Health Plan, reimbursements for expenses such as office rental and equipment, and an incentive payment which distributes to TPMG a share (originally 50%) of net revenues received by Health Plan.¹³³ In Michigan the Henry Ford Health System has its roots in another early system pioneer, the Henry Ford Hospital which opened in 1915 with a salaried staff of physicians. Today the system is organized as a combination of a health plan, hospitals and physician organizations. The Henry Ford Physician Network is a wholly-owned subsidiary of the Henry Ford Health System. It consists of private practice doctors as well as doctors employed by the Health Plan and Henry Ford Hospitals and negotiates contracts for both fixed and incentive/performance payments for its member doctors. Practice guidelines in both Kaiser-Permanente and the Henry Ford System are developed collaboratively between the health plan, hospital and physician components.

Another important innovation, the medical group practice whereby several doctors of different specialties practice together in a defined entity, also had early roots in pre-paid health plans in the early part of the 20th C. The Ross-Loos Clinic in Los Angeles, for example, set up a program in 1929 whereby it agreed to provide health care on a pre-paid basis to the employees of the Los Angeles Department of Water and Power. These early efforts, however, met stiff resistance from the medical profession, as medical societies and hospitals exerted pressure (by denying membership, referrals or hospital privileges) to those practicing in pre-paid or group formats.¹³⁴ Only in the 1970s and 1980s, however, did such behavior meet with opposition from antitrust authorities.¹³⁵ As the limits on innovation in health plans and compensation arrangements with doctors fell away, health plans and managed care organizations in the 1980s and 1990s then found themselves bargaining with large-scale private-equity backed or publicly traded physician practice management corporations. For a time, medical groups went through a frenzy of Wall-Street financed mergers and acquisitions. These systems ultimately crashed, replaced by physician-hospital arrangements with more a thoughtful attention to regional and

¹³³ *Payments to Physicians in the Permanente Medical Group*, available at <http://businesspractices.kaiserpapers.org> .

¹³⁴ ROBINSON, *supra* note XX, at 33–34.

¹³⁵ *See, e.g.*, United States v. Halifax Hospital Medical Center, No. 78-554-Orl-Civ-Y, 1980 WL 7912 (M.D. Fla. 1980) (Consent order which, *inter alia*, enjoins county medical society from taking any action with purpose or effect to discourage physicians from practicing medicine on other than fee-for-service basis); and United States v. Halifax Hospital Medical Center, No. 78-554-Orl-Civ-Y, 1981 WL 2101 (M.D. Fla. 1981) (Consent order which, *inter alia*, enjoins hospital from denying privileges to doctors who affiliate with health maintenance organization.).

specialty needs.¹³⁶ Today, medical groups operate in the context of a wide variety of relationships with health plans and hospitals, ranging from highly centralized employment models to loose affiliations.¹³⁷

Physicians and other licensed health-care professionals also experimented with non-insurance based low-cost health care by providing services in retail settings operated by corporate entities. MinuteClinics, originally headquartered in Minneapolis and operating under contract in stores like CVS and Targe, is now owned by and operates out of CVS Pharmacies. WalMarts throughout the country house the operations of in-store clinics with names like SmartCare, RediClinic, QuickHealth and Medpoint Express. These clinics are routinely staffed by nurse practitioners rather than MDs, although in some states nurse practitioners must be supervised to some extent by a doctor. Retail clinics generally offer a fixed menu of fixed-price services including diagnosis and treatment of conditions such as bladder infections, flu, minor skin infections, nausea, and strep throat as well as providing many basic vaccinations. In another variation on the model, Access Health in California operates retail outlets, staffed both by doctors and nurse practitioners, and offers basic services at low fixed prices.¹³⁸ HealthRite clinics in New Jersey are individually owned by physicians who employ nurse practitioners; the clinics operate under a single system name and contract with a non-profit health system, AtlanticCare, for management and billing services.¹³⁹

These innovations in health care delivery and systems have emerged from complicated legal and regulatory changes in the corporate practice doctrine. Starting with the federal Health Maintenance Organization Act of 1973, more complex arrangements between hospitals, doctors, and insurers were exempted from corporate practice of medicine rules; the Knox-Keene Health Care Service Plan Act of 1975 in California (one of the few states to maintain an express prohibition the hospital employment of doctors) exempted health care service plans from application of limitations on the corporate practice of medicine. Following an order from the Federal Trade Commission acting under the antitrust laws, the American Medical Association in 1979 removed from its “Principles of Medical Ethics” dropped its ethical objections to the corporate practice of medicine, stating that physicians should be “free to choose whom to serve, with whom to associate and the environment in which to provide

¹³⁶ ROBINSON, *supra* note XX, at 162–81.

¹³⁷ For a now somewhat dated overview, see G.J. Bazzoli et al., *A Taxonomy of Health Networks and Systems: Bringing Order out of Chaos*, 33 HEALTH SERVICES RES. 1683 (1999).

¹³⁸ ACCESS HEALTH, www.myaccesshealth.com (last visited Oct. 16, 2012).

¹³⁹ NAT’L ACAD. FOR STATE HEALTH POLICY, ANALYSIS OF STATE REGULATIONS AND POLICIES GOVERNING THE OPERATION AND LICENSURE OF RETAIL CLINICS (Feb. 2009).

medical care.”¹⁴⁰ The federal Patient Protection and Affordable Care Act of 2010 does not expressly preempt state law on the corporate practice of medicine but it contemplates the development of Accountable Care Organizations which have a legal structure enabling the sharing of fees and savings amongst a wide set of participants in the health care system and a management and leadership structure capable of overseeing both clinical and administrative systems.¹⁴¹ This suggests that any remainder of the corporate practice of medicine doctrine at the state level is soon to fall.

