NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOL. 9 Fall 2012 No. 1

RETHINKING REGULATION AND INNOVATION IN THE U.S. LEGAL SERVICES MARKET

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I.
Introduction

For decades, academics have argued that the U.S. system for regulating the practice of law inhibits innovation. Lawyers are blocked from innovations they might pursue by the heavy hand of legal regulation.[1] Even worse, lawyers are not the only ones blocked—because lawyers have a monopoly on legal services, other types of legal service innovators that could offer better or cheaper products cannot enter the marketplace.[2]

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1. Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 Stan. L. Rev. 1689, 1695 (2008) [hereinafter *Legal Barriers*].

2. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1 (1981) [hereinafter Rhode, *Professional Monopoly*]; *Legal Barriers*, *supra* note 1, at 1695 ("The current regulatory model stands as a tremendous barrier to innovation in legal markets . . . ."); Thomas D. Morgan, The Vanishing American Lawyer 4 (2010) ("While individuals may represent themselves or work on their own legal problems, only a lawyer may perform that service for others."); Larry E. Ribstein, *The Death of Big Law*, 2010 Wis. L. Rev. 749, 806-08 (2010) [hereinafter Ribstein, *Big Law*] ("[L]icensing laws impede the development of a legal infrastructure that suits our modern information-based economy."); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. Rev. L. & Soc. Change 701, 703, 711-12 (1996).

Despite that academic consensus, we live in an age of unparalleled innovation in the way legal services are provided to clients in the United States. Innovation has come in forms as varied as legal process outsourcers serving the U.S. legal market,[3] online legal document vendors providing personalized wills to consumers,[4] database companies providing actionable information on intellectual property holdings and enforcement,[5] and marquee lawyers leaving their pre-eminent law firms to set up flat-rate boutiques with radically different firm structures.[6]

What gives? How can we live in a regulatory environment that supposedly prevents innovation, and yet have such an abundance of it? Where does this innovation come from, and from whence might more innovation come? The answers are neither simple nor obvious. Understanding this changing landscape requires a close look both at how innovations take root and at the U.S. system of legal regulation.

This article first looks—as others have not—at legal services[7] innovation in the light of disruptive innovation theory. Over the past three decades, economists and business scholars have studied how innovations take root. This body of work has matured to recognize that not just technology but business models and "value configurations" determine whether a given company can pursue disruptive innovations in a given market. Drawing on the work of business scholars such as Michael

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3. See Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137 (2010), and Sasha Borsand & Amar Gupta, *Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance*, 1 PACE INT'L L. REV. COMPANION 1 (2009), for discussions of the LPO phenomenon.

4. For example, LegalZoom.com, Inc. and its competitors offer such products. LEGALZOOM.COM, http://www.legalzoom.com (last visited Sept. 15, 2012).

5. For example, Lex Machina, Inc. LEX MACHINA, http://www.lexmachina.com (last visited Sept. 15, 2012).

6. Examples of boutique, alternative structure firms founded by leading big firm lawyers include Bartlit Beck Herman Palenchar & Scott LLP, Boies, Schiller & Flexner LLP, and MoloLamken LLP.

7. This article looks at lawyers as one type of provider of legal services, a rubric of increasing popularity with significant implications. *See generally* Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers"*, 2008 J. PROF. LAW. 189 (2008) [hereinafter Terry, *The Future Regulation of the Legal Profession*].

Porter, Clayton Christensen, Charles Stabell and Øystein Fjeldstad, as well as the writings of scholars focused on the legal industry such as Richard Susskind, this article analyzes how innovation can either sustain or disrupt market structures.[8]

The article next looks at the U.S. regulatory scheme and finds very different dynamics in the corporate and individual client "hemispheres" of the legal market. In the corporate client hemisphere, a creeping *de facto* deregulation of legal services provided to corporate clients has allowed innovation to flourish. While several scholars have noted the rise of non-lawyer "consultants" and other service providers, none have carefully connected this to innovation in the legal services marketplace. In the individual client hemisphere, this article examines how developments in the enforcement of unauthorized practice of law provisions—notably, consumer class actions brought by private attorneys—have worked to slow entry of new services and products, despite a perceived lessening in interest in unauthorized practice of law enforcement.[9] Over the past two decades, such class actions have spread widely, and such enforcement has already played a role in driving some innovators from the market.[10] While the Supreme Court's recent holding in *AT&T Mobility v. Concepcion*[11] may stifle such

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8. *See infra* notes 12, 16, 19, 33, 38, 56, 69, 89.

9. GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 46.4 (3d ed. 2001 & Supp. 2010) ("Over a period of many years, there has been a gradual, uneven, but unmistakable trend toward liberalization.").

10. An example is the storefront legal forms business, We The People, whose substantial reduction in size and bankruptcy reorganization filing was attributed, at least in part, to the many unauthorized practice of law lawsuits filed against it. Richard Acello, *We the Pauper*, A.B.A. J., May, 2010, at 24, *available at* http://www.abajournal.com/magazine/article/we_the_pauper/.

11. 131 S. Ct. 1740 (2011). In *AT&T Mobility*, the Supreme Court found that federal arbitration law required application of a clause in a consumer form contract that mandated arbitration of all disputes, thereby blocking class actions. Since this decision, legal product vendors such as LegalZoom have begun incorporating mandatory arbitration clauses in their contracts for services. While *AT&T Mobility* certainly creates a major barrier to future consumer class actions where arbitration clauses are involved, substantial uncertainty remains about the full impact the case will have. *See generally* Andrew Trask, *The State of Class Action Arbitration - Six Months After* Concepcion, CLASS ACTION COUNTERMEASURES (Oct. 25, 2011, 6:14 AM), http://www.classactioncountermeasures.com/2011/10/articles/motions-practice/the-state-of-class-action-arbitration-six-months-after-concepcion.

cases, unauthorized practice of law enforcement remains a threat to innovation on the consumer side of the market.

Finally, this article, taking into account both disruptive innovation theory and the regulation of lawyers, seeks to illustrate how these forces can interact by looking at what might happen in several distinct niches of the legal services market. Predicting the future involves inherent uncertainties, but it helps illustrate how regulations can interact with market structures and business models to determine where innovation might flourish.

II.
How Market Structures and "Value Configurations" Limit Innovation

In the early 1990s a young business school professor began a novel course of research. Clayton M. Christensen hoped to learn how and why new firms and technologies drive formerly entrenched incumbents out of business. He studied hard disk drive companies for the same reason geneticists study fruit flies—the life cycles from birth to death are short.[12] Such rapid life cycles gave him the chance to see patterns repeated over a few short years.

Christensen discerned a counterintuitive pattern—incumbent companies failed not because they were poorly managed, but precisely because they were very well-managed.[13] Companies failed because they were focused on their best customers, wanted to offer better products to those customers, and pursued those opportunities most likely to have a significant impact on the company's profitability.[14] These traits—customer focus, constant product improvement, pursuit of opportunities of sufficient size—more often lead to success than failure, but understanding when and how they can lead to failure uncloaks how disruptive innovation works.

As Christensen studied what he came to call "disruptive innovation," he focused on three elements. The first was innovation itself. As he studied technological breakthroughs within

12. Clayton M. Christensen, The Innovator's Dilemma: The Revolutionary Book that Will Change the Way You Do Business 3 (First Harper Business Essentials 2003) (1997) [hereinafter Innovator's Dilemma].

13. *Id.* at 269.

14. *Id.* at 4.

an industry, he theorized that there were two kinds of technical innovations—sustaining technologies, which helped to make the incumbents stronger, and disruptive technologies, which effectively changed the rules of the game.[15] Christensen called his insights about the market conditions that provided an opening to newcomers the "disruptive innovation theory."[16] The second, his insights about the aspects of firms that made it difficult for them to pursue disruptive technologies themselves, he called the "resources, processes and values theory."[17] The third, the migration of innovators upmarket into more valuable niches, leading to direct competition with and defeat of the incumbents, he called the "value chain innovation theory."[18] The three theories together provide a coherent vision of when technological and other innovations can upend a market.

A. *Christensen's Disruptive Innovation Theory: Understanding Disruptive and Sustaining Innovation*

Every day, someone, somewhere, makes a technological breakthrough. When new technologies are developed, firms already in the market that might use those products have the best opportunity to incorporate them into products. They have the capital, the customer base and the market knowledge to put these new possibilities to use.

1. *Sustaining Innovations*

In many cases, this occurs. A technology arrives, shows potential to make the existing products on the market better, and appears in the offerings of the current leaders. The technological breakthrough may be staggering but the market structure does not change. Christensen calls this sort of innovation "sustaining innovation."[19]

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15. *Id.* at xviii.

16. Clayton M. Christensen, Scott D. Anthony & Erik A. Roth, Seeing What's Next: Using the Theories of Innovation to Predict Industry Change, *a*t xv-xvii (2004) [hereinafter Seeing What's Next].

17. *Id.* at xvii-xviii.

18. *Id.* at xix.

19. Clayton M. Christensen & Michael E. Raynor, The Innovator's Solution: Creating and Sustaining Successful Growth 34 (2003) [hereinafter Innovator's Solution].

There are many examples of sustaining innovations that help industry incumbents maintain their dominance. The switch to electronic from mechanical cash registers required a fundamental technical change, but as a business matter it was a sustaining innovation that left the incumbents in place.[20] The same could be said of the switch from analog to digital telecommunications technology.[21]Incremental technological improvements—such as the steady improvement in land-line telephone technology from the invention of the telephone until the 1960s—also tend to sustain the dominant incumbent players.[22]

Online legal research provides an example of a sustaining innovation in the legal industry. When introduced, it represented a radical new technology for delivering legal information. Whereas before legal publications relied on the printing press, which implied an investment in printing facilities for vendors and in extensive print libraries for consumers, online legal research substitutes a completely different technology, with different facilities and different kinds of technological expertise required.[23]

In the early 1970s, the advent of online law libraries might have seemed disruptive: small law firms unable to sustain the cost of a large print library now could compete with large firms in their access to recent cases, law reviews, and other raw materials of legal research.[24] One could imagine a world where established law firms continued to invest real estate and capital in maintaining print libraries, only to be outmaneuvered by nimbler firms relying on online materials. At the

20. *Id.* at 40-41.

21. SEEING WHAT'S NEXT, *supra* note 16, at 10.

22. *Id.* There are many subtypes of sustaining innovations, and Christensen lays out various categorization schemes. *Id.* at 284. What they have in common is that they tend to reinforce, rather than disrupt, market structures.

23. Rather than reprinting opinions or statutes as paper documents, legal databases input each word in the stature or opinion into a digital electronic database, allowing full text searches for words or phrases. For a discussion of the technology and development of major commercial online legal databases, see William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 Law Libr. J. 543 (1984).

24. *Id.* at 549 n.3 (discussing how founders of computer-assisted legal research believed it would give solo practitioners and small firms as much research power as large firms).

same time, one could envision the legacy print publishers being driven from the market, replaced by new firms delivering legal research materials online.

It didn't happen that way, however. Online legal research became a sustaining innovation for law firms—it allowed big law firms to do better what they were already doing, providing customized legal advice and services on high value matters. Rather than leaving online legal research to be exploited by new entrants, the dominant legacy law firms paid for access to online legal research. Having access from diverse locations to up-to-the-minute legal materials, along with the ability to find cases that might be missed through traditional research methods, made them more valuable, not less valuable, to their corporate clients.[25]

Nor did online legal research completely rearrange the legal publishing market. Some existing publishers developed or acquired online research distribution, sustaining rather than disrupting their place in the market. Others licensed their works to the firms that distributed research online, thus finding a new market.[26]

Most technological innovations are sustaining. The incumbent players invent or acquire new technologies and use them to improve what they already do. Neither the pace nor the novelty of innovation necessarily forecast the demise of established players or the advent of new entrants. What's more, regulatory barriers that discourage new entrants will not prevent established players from adopting those new technologies that sustain their business model.[27]

2. *Disruptive Innovations*

There are other innovations, however, that do change markets. Market structure, not technology, determines what becomes a disruptive innovation.[28] Christensen learned in his

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25. *Id.* at 549.

26. West Publishing responded to the advent of online legal research by creating Westlaw, its entrant into the market. *Id.* at 553-55. A perusal of the offerings of either Lexis or Westlaw will show that the major treatises, which once appeared solely in print form, are now accessible on one or more online systems.

27. SEEING WHAT'S NEXT, *supra* note 16, at xv, 284-285.

28. INNOVATOR'S SOLUTION, *supra* note 19, at 32.

research that the market changing innovations were, at least at first, inadequate to meet the needs of the market leaders on those measures of quality that mattered most to their best customers. A new disk drive technology might fit in a smaller physical space, but if it held less data or retrieved data more slowly, the market leaders would reject the innovation in favor of incremental improvements to the existing market leading technology.[29]

In these situations, the managers of the incumbent acted rationally in rejecting the new technology. Focused on their current customers, they saw little advantage in offering inferior products that their current best customers would reject. Even if a niche market existed for the new technology, it would be irrational for the market leaders to divert resources to it because the size of the market would be too small to make a significant difference in the incumbent's bottom line.[30]

In some cases, rejection by the established market or defeat by entrenched incumbents means the end of the new technology.[31] In other cases, however, the technology finds a market not served by the existing offerings. For this market, the attributes of desirability differ. Factors that matter little in the established market—small physical size, for example, or lower power consumption—may be prized in these markets. Once established at the fringe of the market, the innovator is poised to cause disruption.[32]

3. *Situations Ripe for Disruptive Innovation*

Consumer needs, and not the technical brilliance of an innovation, will determine whether an innovation will be dis-

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29. INNOVATOR'S DILEMMA, *supra* note 12, at 16.

30. *Id.* at 139, 148.

31. An example of a failed innovation would be the rise and fall of Metricom, a wireless internet company offering a data only service called Ricochet that absorbed around a billion dollars in capital before going into bankruptcy. Metricom suffered from a one-two punch. Not enough consumers subscribed to support the massive costs of building out a nationwide infrastructure, and the incumbents in the wireless communication space saw data transmission as an opportunity consistent with their business model. Ben Charny, *Metricom Files for Bankruptcy Protection*, CNET NEWS (July 2, 2001, 4:40 PM PDT), http://news.cnet.com/2100-1033-269362.html.

32. See discussion of upmarket movement *infra* p.118-19.

ruptive or sustaining.[33] When the incumbent companies can use the innovation to better serve their current customers, the innovation will be sustaining.[34] Only when the innovation allows the targeting of new consumers or the targeting of existing consumers in ways not of interest to the incumbents will an innovation be disruptive.[35] Christensen writes of innovations that allow new types of products to be offered to non-consumers, to consumers overshot by the current product offerings, and to consumers underserved by the current options.[36]

a. Non-Consumers: Providing Inferior Products to Unserved Consumers

Sometimes disruptive innovation creates new markets, allowing those who previously were not consumers to become consumers. Existing customers do not, at least at first, shift to the new product. Rather, thanks to the disruptive innovation, those without the option to be consumers at all have a chance to become consumers for the first time.[37]

The history of computers provides many examples. The first mini-computers did not cannibalize the consumer base of mainframes, but instead gave the option of computer ownership to organizations that could not afford the higher cost of mainframe computers. Similarly, when the first personal computers arrived in the marketplace, the owners of the early Al-

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33. Richard S. Rosenbloom & Clayton M. Christensen, *Technological Discontinuities, Organizational Capabilities, and Strategic Commitments*, *in* TECHNOLOGY, ORGANIZATION AND COMPETITIVENESS: PERSPECTIVES ON INDUSTRIAL AND CORPORATE CHANGE 233 (Giovanni Dosi, David J. Teece & Josef Chytry eds., 1998) ("If no mobility or change in strategic direction is required—if the new technology is valuable within a firm's established value network—the consequences of the innovation are likely to be reinforcing, regardless of its intrinsic technological difficulty or riskiness. If realization of inherent value requires the establishment of new systems of use—served by new value networks—the consequences are likely to be radical—even if the innovation if technically simple. This may occur because such innovations require far more than technological activity—complementary assets must be created or acquired as new commercial capabilities become significant.").

34. INNOVATOR'S DILEMMA, *supra* note 12, at 14.

35. *Id.* at 16 ("They offered a different package of attributes valued only in emerging markets remote from, and unimportant to, the mainstream.").

36. SEEING WHAT'S NEXT, *supra* note 16, at 9.

37. *Id.* at 6-8.

tairs and Apple IIs did not replace minicomputers but instead entered the market for the first time.[38] The earliest personal computers were essentially "toys for hobbyists" and incapable of meeting the more demanding needs of corporate data management.[39]

These products could not compete, at the time they entered the market, with the dominant legacy providers. A company that needed an IBM 360 mainframe or a Control Data minicomputer would not have its needs met by the more rudimentary capabilities of an Apple II. The new technology, by virtue of its inferiority, had to seek out a different market.

A possible example of this kind of disruption in the current legal marketplace would be the offering of form documents to consumers.[40] At a fundamental level, the form legal document is inferior to the services of a competent attorney.[41] The attorney can use specialized expertise to evaluate the client's needs, and can deliver not only a properly written document but also the correct document for the particularized needs of the client. On the other hand, even given uncertainty about selecting the correct form or filling it out properly, form legal documents may be the best available solution for those unable to afford the services of an attorney and incapable of drafting their own legal documents. Form legal documents thus represent a potentially disruptive way to provide a useful—if inferior—solution to consumers unable to afford an attorney.

b. Overshot Consumers: Replacing Products That Provide More Than Consumers Need

Another opening for disruptive newcomers can come when the curve of technological improvement has allowed products to improve faster than consumer demand. The existing products on the market are not just good enough—they

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38. CLAYTON M. CHRISTENSEN, JEROME H. GROSSMAN & JASON HWANG, THE INNOVATOR'S PRESCRIPTION 6 (2009) [hereinafter INNOVATOR'S PRESCRIPTION].

39. INNOVATOR'S DILEMMA, *supra* note 12, at 52.

40. See discussion of form legal documents *infra* pp. 137-39.

41. The documents themselves might be superior, but the lack of the "diagnostic" function makes the difference.

are more than good enough.[42] For these consumers, a cheaper, simpler solution might meet their needs.

The original discount long distance telephone services, such as MCI, provide an example of a disruptive innovation marketed to overshot consumers. The original MCI service was not as convenient to use as the existing AT&T long distance service, and the quality of the connection was often not as good. It was, however, sufficient to meet the needs of many corporate customers and much cheaper.[43] The same cycle has played out more recently with Voice Over Internet Protocol long distance services such as Skype, which also provide a lower quality of service at a lower cost.

These lower cost options take advantage of changing consumer preferences as a product category matures. In the early stages of a product category's life cycle, consumers tend to focus on criteria that define the core quality of the product such as base functionality and reliability. As technology improves and functionality and reliability become more of a given, the consumer preference determinants for at least some consumers shifts to criteria such as ease of use, the ability to customize the product, and, finally, price.[44]

In the legal marketplace, the rise of Legal Process Outsourcer (LPO) firms reflects a response to an overshot market.[45] Once upon a time, massive document production and review typically involved "bet the company" cases or transactions that demanded elite law firms. As corporate clients have become more accustomed to massive document productions in connection with more routine litigation or corporate transactions, the sense that only a few elite law firms were competent to handle these matters waned. This shift provided an opportunity for LPO firms to come into the market with a good-enough, lower cost offering.[46]

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42. SEEING WHAT'S NEXT, *supra* note 16, at 11-12.

43. *Id.* at 13-14.

44. *Id.* at 12.

45. See the discussion of LPO's *infra* pp. 163-67.

46. Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2189 (2010).

c. Undershot Consumers: Products That Are Not Good Enough

The ability for firms to move upmarket as technology allows their products to improve plays an important role in how disruption roils markets.[47] Firms enter the marketplace in areas where the incumbents either offer no affordable services or offer services that overshoot the market. The initial entry into the market comes with a product that does not meet the needs of the best customers of the existing dominant players. In a world where either new technology or mastering experience curves allow constant improvement, the initial product offering only begins the story.

Once a firm establishes a foothold in a market, it may find that its consumers want a better-quality or more fully featured product. Christensen terms these "undershot consumers," and sees them as an opportunity for firms that wish to market sustaining, upmarket innovations. Faster personal computers, more feature-rich software and smaller or more feature-rich mobile phones all offer examples of products that, once introduced to a market that previously had no chance to consume, moved upmarket by marketing more fully featured products to consumers who wanted more.[48]

In the legal market, automated document assembly may provide an example of a technology moving upmarket. Legal form documents, as noted, are inferior in comparison to the services of a competent lawyer. If interactive technology can increase the likelihood that the consumer gets the correct form filled out correctly, then consumers of print forms will move upstream to the interactive version, and the improved forms may siphon business from lawyers.[49]

B. *Why Incumbents Cannot Disrupt - Resources, Processes and Values Theory*

One might wonder why, when new markets are developed by disruptive entrants, the typically better-funded, more resource-rich incumbents do not simply move into those new

47. See the discussion of value chain evolution *infra* pp. 118-19.

48. SEEING WHAT'S NEXT, *supra* note 16, at 9 ("[U]ndershot customers, for whom existing products are not good enough . . . .").