None of these incursions on the corporate practice of medicine doctrine resulted in a diminution of the professional responsibility of care that physicians hold towards their patients. Hospitals and health service plans are expressly prohibited from interfering with medical matters. At the same time, practice guidelines and protocols aimed at containing costs are clearly allowed. As the Knox-Keene Act in California expresses this, contracts between health services plans and physicians may not employ incentive plans “as an inducement to deny, reduce, limit or delay specific, medically necessary and appropriate services¹⁴²” but this leaves substantial space for cost-control mechanisms; moreover, the statute expressly allows “contracts that contain incentive plans that involve general payments such as capitation payments, or shared-risk arrangements that are not tied to specific medical decisions involving specific enrollees.”¹⁴³ Moreover, hospitals and health service plans are themselves regulated entities subject to obligations of care towards their patient-customers and authorized to provide services only under a valid license—providing a regulatory hook for failures in care.

The diverse landscape of organizational forms, and specifically the replacement of the “cottage industry” of solo and small firm medical practice with a variety of corporate forms and formerly prohibited relationships, has clearly played and will continue to play a major role in innovation, quality improvement and cost-containment in medicine. As one close student of this phenomenon has put the case for why corporate practice forms are so important to innovation in medicine:

The second feature of the emerging health care system, which derives from the first [pressure to adopt cost-increasing technologies while moderating economic burden] is continued innovation in forms of organization, ownership, contract, finance and governance...large rewards will accrue to those who pioneer cost-decreasing products and processes...These product and process innovations do not occur in a vacuum but require organizational changes that enhance coordination and reward efficiency. . . The

¹⁴⁰ Quoted in KIM, *supra* note xx, at 18.

¹⁴¹ See 42 U.S.C. § 1395jjj (2010).

¹⁴² CAL. HEALTH & SAFETY CODE § 1348.6(a).

¹⁴³ CAL. HEALTH & SAFETY CODE § 1348.6(b).

corporate system of health care demonstrates daily its economic superiority over the traditional system of professional dominance. . .¹⁴⁴

VII. Conclusion

Why have our sister professions and notably medicine been able to move away from outdated prohibitions on corporate practice while law has only reinvigorated its commitment to a 19th century mode of economic organization? The answer, I believe, lies in the uniquely powerful form of self-governance that lawyers have asserted. Physician self-governance is ultimately held accountable to political processes working through legislatures. Lawyer self-governance, in contrast, is held accountable only to a judiciary comprised of members of the same tribe. Judges have largely delegated their role in the economic regulation of legal markets to bar associations; bar associations have framed the issues of regulation as matters of ethics in conventional practice. But even if they were to recognize the problem with that framing, neither state supreme courts nor bar associations are well-equipped to perform the kind of deep policy and economic analysis that this critical issue requires.

The prohibition on the corporate practice of law—which, as we have seen, bans a wide variety of organizational and contractual relationships between lawyers and non-lawyers—hobbles the innovation of lower-cost means of providing legal help to the great majority of ordinary individuals. Many of those lower-cost innovations are within easy reach—if the profession would relax its stranglehold on the practice of law. Corporate entities that can sink capital into consumer research, document and process design, and improved sub-market-sensitive means of communication are ready to do so. Web-based platforms for service delivery are already in place to provide a means for building the reputational capital that lowers costs and improves quality in most service sectors. Large-scale data and information systems are now available to provide standardized documents, procedures and protocols to meet the needs of a large segment of the population that now muddles through with no help at all in legal proceedings, imposing huge costs on our courts and other litigants. Innovators with one foot in the law and another in software or enterprise development are already at work but facing unnecessary and costly limits on their business models to comply with corporate practice rules that no one has, or could, demonstrate improve the well-being of ordinary individuals whose alternative to standardized online legal help is no legal help at all.

It is important to recognize that other professions have not submitted willingly to the changes foisted upon them. Doctors did not applaud the licensing of nurse practitioners or the

¹⁴⁴ Robinson, *supra* note xx, at 217–218.

authorization of health maintenance organizations that retained the capacity to develop drug formularies and require pre-authorization of medical procedures subject to a demonstration of medical necessity.¹⁴⁵ But few can argue that these changes have not been essential to expand the reach and reduce the cost of health care. Expanding the accessibility and reducing the cost of legal assistance will similarly require sea changes in our approach to the economics of legal work. As a profession, American lawyers fought to close the loop on self-governance, resting ultimate and exclusive authority in state supreme court judges who are largely dependent on lawyers for support, and sometimes for their seat on the bench. With their success came an especially heavy obligation, to step outside of the narrow frame of the economics of their existing law practices and into the broader frame of the economics of the legal industry. The prohibition on the corporate practice of law might have seemed an appropriate regulatory stance at a time when law played a much smaller role in daily lives, when regulation of the corporation was much less developed, and when technology and scale held less promise. But today the doctrine stands only in the way of any sensible solution to a problem of the profession's making: the indefensibly high cost of delivering legal help to ordinary people as they navigate the law-thick world we have assembled.

¹⁴⁵ Laurel A. Rigertas *Stratification of the Legal Profession: A Debate in Need of a Public Forum*. 2012 JOURNAL OF THE PROFESSIONAL LAWYER 79 (2012); Douglas R. Wholey, Jon B. Christianson and Susan M. Sanchez, *The Effect of Physician and Corporate Interests on the Formation of Health Maintenance Organizations* 99 AMERICAN JOURNAL OF SOCIOLOGY 164 (1993).