49. Whether those regulating the legal marketplace will allow this is a different issue. *See infra* pp. 130-32.

markets themselves. Focusing on this issue, Christensen had a breakthrough insight: the incumbents do not pursue these opportunities because it would not make sense for them to do so.[50] The incumbents do not move into these markets because doing so would divert resources that could be more profitably used delivering better products and service to their best and most profitable customers.[51]

Christensen explains this phenomenon in what he terms the "resources, processes and values theory" or "RPV."[52] By looking at how companies deliver their current products, he makes clear why successful companies cannot easily switch to new kinds of products, particularly if those products are lower cost and less fully featured. The resources, processes and values that make a company strong in one setting also serve as a kind of cage preventing innovation.

Resources. Companies have resources they can draw on to serve their customers. These resources take many forms. Highly trained personnel, access to capital, physical plants, technology, brand power and distribution channels are all among the kinds of resources that a company can use to deliver value. No company has infinite or comprehensive resources; a company develops the resources it needs to serve its established customer base with its existing products and cannot always cheaply or easily substitute new ones.

When a disruptive innovation arrives on the scene, the resources held by the incumbent company are unlikely to be those needed to embrace the innovation. Personnel have been assessed and trained in a different, typically stable environment, and would often need to abandon techniques and strat-

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50. Of course, after Christensen's work, some companies did begin moving into markets that would not make sense for them to pursue on a short term profitability basis in order not to provide an opening to disruptive entrants. An example would be Intel, which was spurred by Christensen's work into moving aggressively into the market for low cost chips for low cost personal computers. Toni Mack, *Danger: Stealth Attack*, Forbes, Jan. 25, 1999, http://www.forbes.com/forbes/1999/0125/6302088a.html.

51. Christensen provides the example of hard disk drive companies focusing their resources on delivering incrementally better products to their existing customers, causing them to lag on new technologies that ultimately made their products obsolete. Innovator's Dilemma, *supra* note 12, at 19-20.

52. *See* Seeing What's Next, *supra* note 16, at 279-80; Innovator's Solution, *supra* note 19, at 189-90; Innovator's Dilemma, *supra* note 12, at 191-92.

egies that served them well in the past. Distribution channels might resist a new product that generates less profit than previous products. Brand managers may resist attaching a powerful brand to a disruptive innovation that, given the nature of disruptive products, falls short of prior products on traditional measures of quality.[53]

PROCESSES. As businesses mature, they develop highly defined processes for creating the products and services they sell. Everything from capital budgeting to procurement to product development to marketing follows processes that have evolved to deliver successful products. These processes are sometimes formal, but at times only implicit in the structure of an organization. The formal and informal processes sometimes overlap—for example, a defined process may be followed to determine which potential projects to back with budgeted resources, while a less-defined but equally inevitable process will be followed to advance the careers of those who back budget resources for products that succeed in winning corporate funding and to block the career advancement of those who support losers. These processes will determine what projects a company can pursue.[54]

VALUES. When Christensen speaks of values, he does not mean just aspirational values ("promote justice," say, or "deliver extraordinary value to our clients"). He looks to more basic matters—what kind of work does a firm want to do? What kind of employees does it want to attract? How much do firm profits have to increase before the increase matters?[55] Values determine how a firm prioritizes projects and allocates resources.

An elite corporate law firm, by way of example, may have as an implicit value that it handles high-stakes, high-value matters. This sense of values—"who we are and what we do"—will lead a firm to decline some opportunities. Such a firm would not be particularly interested in collecting a $500 fee to handle a residential house closing, nor might it find it valuable to sell as low-cost commodities those same legal documents it has previously sold at high prices as an element of custom services.

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53. *See* INNOVATOR'S SOLUTION, *supra* note 19, at 178-83.

54. *See id.* at 274-75.

55. *See id.* at 185.

The values of successful firms derive from the firms' past successes and generally make sense for the businesses those firms have been engaged in. A firm with $5 billion in annual profits cannot materially change its financial position with a new product that can only generate an additional $1 million in profits. A firm with a reputation for the most dependable hard drives will not enhance its brand by selling new hard drives that fail much more frequently, even if those drives consume less electricity or are smaller. A firm that has become profitable by valuing projects with 50% margins may have developed a cost structure that will make it insolvent if it moves to lower margin work.

The same value constraints apply in the area of legal services. For example, an elite law firm will find its values limit what opportunities it can pursue. Much of the firm's value comes from its reputation,[56] which depends on the kind of matters it handles and the kind of people selected to work there. If the firm drifts into low status work, its reputation might suffer. It also has a cost structure based on its existing business. A firm that hires elite law school graduates at top rates will have a hard time competing on price for low margin work (and a hard time keeping those associates if they are sufficiently dissatisfied with the work they are assigned). Firms take work inconsistent with their values at their peril.

RPV. Taken together, a firm's resources, processes and values define what a firm has been able to do, but also critically limit what it can choose to do going forward. Top managers can only execute with the support of the organization, and the firm's RPV programs the organization. Mid-level managers

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56. *See Legal Barriers, supra* note 1, at 1717; Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998); Ribstein, *Big Law, supra* note 2, at 753-54; Charles B. Stabell & Øystein D. Fjeldstad, *Configuring Value for Competitive Advantage: On Chains, Shops, and Networks*, 19 STRATEGIC MGMT. J. 413, 423 (1998) ("The professionals—or rather their reputation—is often the critical marketing resource."). *But see* Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 76-87 (2011) (arguing that reduced transaction costs in hiring lawyers explains big firm structures, and noting that improving information technology puts pressure on firms dependent on that advantage); Jordan Furlong, *Why Do Law Firms Exist?*, LAW 21, May 3, 2011, http://www.law21.ca/2011/05/03/why-do-law-firms-exist/ (arguing that law firms succeed because they lower transaction costs for clients trying to build a team with varied skill sets).

attuned to what has led to career success in the firm in the past or to what customers are currently demanding will make sure projects outside the firm's established RPV are never presented to higher levels for review.[57] Much as a biological organism's immune system fights off invaders, a firm's RPV process will nudge the firm back towards what it has successfully done before and away from disruptive innovation.

Typically, then, incumbent firms do not pursue true innovative disruptions because they are inconsistent with a firm's resources, processes and values. A firm wishes to deliver more high performing products to its existing customer base. It also wishes to focus investment on those markets large enough to provide a meaningful impact on its bottom line. Developing inferior products for smaller niche markets will prove inconsistent with these factors, and well-run firms not focused on closing off disruptive innovation will leave those new markets open for others in order to concentrate on their core business. Incumbent firms that do pursue disruptive strategies typically succeed only if they set up new business units, separate from the legacy operations, so that the firm's RPV culture does not squelch the initiative.[58]

C. *How Disruptors Take Over Markets - Value Chain Evolution Theory*

The final piece of Christensen's original analytic structure looks at how firms, once established at the low, disruptive end of a larger market, tend to move step by step to the higher end.[59] Over time, the new entrants improve the quality of their products, increasingly competing directly with the incum-

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57. *See* INNOVATOR'S DILEMMA, *supra* note 12, at 94-95 ("In most organizations, managers' careers receive a big boost when they play a key sponsorship role in very successful projects—and their careers can be permanently derailed if they have the bad judgment or misfortune to back projects that fail.").

58. The classic example of a disruptive innovation that succeeded within a legacy company is IBM's personal computer division, established in Boca Raton, far from company headquarters, so that it could pursue a business where margins, average product price and product capabilities were all inconsistent with what had made IBM successful. INNOVATOR'S PRESCRIPTION, *supra* note 38, at 197.

59. *See* INNOVATOR'S DILEMMA, *supra* note 12, at 216 ("[W]ell managed companies are generally upwardly mobile and downwardly immobile . . . .").

bents, and in some cases eventually driving them from the market. Christensen makes clear that disruption occurs not all at once, but as the culmination of a process that can take a long time as incumbents beat a retreat to the higher end markets still open to them.[60]

The value chain evolution theory relies on a core observation—in the modern world, technology tends to improve more quickly than consumers become more demanding.[61] Moore's Law[62] and related phenomena allow what were once low-end products to deliver more functionality relatively quickly. As a result, products that were at first not good enough for the dominant market become, after iterative improvements, good enough. At the same time, the products that formerly were good enough now become better than good enough, offering excess capability and often charging an excessive cost.[63]

The value chain evolution theory shows how products that got their initial foothold precisely because they were not good enough for the existing market can come, over time, to drive the incumbent providers from the marketplace. Products and technologies do not stand still. The new entrants constantly improve their products, and can compete for markets that previously would have found their offerings inadequate.

Christensen gives an example of this process in the steel industry. Integrated steel mills are massive facilities that produce steel from raw materials, and require huge economies of scale to be competitive. In the 1960s, a new technology appeared on the market that made steel from scrap metal, and was employed by new smaller scale facilities called minimills. At first, the quality of the steel was so low that it could only be used for steel reinforcing bars (rebar), a low margin commodity business relatively unattractive to the major mills. Over time, however, the quality of minimill steel improved and minimills were able to move upstream into the bar, rod and

60. SEEING WHAT'S NEXT, *supra* note 16, at 41.

61. *Id.* at 11-12.

62. Moore's law is the theory attributed to Intel cofounder Gordon Moore that states that the number of transistors that can inexpensively be placed on an integrated circuit doubles about every two years. *Moore's Law: Raising the Bar*, INTEL (Sept. 15, 2012), http://download.intel.com/museum/Moores_Law/Printed_Materials/Moores_Law_Backgrounder.pdf.

63. SEEING WHAT'S NEXT, *supra* note 16, at 12.

angle iron market, then on to the structural beam market, and eventually to the slab steel market. Each move to a new niche up the chain proved more profitable for the minimills. While ceding the lower markets was initially profitable for the integrated mills, it eventually left them restricted to the top tiers of the steel market and still facing attacks from below.[64]

At the same time, the incumbent players cannot generally move down the value chain to compete for the newly developed markets. In some cases, these markets continue to prize attributes (smaller size, lower power consumption, etc.) that the incumbents are not capable of offering as well as the new entrants. In other cases, the market size is too small or the margins too low for it to make economic sense for the incumbent to pursue these opportunities.

In his hard disk drive research, Christensen saw, time after time, new entrants come into the market with products that were acceptable only to the lowest segment of the computer market. As the products improved, the producers moved up a niche in the value chain—from personal computers to desktop workstations. As the new entrants took what had been a higher value niche, the incumbents in that niche moved up a step—from desktop workstations to minicomputers. Firms already occupying that niche were themselves pushed up a notch, from minicomputers to mainframes. In the end, the incumbents reached a point where there was no higher spot on the value chain to move to, or where the market share was too small to support fixed costs, leading repeatedly to bankruptcy or forced mergers.[65]

D. *How Business Models and "Value Configurations" Impact Who Can Innovate*

In Christensen's more recent work, technology as the source of innovation has taken a backseat to business model innovation. As we have seen, market structure, rather than radically new technology, determines whether an innovation proves sustaining or disruptive. This being so, innovative busi-

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64. *See* INNOVATOR'S DILEMMA, *supra* note 12, at 101-08 INNOVATOR'S SOLUTION, *supra* note 19, at 35-39.

65. INNOVATOR'S PRESCRIPTION, *supra* note 38, at 103-04.

ness models or processes can disrupt markets as much as new technology.[66]

When discussing business models, Christensen carefully defines what he means by a business model, unlike some other scholars and commentators who sometimes conflate marketing strategies, revenue models and any activity with a significant impact on a firm's profitability with business models.[67] For Christensen, a business model has four interdependent elements: a "value proposition," resources, processes and a profit formula. The value proposition is offering to do a "job" more conveniently, quickly, or cheaply than the consumer can. The other three elements enable the firm to deliver on that proposition in the long and short term.[68]

Christensen's original work was framed in terms of Michael Porter's "value chain" theory.[69] Porter's value chain theory was developed in the context of manufacturing and distribution businesses. In these sorts of settings, a business adds value to inputs. The added value can come in the form of a factory, bringing raw materials in one door and shipping out finished product through another. In his more recent work, Christensen looks at other kinds of "value configurations."

1. *The Three Value Configurations*

In incorporating business models into his analysis, Christensen has relied on work that extends Porter's theory beyond its original product manufacturing setting to other types of value configurations that better fit service providers and companies that are not centered on physical products.[70] Porter's work speaks of the process by which value is added in business as being a "value chain." A model developed by Charles B.

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66. An example of disruption by business model innovation would be Dell Computers, which sold computers that were functionally identical to others on the market but which used an innovative direct to consumer business model. SEEING WHAT'S NEXT, *supra* note 16, at xvii.

67. *See, e.g.*, Mark Pruner, *The Clash of 20th Century Regulation with 21st Century Technology*, 16 ST. JOHN'S J. LEGAL COMMENT. 587, 589 (2002) (indicating that prohibition of the use of sales agents precludes adoption of a sales agent "business model").

68. *See* INNOVATOR'S PRESCRIPTION, *supra* note 38, at 8-10.

69. MICHAEL PORTER, COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE 33-34 (1985).

70. Stable & Fjeldstad, *supra* note 56, at 413.

Stabell and Øystein D. Fjeldstad sees value chains as one of three possible "value configurations."

VALUE CONFIGURATIONS[71]

Value Creation Logic	**Value Chain** Transformation of inputs into products	**Solution Shop** (Re)solving customer problems with expertise	**Value Network** Linking customers
Primary Activity Categories	• Inbound logistics	• Problem-finding and acquisition	• Network promotion and contract management
	• Operations	• Problem-solving	• Providing service
	• Outbound logistics	• Solution choice	• Operating infrastructure
	• Marketing	• Solution execution	
	• Service	• Control/evaluation	
Main Interactivity Relationship Logic	Sequential Add value to input	Cyclical, spiraling, iterative	Simultaneous, parallel
Exemplary Solution	Standardized product	Custom service	Community interface If product (e.g., insurance policy) arbitrages members of network
Examples	Factory	Lawyers, doctors, consultants, detectives, engineers	eBay Insurance company

a. Value Chain Businesses

Porter's "value chain configuration" (renamed the "value adding process business model" by Christensen)[72] describes the familiar industrial process. Raw materials enter into one door of a factory, and finished products exit from another. Porter observed that the cost of each step might bear little relationship to the value added—for example, the cost of materials and the time involved for a diamond cutter to cut a diamond are quite low, but the value added to the diamond at this step is very high.[73] The value chain configuration breaks down how companies add value and focuses a company's activ-

71. *Id.* at 415 tbl.1.

72. INNOVATOR'S PRESCRIPTION, *supra* note 38, at xxv. In this paper we will use the term Value Chain because of the wide acceptance and clarity of Porter's term.

73. *See* PORTER, *supra* note 69, at 39.

ities on those parts of the chain where the most value can be captured. The framework has had broad influence since Porter introduced it more than 30 years ago.[74]

Services as well as hard products can be delivered through the value chain configuration. For example, a carpet cleaning franchise offers a service, not a product, but the franchised service follows the value chain configuration. The service provider eschews diagnostic and suitability analysis (e.g., shouldn't the consumer instead buy new carpet or restore the underlying wood floors?) and delivers, based on standard inputs the service selected by the consumer. Value chain services can be automated and impersonal—for example, Google Translate offers a remarkably powerful translation service from a value chain format.[75] Users put in language that they need translated, and using software Google provides the service of rendering the input text into another language. The service is transformative, standardized and automated.

Stabell and Fjeldstad start with the realization that the "value chain" described by Porter does not fit all businesses. While some businesses do involve transforming inputs into finished or at least higher value products or services, many do not. Asking what the raw materials and finished products would be for an insurance company, they observe that "[f]ew insurance companies would perceive uninsured people as the raw material from which they produce insured people."[76] Stabell and Fjeldstad add two other radically different ways companies can organize to deliver value.

b. Solution Shop Businesses

The "value shop" (relabeled the "solution shop business model" by Christensen)[77] will be familiar to those who have worked in law firms or law departments, or have familiarity

74. Jay B. Barney, *Strategic Management: From Informed Conversation to Academic Discipline*, 16 ACAD. OF MGMT. EXECUTIVE 53 (2002) ("There is little doubt that Michael Porter has been the most influential scholar in the field of strategic management over the last 25 years.").

75. http://translate.google.com.

76. Stable & Fjeldstad, *supra* note 56, at 414.

77. INNOVATOR'S PRESCRIPTION, *supra* note 38, at xxiv. In this paper we will use the term Solution Shop because it succinctly describes the concept.

with the sociological literature discussing the profession.[78] Consumers come with problems. Frequently, the true nature, scope, and best solution to the problem are unclear, precluding the application of standardized off-the-shelf solutions in the first instance. "Knowledge-intensive service firms not only sell a problem-solving service, but equally a problem-finding, problem-defining, solution-execution and monitoring service."[79] The solution shop value configuration demands that the solution be tailored to the problem identified.[80] There must be "a strong information asymmetry between the firm and its client" with the firm possessing an "intensive technology."[81] Firms in the solution shop zone must be able to deal with unique cases, even if the solutions employed after diagno-

78. *See, e.g.*, ANDREW ABBOT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 4 (1988) ("Professions were organized bodies of experts who applied esoteric knowledge to particular cases. They had elaborate systems of instruction and training, together with entry by examination and other formal prerequisites. They normally possessed and enforced a code of ethics or behavior. This list of properties became the core of later definitions."); ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE (1986); ROBERT ELI ROSEN, LAWYERS IN CORPORATE DECISION-MAKING (2010). The specialized asymmetric knowledge and application of it in light of the specific facts of the matter maps directly from the value shop model to the traditional conception of professions; the additional elements of licensing, ethical codes and striving for status appear in some but not all applications of the model. Interestingly, on the corporate side, some of the non-law practice competitors in the legal services market have retained the solution shop value configuration while disclaiming a "professional" role.

79. PETER GOTTSCHALLK, KNOWLEDGE MANAGEMENT SYSTEMS: VALUE SHOP CREATION 3 (2007).

80. This value configuration explains, among other mysteries, why identifying a clear value chain for legal services has eluded analysts. Law, when practiced as a consultative profession, is not a value chain business configuration, and so there is no value chain. Value chain analysis applies to standardized products and services where value is added at various steps in a process toward a more or less standardized product or service, and the traditional "profession of law" is by nature customized and not product-centered. While it uses inputs and resources, these resources and inputs are not transformed in a value adding process, but used in a solution shop process to solve a problem. From this perspective, to refer to the resources and inputs used by law firms or general counsel as part of a "value chain" is a misnomer. *But see* Regan & Heenan, *supra* note 3, at 2167 (referring to a "legal services value chain.").

81. Stabell & Fjeldstad, *supra* note 56, at 421.

sis are standardized.[82] The "intensive technology" can be a command of ERISA regulations or remote sensing technology for finding undersea oil and gas deposits. The process is iterative and evaluative, with a key component being ongoing evaluation of whether the solution provided is the right one.[83] From the consumer's viewpoint, cost matters less than obtaining the right solution.[84]

Christensen's "solution shop" label is apt because what firms with this value configuration principally offer are solutions, and services or products only as a means to that solution. A doctor's prescription of medicine, for example, has value only in the context of the correct diagnosis of the disease causing the symptoms and the selection of an appropriate treatment for the disease. As with the pills prescribed by the doctor, components that have been produced through a value chain process may be incorporated in the solution shop service, but the service remains inherently individualized and directed at diagnosing and solving the consumer's problem.

c. Value Network Businesses

The third value configuration, the "value network," has become increasingly familiar to those of us living in the internet age. The value configuration of eBay, for example, is neither products nor services. Its value comes from providing a network in which connections are made. It achieves success when a sufficiently large network is built and sufficiently avidly used so that it can help users resolve their unmet needs. The network model includes all businesses where the value comes from mediating between the diverse constituencies of the business. Banks, insurance companies, telephone companies and postal services are all examples of value networks.[85]

For network businesses, the primary value lies in the network, with the value growing as the network achieves scale. A competitor with equivalent technology and facilities will fail without having the right members in the network. Network value companies succeed in part by being "club managers"

82. *Id.* at 421-22.
83. *Id.* at 422.
84. *Id.* at 426.
85. *Id.* at 427.

who exclude inappropriate members,[86] while achieving sufficient scale to make use of the network valuable. In pursuit of the network, network companies will provide mediating technologies, perhaps reinforced by common standards, but the network rather than the facilities is ultimately what matters.[87]

Most substantial companies are not pure examples of any one of these value configurations. As Stabell and Fjeldstad note, a telephone company may employ a mediating network value configuration for its basic telephone service, but source its equipment using a value adding process value configuration.[88] A company can provide a solution shop front end, and then incorporate selected products that have been developed through a value chain.

From the perspective of a consumer, it may not matter which value configuration a given company follows. If the job the consumer needs filled is having a hole in put into a wall, to borrow an example from Susskind,[89] he can obtain that hole from any of these value configurations or business models. He can buy a drill or a shotgun created by someone pursuing a value chain value configuration and create the hole himself. He can hire a solution shop with expertise in putting holes in walls and, after the solution shop has verified that a hole in the wall really is the best solution, allow it to punch the best possible hole. He can access a network and, perhaps after seeking advice and guidance from other consumers of holes in walls, be connected with someone with a need for round pieces of drywall.

Stabell and Fjeldstad portray these value configurations as co-existing in the market. The world is not in the midst of an evolutionary progression from old forms of value configurations (say, solution shops) to new ones. At any given moment, all three generic value configurations can coexist.

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86. *Id.* at 427-28.

87. *Id.* at 427.

88. *Id.* at 434.

89. RICHARD SUSSKIND, THE END OF LAWYERS: RETHINKING THE NATURE OF LEGAL SERVICES 158-59 (2010). Christensen tells a story of how a fast food company analyzed the "job" done by a milkshake, which turned out to involve several non-obvious attributes such as the ability to be consumed neatly with only one hand while driving. INNOVATOR'S PRESCRIPTION, *supra* note 38, at 11-14.

With regard to a job that needs to be done, however, there can indeed be a progression. At first, a job can seem complex and fully in need of a custom solution from a high-end solution shop. As the solution shop addresses the job multiple times, the contours of the problem may become clearer, opening the way to standardized value chain solutions. Richard Susskind argues that many law-related jobs are, with the aid of technology, becoming solvable with value chain solutions.[90]

From the perspective of the business, however, it is very difficult to move from one value configuration to another. As Christensen shows, companies become captured by their competencies. They also reside within an intermeshed network of vendors, partners and consumers that will resist changes from a counterpart they rely on. To the extent companies view a shift as necessary, radical change usually can only be achieved by setting up a separate operation to pursue the new opportunity, unconstrained by existing relationships.[91]

2. *Captured by Success: Value Configurations as Barriers to Innovation*

Looking only at Christensen's earliest work on disruptive innovation, theorists of legal innovation such as Susskind have focused primarily on coming technological leaps,[92] but technology can be sustaining as well as disruptive. As disruptive innovation theory has matured, business models and value configurations have taken center stage as the real enablers of disruptive innovation.

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90. *Id.* Susskind does not use the "value chain" or "solution shop" concepts developed by Stabell and Fjeldstad, but the recognition that formerly complex tasks are becoming commoditized and are subject to being systematized recurs throughout his work.

91. INNOVATOR'S PRESCRIPTION, *supra* note 38, at 3 ("Historically, it is almost always new companies or totally independent business units of existing firms that succeed in disrupting an industry.").

92. Susskind discusses Christensen's older work and the objection posed to Susskind that perhaps business models get short shrift in his analysis in contrast to technology, but essentially concludes that technology is what he wants to focus on. As a technologist and futurist, Susskind seems less concerned with which institutions win or lose in the market than with the possibilities of technology. SUSSKIND, *supra* note 89, at 97. ("[F]or the purposes of some of this book, I do want to be technology-led.").

The different types of value configurations help illuminate the challenges facing the incumbents in the legal profession today. As will be discussed below, law firms live in the solution shop business model. They don't live alone in that model, but wrap themselves in a set of value relationships that will steadily and persuasively push back against radical attempts at change. While in a changing world it might be a better business to become a vendor of information products following a value chain model, that switch will not be made easily by incumbent law firms. Even if a law firm's management sees the future as belonging to commoditized information products, it will be an unusual firm that can make the switch.

The business literature on innovation, which has been largely ignored by scholars addressing legal markets, helps make many things clear. Successful incumbents cannot easily change their business model; their resources, processes and values are optimized to their current clients and will resist change. Incumbents can use radical new technologies to sustain their business model, but tend to leave alone new technologies or business processes that do not enhance their offerings to their current clients. Disruptive entrants can enter the low end of the market with new technologies or business processes, and disrupt the market through a sequence that sees them improving their offerings in an iterative matter, eventually allowing them to challenge for the incumbent's best customers. Innovation can be driven by technology, but it also can be driven by firms targeting the same consumers with different business models and value configurations, and it always depends on market and business structures being open to disruptive entrants. In a world where incumbents cannot implement disruptive change, regulation that excludes entrants from different value configurations excludes not just the potential entrants but the possibility of disruptive change itself.

III.
How the Regulation of Legal Services Limits Innovation

Disruptive innovation theory, it should now be clear, turns only in part on actual technical or business model innovation. Understanding how innovation takes root depends on understanding the market. In the realm of legal services in the U.S., that market has been shaped by regulation of the legal

profession, and the rules limiting competition from non-lawyers.[93] These rules lock lawyers into one value configuration, the solution shop, while limiting the ability of new entrants to offer solutions that include any solution shop aspect.

A. *If It Is the "Practice of Law," the "Solution Shop" Value Configuration Is Required*

Those who "practice law" in the United States must operate in a circumscribed way. State rules based on the American Bar Assocation's Model Rules of Professional Responsibility and other rules regulating lawyers set out in painstaking detail the characteristics of acceptable legal practice. The purpose behind some—such as education requirements or the difficulties encountered in limiting the scope of a client engagement—might seem obscure.

The rules have been described as controlling what constitutes a "legal product" and who can sell such products and services.[94] While this description makes sense from some perspectives, it would be misleading to view lawyers as delivering some kind of value added product. The rules are best seen not as defining a product at all, but as mandating a particular kind of method for addressing the job the client wants done.

Understanding the various generic value configurations helps make clear what is going on—the regulatory scheme tracks and imposes the solution shop value configuration. It contains requirements to make sure lawyers are able to meet the expectations of this model. The regulatory framework mandates that lawyers deliver their services according to this model. Lawyers practicing law cannot simply sell products or create networks; they must incur the overhead and meet the implied obligations of the solution shop configuration.[95]

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93. Most state rules are based on model rules promulgated by the American Bar Association. MODEL RULES OF PROF'L CONDUCT (2012). Malpractice liability and the duties implied by malpractice standards also serve to regulate the profession. In addition, lawyers are increasingly regulated as service providers by rules that are not necessarily lawyer specific. *See generally* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

94. *Legal Barriers*, *supra* note 1, at 1706.

95. The difficulties lawyers face in offering limited scope services help drive this home. For a thoughtful examination of the ethical burdens faced by lawyers wishing to offer limited scope services, see PA. BAR ASS'N COMM. ON LEGAL ETHICS AND PROF'L RESPONSIBILITY & PHILA. BAR ASS'N PROF'L GUI-

The regulatory scheme's prescription of the solution shop value configuration impacts innovation vastly more than any one regulatory requirement. Modifying or eliminating specific regulations will have limited impact so long as lawyers are committed to the solution shop model. So long as lawyers are controlled by the underlying architecture of the solution shop configuration, tweaking individual rules will amount only to painting the trim.

1. *Possessing the Intensive Technology*

In the solution shop configuration, the expected information asymmetry means the provider will know more about the intensive technology used to solve the problem than the client base. The regulatory scheme enforces this information asymmetry in many ways, most specifically by requiring high levels of specialist education tailored to solving legal problems. States typically require graduation from law school, and in most states an ABA-accredited law school, as a prerequisite for taking the bar exam and joining the bar.[96] Both the educational and testing requirement correlate with ensuring that the lawyer has mastered the "intensive technology" critical to lawyering and with preserving an information asymmetry between lawyers and lay people. Mandatory continuing legal education requirements help ensure licensed lawyers remain current in their command of the technology. Other rules, including virtually every rule requiring "informed" consent,[97] take as a given that there will be an information asymmetry, and build into the fiduciary relationship the duty to not abuse the asymmetry by making sure the hidden implications of the consent have been disclosed.

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dance Comm., Joint Formal Op. 2011-100: Representing Clients in Limited Scope Engagements (2011), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Joint_Formal_Opinion_2011-100.pdf.

96. A Nat'l Conference of Bar Exam'rs & A.B.A. Section of Legal Educ. & Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements (Erica Moeser & Claire Huismann eds., 2012).

97. *See, e.g.*, Model Rules of Prof'l Conduct R. 1.0(e), R. 1.2(c), R. 1.4(a)(1), R. 1.6(a), R. 1.7(b)(4), R. 1.8(a)(3), R. 1.9, R. 1.11(a)(2), R. 1.12(a), R. 1.18(d)(1), R. 2.3(b), R. 6.5, cmt. 2 (2012).

2. *Diagnosing and Solving a Problem Rather Than Selling a Product*

The rules also define the process a lawyer must follow, closely tracking the solution shop value configuration. As a practical matter, the rules preclude lawyers selling products or precut solutions without becoming significantly involved in investigating and diagnosing the client's problem. Rather, lawyers must inquire into the facts and analyze the factual and legal elements of the client's problem before offering any solution.[98] While in theory lawyers can limit the scope of the representation,[99] in practice doing so also requires personalized involvement. The lawyer must determine for herself whether limiting services is reasonable under the circumstances,[100] and must also sufficiently inform the client of the issues and consequences so that the client can give informed consent to the scope of the representation.[101] Malpractice liability adds bite to these duties should the lawyer fail to reasonably extend her services to solve the underlying problem, even if the client did not recognize the full nature of the issue.[102]

Once the lawyer has embarked on this course of analysis and diagnosis, the rules place further restrictions that prevent variance from the solution shop configuration. The lawyer must act with reasonable diligence and promptness.[103] The expectation is that the lawyer will not stop the representation prior to delivering a solution.[104] Consistent with the solution shop value configuration, lawyers are required to communicate with their clients throughout the representation, so that the problem-solving lawyer understands the full nature of the problem and the clients understand the solution being offered.[105]

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98. Model Rules of Prof'l Conduct R. 1.1, cmt. 5 (2012).

99. *Id.* R. 1.2.

100. *Id.*

101. *Id.*

102. *See, e.g.*, Nicholls v. Keller, 19 Cal. Rptr. 2d 601, 609 (Cal. Ct. App. 1993) (holding that absent a knowing waiver, attorney must represent client on full range of possible remedies).

103. Model Rules of Prof'l Conduct R. 1.3 (2012).

104. *Id.* R. 1.3 cmt. 4; *Id.* R. 1.16 cmt. 1.

105. *Id.* R. 1.4.

3. *Implications of Requiring Solution Shop Services*

Recognizing that lawyers—and professionals in other fields—operate in the solution shop value configuration also has implications for reforming legal services. The solution shop approach makes sense in certain kinds of situations, typically where problems are complex and inchoate. Regulations requiring that solution shop providers have the skills necessary to solve complex puzzles make some sense. Where, however, situations can be identified whereby standardized solutions can be applied safely without the vendor having a command of the intensive technology, vendors fitting into other value configurations might deliver more value at a lower price. Reformers can both identify niches where full legal training is not required and change the substantive law to be amenable to off-the-shelf-services.

In the medical setting, Christensen provides the example of nurse practitioners relying on automated diagnostic tests.[106] Technology allows diagnostic tests to be performed without recourse to a physician, permitting in turn the dispensing of standard, appropriate solutions to a range of common ailments. At the time his book was written, the MinuteClinic offered walk-in nurse staffed clinics without a single doctor on site, and it had never faced a malpractice claim.[107] While the diagnostic function can be more difficult in law, perhaps in part because lawyers and judges keep law complicated,[108] such paraprofessional solutions incorporating value chain solutions could meet consumer needs for legal services.

In law, the rules governing lawyers prevent those who "practice law" from pursuing a value configuration other than the full bore "practicing law" solution shop. This value configuration applies to all U.S. lawyers—even though the bar, and more importantly, the customer bases are divided by size. On one side of the divide are lawyers who serve large corporations,

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106. INNOVATOR'S PRESCRIPTION, *supra* note 38, at 118-20.

107. *Id.*

108. Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 964-73 (2000) (discussing the causes and impact of legal complexity).

and on the other are those who serve individuals and small businesses.[109]

While there are sociological and cultural consequences of this divide within the bar,[110] what matters for our purposes is that there are different markets. Corporations and individuals have different needs when it comes to legal services. If consumers looking for a service or product have a job they want done, as Christensen says, corporations and individuals have different jobs that need doing. The two types of consumers also approach the market with vastly different resources and capabilities. Both, to the extent they use lawyers, must buy the custom solution shop package. As we shall see, however, well-served, sophisticated corporate clients have been more successful in evading these constraints than the underserved, less sophisticated individual consumers.

4. *The Corporate Side of the Legal Services Marketplace*

On the corporate side, the rise of the general counsel has changed everything. Once upon a time, corporate General Counsel were peripheral players in the providing of legal services to corporations. Today, senior lawyers happily leave major firm partnerships to join a General Counsel's office, where the pay can be at least equal and the job satisfaction higher. If there are "wise counselors" advising major corporations today about their social as well as legal obligations,[111] they almost certainly will be found in the General Counsel's office.

The purchaser of legal services on the corporate side almost always is a lawyer herself, a point of some importance. Corporate clients are also repeat players, and so anticipate and

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109. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982); JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR, & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 44-47 (2005).

110. *See generally* JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR, & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 57–71 (2005) (discussing ethnic, religious, and educational differences observed between those lawyers serving individuals and those serving large corporations).

111. LOUIS D. BRANDEIS, BUSINESS – A PROFESSION 313, 321 (1914); ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 3 (1993); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 721 (1988).

plan legal costs. Often global in scope, major corporations can access legal providers outside the United States. As powerful repeat players, corporations are likely to get an attentive if not sympathetic ear from regulators if a legal innovation that could be characterized as the "unauthorized practice of law" proves helpful to their business.

With regard to the general practice of law, no information asymmetry exists between the General Counsel and the firms she hires.[112] The General Counsel has passed the bar and knows how to practice law. This perhaps has forced a change in the nature of law practice in major law firms.[113] The solution shop model depends for its value proposition on an information asymmetry between vendor and consumer. Put simply, to flourish, the solution shop service provider needs to know how to do things the clients cannot do more cheaply by themselves. To preserve this asymmetry, lawyers in law firms can no longer be generalists if they wish to be marketable to general counsel; aside from a very few especially wise counselors, they must seek and have indeed sought the needed information asymmetry by becoming specialists in narrow areas of law.[114] Without such specialization, the solution shop model would no longer work in the corporate setting.[115]

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112. "Increasingly, general counsel are former partners in large corporate firms who are capable of internalizing both the diagnostic and referral functions they previously performed on behalf of clients as outside counsel." Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 902 (1990).

113. For an interesting discussion of the changing relationship between outside lawyers and corporate clients, see Robert Eli Rosen, *"We're All Consultants Now": How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 640 (2002) (arguing that lawyers are increasingly just one of many flavors of consultants used by corporations).

114. *See* Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1007-10 (1994); William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 379-80 (2011); Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917, 919-20 (2002).

115. Even if the demands of the solution shop model force specialization on lawyers serving corporate clients, the new model of practice in which lawyers become narrow technicians rather than 'statesmen' has had wrenching impact. *See generally*, ROSEN, *supra* note 78, at 36-41 (discussing the professional impact of "differentiated specialization," which Rosen views as a

The rise of general counsel has also begun to have a substantial impact on the business models available to vendors of legal services other than law firms. This is because, from the perspective of the business people in the corporation, *the ultimate "solution shop" providing answers to legal problems on the corporate side is the General Counsel's office.* The General Counsel may retain other solution shops to help it improve its level of service, and those solution shops may include law firms along with management and information technology consulting firms.

The General Counsel can also, however, purchase services or products from firms that pursue value adding process or network business models. The corporation need not accept bundled services from a law firm, but can instead construct its own network of vendors.[116] The General Counsel can disaggregate the services provided by law firms and select à la carte. In practice, this means that the dominance of the General Counsel's office has created a potentially disruptive opening for non-lawyers and non-solution shop vendors to sell their products and services to the General Counsel's office.

However, this opening can be limited by the resources, processes and values that control the activities of the in-house legal departments. Like any other organization, in-house departments have developed resources and processes in order to do what they do, and values that help them rank priorities. In many cases, these resources, processes and values reflect the law firm backgrounds of the lawyers in the legal department. These often lead to a symbiotic relationship with law firms. Innovations that are viewed as sustaining to the way the law department does business—say, assigning a severable portion of the work on a matter that might have gone to a less expensive law firm to an LPO instead—can fit into the department's resources, processes and values. Innovations that do not mesh with the established resources, processes and values of a given

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path corporate advisors are free to choose or not choose); KRONMAN, *supra* note 111, at 3 (discussing the impact on the legal profession of new modes of practice).

116. Regan & Heenan, *supra* note 3, at 2160.

law department will have a much harder time gaining traction in that department.[117]

5. *The Individual Side of the Legal Services Marketplace*

The story is quite different on the individual side of the market. Here, a core information asymmetry will likely exist. Individuals and small businesses are less likely to be repeat players with regard to a given kind of legal matter, are more likely to be limited to a local market, and are not likely to be members of the bar themselves. They are less likely to have the ability to build their own vendor network for legal matters, and are more likely to be dependent on the services offered on a matter by a selected firm or lawyer.

At the same time, individuals and small businesses are more likely to be absolutely constrained by cost than massive corporations. Some evidence suggests that, more than similarly situated consumers in other countries, U.S.-based individuals choose to forego legal services altogether.[118]

Last but not least, individuals are the consumers most likely to be "protected" by the organized bar against those who might engage in the unauthorized practice of law. When state authorities or private lawyers bring challenges to those allegedly engaged in the unauthorized practice of law, the consumers of those services tend to be individuals and small companies rather than major corporations.[119] It is within the solo and small practice groups of the bar associations—the groups most likely to serve individuals and small businesses—that the most vocal defenders of unauthorized practice of law enforcement can be found.[120]

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117. For example, an in-house department with highly developed processes for managing firms that bill by the hour but without the resources or processes to evaluate a flat rate fee may avoid firms that offer only alternative billing options. For a fuller discussion of how RPV limits an organization's ability to change, see INNOVATOR'S DILEMMA, *supra* note 12, at 185-210.

118. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 134-40 (2010).

119. See *infra* p. 141-46.

120. *See* Deborah L. Rhode, *The Delivery of Legal Services By Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 220-21 (1990) (suggesting that the elite bar feels little competition from lay services and has been willing to liberalize UPL, but attorneys with small, non-corporate practices feel more need to protect their status and their incomes).

B. *Defining and Enforcing "Practice of Law" Restrictions*

1. *The Difficulty of Defining the Scope of the "Practice of Law"*

No one, it seems, has adequately defined what is meant by "the practice of law."[121] A blue ribbon ABA task force labored and failed.[122] State definitions tend to be circular, describing the practice of law as "what lawyers do."[123] Some commentators now seem to view even pursuing a definition as a fool's errand.[124]

There is, however, a general sense that the practice of law involves the application of legal knowledge in a personalized way to a particular situation.[125] This notion excludes general statements about what the law is but still draws in too much—a policeman advising a suspect of his Miranda rights could be charged with the unauthorized practice of law if this approach were applied broadly.[126] When statutes attempt to provide a list of what is included, the list generally includes court appearances, drafting of legal documents, and personalized legal advice.[127] In general, the U.S. definition is broader than those

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121. *See generally Legal Barriers*, *supra* note 1, at 1706-07.

122. *See* A.B.A. Task Force on the Model Definition of the Practice of Law, Board of Governors Resolution, *available at* http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html.

123. *See, e.g.*, Neb. Ct. R. § 3-1001, (providing a "General Definition": "The 'practice of law,' or 'to practice law,' is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer."); Rhode, *Professional Monopoly*, *supra* note 2, at 45.

124. *See* 2 Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering § 46.4 (3d ed. 2001) ("[I]n our law-dominated society, no logically satisfactory and practically workable definition is possible."); Kathleen Blanchard and Bonnie Howe, *Attorney Sanctions: Unauthorized Practice of Law*, 3 Geo. J. Legal Ethics 93, 97 (1989) ("Formulation of a standard or logical definition of the unauthorized practice of law has not been successful.").

125. The ABA task force on the definition of the practice of law recommended that each state adopt a definition, and that "each state's and territory's definition should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity." A.B.A. Task Force on the Model Definition of the Practice of Law, Report to the House of Delegates (2003), http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm.authcheckdam.pdf.

126. 2 Hazard & Hodes, *supra* note 9, at § 46.4.

127. *See, e.g.*, Wash. Super. Ct. APR 24.

found in other developed countries, where it generally is allowed for non-lawyers to give personalized legal advice so long as they do not misrepresent their qualifications or their status.[128] The gap between the U.S. and other countries in this respect is growing broader as countries such as Great Britain and Australia pursue reform of their legal marketplaces.[129]

2. *Permissible Legal Services That Are Not the "Practice of Law"*

Commentators sometimes suggest that lawyers have a monopoly on providing legal services in the United States.[130] From a market perspective, this is not quite accurate. Lawyers have a monopoly on engaging in "the practice of law," but there are law related products and services that do not constitute the practice of law.[131] While lawyers must conform to the solution shop value configuration prescribed by the rules, non-lawyers are free to select different business models and value configurations.[132] Through these exceptions innovation has been able to flourish on the corporate side of the market. In fact, setting aside the barrister function of court appearances, the corporate side of the legal market seems to be moving toward *de facto* deregulation.[133]

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128. *See generally* Rhode, *Professional Monopoly*, *supra* note 2 (highlighting how providers of legal services, other than lawyers, are barred from entering the marketplace in the United States; *Legal Barriers*, *supra* note 1 (stating that the current regulatory model presents a tremendous barrier to innovating how legal services are provided in the United States).

129. *See* Legal Services Act, 2007, c. 29 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2007/29/contents; *Legal Profession Act 2004* (NSW) ss 134-64 (Austl.), *available at* http://www.legislation.nsw.gov.au/fragview/inforce/act+112+2004©h.2-pt.2.6-div.2+0+N.

130. *See* Rhode, *Professional Monopoly*, *supra* note 2.

131. Thomas D. Morgan, *On The Declining Importance of Legal Institutions*, MICH. ST. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=2007273 http://ssrn.com/abstract=2007273 ("[L]awyers' monopoly over the delivery of legal services has eroded . . . .").

132. In some contexts, to avoid falling into the "unauthorized practice of law" they may be required to pursue other value configurations that do not purport to provide customized solutions based on legal knowledge asymmetries.

133. This has happened as commentators urge that the legal market be formally deregulated. *See* CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS (2011); *Legal Barriers*, *supra* note 1, at 1729.

a. Non-Personalized Information Products

Non-lawyers can sell non-personalized information products even though they provide a kind of a substitute for the services of a lawyer. Examples include books explaining how to achieve a certain legal task, such as the "*Avoid Probate!*" book popular in the 1960s[134] or a range of titles available from Nolo Press. This category also includes legal forms or form documents such as leases that are available over the counter commercially.[135]

Technology promises to change the nature of the legal information product niche. Document assembly software that presents different documents based on answers to questions can go beyond the "one size fits all" forms and present tailored documents. Despite a temporarily successful effort to ban it in Texas, Intuit's WillMaker Plus software is now sold throughout the U.S.[136] Online, companies such as LegalZoom offer a wide variety of documents. LegalZoom claims to have created more than one million legal documents, has attracted funding from A-list venture capitalists that clearly see a substantial business opportunity, and has filed for an initial public offering.[137] Whether companies like LegalZoom can withstand unauthorized practice of law challenges will be discussed below.

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134. NORMAN F. DACEY, HOW TO AVOID PROBATE! (1965); N.Y. County Lawyers' Ass'n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967) (litigation was premised on charging Dacey with the unlawful practice of law for authoring HOW TO AVOID PROBATE!); Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 822-29 (2002) (recounting Dacey's story).

135. For an example of this kind of information product, see Ralph Warner & Robin Leonard, 101 LAW FORMS FOR PERSONAL USE (2011)

136. Federal district court judge Barefoot Sanders ruled that the definition of unauthorized practice of law in Texas was violated by Will Maker Plus and enjoined sale of the product, but that ruling was vacated by the Fifth Circuit after the Texas legislature amended the Texas definition of unauthorized practice to allow sale of such products. *See* Unauthorized Practice Comm. v. Parsons Tech., Inc., No. Civ. A. 3:97-CV-2859-H, 1999 WL 47235, at 1 (N.D. Tex.), *vacated*, 179 F.3d 956 (5th Cir. 1999).

137. Anthony Ha, *LegalZoom Files For $120M IPO, Saw $156M In Revenue Last Year*, TECHCRUNCH (May 11, 2012), http://techcrunch.com/2012/05/11/legalzoom-ipo/.

b. Legal Document Assistance

Some states allow non-lawyers to assist the public with completing standardized forms.[138] While consumers unable to afford lawyers no doubt welcome such services, the providers of these services face an obvious slippery slope. To the extent they attempt to improve their service by offering guidance beyond that allowed, they cross into the unauthorized practice of law. The travails of the chain We The People indicate how quickly and pervasively charges can be brought.[139] It remains true, however, that a firm that is able to operate within the constraints of simply filling out forms does not cross the line into the unauthorized practice of law where this practice is legal.

c. Under Supervision of a Lawyer

Non-lawyers can provide law related services so long as they do so under the supervision of a lawyer.[140] It is not the unauthorized practice of law, for example, if a paralegal asks questions of a client, following a list prepared by an attorney, and prepares legal documents for the attorney's review. In certain areas relevant to individual clients, this exception allows attorneys to achieve local scale and offer fixed fee services in practices such as uncontested divorces and personal bankruptcies; the lawyer's time is leveraged not just via associates, but also via lower-paid staffers following defined protocols.[141]

In the large corporation context, the supervision exception has major importance. Because the consumer, in the form of the General Counsel, is also a lawyer, almost all services can

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138. For example, California allows this. CAL. BUS. & PROF. CODE § 6400 (West 2003); *see also* Kathleen E. Justice, Note, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179 (1991).

139. *See* pp. 144-45, 149.

140. MODEL RULES OF PROF'L CONDCUT R. 5.3 (2012); For a discussion regarding the permissible scope of paralegal activity, see PAUL R. TREMBLAY, *Shadow Lawyering: Nonlawyer Practice within Law Firms*, 85 IND. L.J. 653 (2010).

141. This appears to have been the business model of Jacoby & Meyers and Hyatt Legal Services in their heyday. *See* JERRY VAN HOY, FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES 40-41 (1997) ("It is clear that secretaries aided by computer boilerplate are the essential element in office productivity. Staff attorneys are . . . extra help to facilitate selling services to clients.").

be provided under the supervision of a lawyer. In responding to inquiries about whether sending U.S. legal work to offshore lawyers was facilitating the unauthorized practice of law, several local bar associations and the ABA all reached the conclusion that so long as a U.S. attorney supervised the work it was not the unauthorized practice of law.[142]

This allows, as a practical matter, offshore LPOs to provide any services that could be provided in the U.S. by associates or paralegals.[143] A U.S. licensed attorney must "supervise" the work, but that is not hard to arrange. Neither, it seems, are corporate clients facing searching inquiries second-guessing whether the level of supervision was adequate. The significance of attorney supervision for current and future innovation will be discussed below.

d. Non-U.S. Services

The U.S. unauthorized practice of law mandates are limited by their nature to situations with a U.S. nexus. Particularly where major corporations are involved, the governing legal regime can be a matter of choice.[144] For some matters, a different legal system can be selected, making U.S. unauthorized practice of law rules irrelevant. An example of where this has happened, allowing substantial expertise and sophisticated systems to be developed, are those countries in Europe and elsewhere that allow lawyers to practice within the context of multidisciplinary firms.[145] The different capital structure and

142. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); Fla. St. Bar Assn. Comm. on Prof'l Ethics, Op. 07-2 (2008); N.C. St. Bar, 2007 Formal Ethics Op. 12 (2008); Assn. of the Bar of N.Y.C. Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006); L.A. Cnty. Bar Assn. Prof'l Responsibility and Ethics Comm., Op. 518 (2006).

143. Interview by Richard Susskind with Leah Cooper, Managing Attorney, Rio Tinto (Oct. 9, 2009), http://www.legalweek.com/legal-week/analysis/1556450/legal-process-outsourcing-richard-susskind-leah-cooper, quoted in Regan & Heenan, *supra* note 3, at 2137, n.7 (2010).

144. For example, through choice of law or arbitration provisions, corporations can direct resolution of a dispute away from the United States. ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 85-106 (2009). Interpretation of international treaties such as GATS would also seem to be amenable to selection of non–U.S. legal service providers.

145. *See* CHARLES W. WOLFRAM, *Comparative Multi-Disciplinary Practice Of Law: Paths Taken And Not Taken*, 52 CASE W. RES. L. REV. 961, 978 (2002) (MDPs have existed in Europe for a quarter century with an upsurge in re-

deeper resources of these organizations allow an investment in systems.[146]

e. Some Services, Dependent on Legal Knowledge, That Do Not Purport to Be Practice of Law

A variety of consulting firms offer services that appear to be rich in legal content but that do not purport to be the practice of law.[147] Despite the overlap of what these firms offer with what law firms offer, they do not appear to have been subjected to unauthorized practice of law challenges. These firms might advise on regulatory compliance, advise on risk or human resource management, conduct internal investigations, or provide litigation consulting. Some of the consultants are licensed lawyers, but as employees of corporations the services they offer are not styled as the practice of law.

The core competencies of these firms sometimes appear to be different from those of law firms, as they typically draw on specialized expertise in knowledge management, business processes, evidence presentation, or information technology.[148] At other times, it is hard to tell how services such as litigation consulting differ from the practice of law. For example, the founder and owner of Cornerstone Legal Innovation is a pilot, not a lawyer. Despite the legal expertise of some of its staff members and the close nexus to legal strategy and advice, the firm does not claim to practice law. Nonetheless, the

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cent years); *see generally* MARY C. DALY, *Monopolist, Aristocrat, Or Entrepreneur?: A Comparative Perspective On The Future Of Multidisciplinary Partnerships In The United States, France, Germany, And The United Kingdom After The Disintegration Of Andersen Legal*, 80 WASH. U. L.Q. 589 (2002).

146. Unlike law firms, these companies can seek outside funding, including being listed as public companies. Law firms, by contrast, can only be owned by lawyers, and so cannot seek outside funding. While long term projects could be funded by diminishing current partner income, that would incur the risk of partners leaving for other firms that did not decrease current partner income for the benefit of future partners.

147. *See generally* TANINA ROSTAIN, *The Emergence of "Law Consultants"*, 75 FORDHAM L. REV. 1397 (2006); Terry, *The Future Regulation of the Legal Profession*, *supra* note 7.

148. For example, the legal consulting function of Huron Legal Consulting fits within a broader management consulting firm, and some of the services offered depend on expertise in business processes and information management. *See Services,* HURON CONSULTING GROUP, http://www.huronconsultinggroup.com/services.aspx (last visited Oct. 30, 2012).

web page for the litigation support practice of Cornerstone Legal Innovation claims, "We are trial lawyers serving trial lawyers . . . . We are not spectators but rather active members of your litigation team."[149] These "legal consultants" operate outside the constraints of the rules, and as such are free to explore value configurations and business models different from that required of attorneys.

3. *Enforcing Unauthorized Practice of Law on the Individual Side of the Market Through Private Suits and Class Actions*

Lack of definitional clarity does not prevent enforcement of unauthorized practice of law provisions. Most states have statutes prohibiting the unauthorized practice of law,[150] and some of those that have no statutes nonetheless have court rules enabling contempt of court proceedings.[151] In years past, state bar associations and state court systems used these rules to police the unauthorized practice of law.[152] While some states have shut down their unauthorized practice of law committees[153] and commentators have detected a gradual liberalization in unauthorized practice of law rules,[154] it would be a mistake to assume unauthorized practice of law restraints have faded away. Unauthorized practice of law provisions continue to provide an active constraint on the individual consumer side of the market.

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149. *Trial Support*, CORNERSTONE LEGAL CONSULTANTS, http://www.cornerstoneconsultants.com/litigation (last visited Oct. 30, 2012).

150. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2585 (1999).

151. *See, e.g.*, Ariz. Sup. Ct. Rules 31 ("Regulation of the Practice of Law"), *available at* http://www.supreme.state.az.us/cld/pdf/Rule%2031%20FINAL%20for%20Code%20Book.pdf.

152. *See, e.g.*, Clark v. Austin, 101 S.W.2d 977 (Mo. 1937) (contempt); Shortz v. Farrell, 193 A. 20 (Pa. 1937) (injunction); *In re* Baker, 85 A.2d 505 (N.J. 1952) (contempt); Alamo Title Co. v. San Antonio Bar Ass'n, 360 S.W.2d 814 (Tex. App. 1962) (injunction); Fl. Bar v. Scussel, 240 So.2d 153 (Fla. 1970) (contempt).

153. *See e.g.*, *In re* Dissolving the Comm'm on the Unauthorized Practice of Law, 242 P.3d 1282 (Mont. 2010) (holding that they themselves do not have the authority to promulgate rules regulating unauthorized practice).

154. GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 46.4 (3d ed. 2001).

In part, unauthorized practice of law restrictions remain vital because enforcement has moved from official bodies to individuals—and their attorneys—pursuing private rights of action. In some cases, this private right of action has been based directly on violation of a legal duty to not practice law without authorization.[155] In other cases, the private right of action has been based on theories such as deceptive trade practices.[156]

The shift to private enforcement took on new importance when class actions were added to the mix. At one time, unauthorized practice of law class actions were brought by and for the organized bar membership, and added little in enforcement risk to injunctive actions by the bar.[157] In more recent years, however, private attorneys operating independently have turned not only to private rights of action for violations of unauthorized practice of law rules but also to consumer protection statutes as a vehicle for unauthorized practice of law enforcement.[158] In addition to allowing consumer class actions, the consumer protection statutes sometimes provide

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155. *See e.g.*, Armstrong v. Brown Serv. Funeral Home W. Chapel, 700 So.2d 1379 (Ala. Civ. App. 1997); Francorp, Inc. v. Siebert, 210 F. Supp. 2d 961 (N.D. Ill. 2001); Haymond v. Lundy, 205 F. Supp. 2d 403 (E.D. Pa. 2002); McMahon v. Advanced Title Servs. Co. of W. Va., 607 S.E.2d 519 (W. Va. 2004); Am. Abstract & Title Co. v. Rice, 186 S.W.3d 705 (Ark. 2004); Newman v. Ed Bozarth Chevrolet Co., 2007 WL 4287478 (D. Colo. 2007); Greenspan v. Third Fed. S. & L. Assn., 912 N.E.2d 567 (Ohio 2009); *see generally* Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719 (2007).

156. *See, e.g.*, Foster v. D.B.S. Collection Agency, 463 F. Supp. 2d 783 (S.D. Ohio 2006) (relying on Fair Debt Collection Practices Act and Ohio Consumer Sales Practices Act); Francorp, Inc. v. Siebert, 210 F. Supp. 2d 961, 971 (N.D. Ill. 2001) (relying on Illinois Deceptive Trade Practices Act); *In re* Samuels, 176 B.R. 616 (M.D. Fla. 1994) (relying on Florida Deceptive and Unfair Trade Practices Act); Dressel v. Ameribank, 664 N.W.2d 151 (Mich. 2003) (suing under Michigan Consumer Protection Act and Savings Bank Act); Thomas v. State, 226 S.W.3d 697 (Tex. App. 2007) (relying on Deceptive Trade Practices Act).

157. *See generally* Note, *Remedies Available to Combat the Unauthorized Practice of Law*, 62 COLUM. L. REV. 501 (1962).

158. *See, e.g.*, Armstrong v. Brown Serv. Funeral Home West Chapel, 700 So. 2d 1379 (Ala. Civ. App. 1997) (upholding class action on unauthorized practice of law cause of action); Am. Abstract & Title Co. v. Rice, 186 S.W.3d 705 (2004) (upholding class action under Arkansas Deceptive Trade Practices Act).

statutory attorney's fees and/or treble damages.[159] In some states, such statutes have been the tools of state agencies charged with protecting the public against the unauthorized practice of law,[160] but in others private attorneys decide whether to pursue legal service competitors with these tools.

A recent example of unauthorized practice of law enforcement is *Janson v. LegalZoom.com, Inc.*[161] LegalZoom.com sells legal documents online, with a "clerical review" conducted by a human. Private lawyers brought a class action in Missouri state court alleging that LegalZoom engaged in the unauthorized practice of law. The plaintiff class sought injunctive relief to bar LegalZoom from charging Missouri consumers and money damages under the Missouri Merchandising Practices Act.[162] The case was removed to federal court that, in its decision of summary judgment, held that the website's "clerical review" constituted unauthorized practice of law under Missouri law, and was therefore suitable for class certification.[163] The lawsuit finally reached a settlement that in principle includes compensation to Missouri consumers and LegalZoom's promise to modify its business practices in Missouri.[164]

For would-be innovators, these private class actions change the nature of the risk they face in daring to innovate in legal service markets. The opponent is not a bar association with broader policy considerations or an elected official responsive to consumers as well as the organized bar, but a private attorney pursuing a cash recovery from a potential competitor. The remedy is not just cessation of activities but, as in the Missouri LegalZoom case, might instead include treble damages, with the damages calculated as three times the total

159. Nathan Koppel, *Seller of Online Legal Forms Settles Unauthorized Practice of Law Suit*, WALL ST. J. L. BLOG (Aug. 23, 2011, 11:47 AM), http://blogs.wsj.com/law/2011/08/23/seller-of-online-legal-forms-settles-unauthorized-practiced-of-law-suit.

160. *See* Thomas v. State, 226 S.W.3d 697 (Tex. App. 2007) (action by state agency against We The People franchisee for unauthorized practice of law, obtaining injunctive relief, restitution, statutory damages, statutory penalties and attorney's fees).

161. F. Supp. 2d 1053, 1057 (W.D. Mo. 2011).

162. *Id.* at 1057.

163. *Id.* at 1063-65.

164. Koppel, *supra* note 159.

amount paid for the services deemed to be unauthorized practice of law.[165] Providing useful products or disclosing non-lawyer status may not constitute defenses to the charges of consumer deception and harm; in some states, if the behavior constitutes the unauthorized practice of law it is, per se, a deceptive practice.[166] If a bar association or a state attorney general brings enforcement proceedings, a provider may have to abandon doing business in a given state; a wave of class action lawsuits can force a provider into bankruptcy.

In at least one case, unauthorized practice of law class actions seem to have played at least a contributing role in the bankruptcy of an alternative provider of legal services. We The People sells legal forms to consumers from franchised storefront offices. The business model calls for the storefronts to only sell forms, and to provide no assistance beyond clerical help. Franchisees may be tempted to offer advice related to the forms that goes beyond the clerical into more substantive advice. Such a lower cost service could attract consumers with perceived "simple" legal problems away from licensed lawyers. We The People and its franchises did face a wave of class actions,[167] and this, along with business issues, seems to have contributed to its insolvency.[168]

Challenges brought by private lawyers seeking recovery for unauthorized practice of law generally involve services provided to individual consumers and small businesses. State at-

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165. *Janson*, 802 F.Supp.2d at 1053.

166. *Id.* at 1060.

167. *See, e.g., Press Release Sept. 25, 2007, California Advocates for Nursing Home Reform* (Sept. 25, 2007), http://www.canhr.org/newsroom/releases/2007/Press_Release20070925.html (California action targeting services provided to elders and brought by elder services attorney); *Smith Law Firm, The Smith Law Firm, LLC, reaches class-wide settlement in Jones, et al. v. Dollar Financial Corp.* (April 5, 2011), http://www.smithlawfirm.com/firm-news/2011/4/5/the-smith-law-firm-llc-reaches-class-wide-settlement-in-jone.html. *We The People and its franchisees also faced non-class litigation. See, e.g.*, Statewide Grievance Comm. v. Goldstein, 1996 WL 753092 (Conn. Super. Ct. 1996); In re Boettcher, 262 B.R. 94 (Bankr. N.D. Cal. 2001), *available at* http://www.canb.uscourts.gov/node/600 (fine, Suspension as Document preparer, and injunction against WTP franchisee Terry Mohr).

168. Richard Acello, *We the Pauper*, A.B.A. J. 24 (May 1, 2010), http://www.abajournal.com/magazine/article/we_the_pauper/ (explaining that consumer class actions is one factor in driving We The People legal forms chain into bankruptcy).

torneys general and private attorneys general are not filing, to the extent the reported cases reveal, class actions to protect Fortune 100 general counsel from the deceptive activities of legal process outsourcing firms. The actions target products and services aimed at individual consumers that would compete with the small firm and solo practice members of the bar.

As has long been noted, individual consumers have been conspicuously reluctant to express gratitude for the protection provided them by unauthorized practice enforcement.[169] Anecdotal and some empirical evidence suggest that, to the contrary, individuals and small businesses struggle and often fail to obtain legal services that meet their needs at an affordable price.[170] Class actions remove regulation of legal service innovations from contexts where non-lawyers might have a voice, and instead put it in a context where neither democratic pressures nor regulatory processes can serve as a counterweight.

The Supreme Court's recent holding in *AT&T Mobility v. Concepcion*[171] may curb these class actions. Some vendors of legal products such as LegalZoom have begun to incorporate *AT&T Mobility v. Concepcion* compliant arbitration clauses into their consumer contracts, and this can be expected to spread. It remains too early to say, however, that the door has closed on these lawsuits: *AT&T Mobility v. Concepcion* has proved controversial and is subject to future interpretation, and courts considering unauthorized practice of law class actions have shown themselves unusually eager to override on public policy grounds contractual provisions such as forum selection clauses.[172]

4. *De Facto Deregulation on the Corporate Side of the Market*

It overstates the case to claim that the market for legal services to corporations has become deregulated but such a claim appears to be closer to the truth than a claim that this side of the market currently faces substantial barriers to inno-

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169. Rhode, *Professional Monopoly*, *supra* note 2, at 28-29.

170. *See* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001) [hereinafter Rhode, *Access to Justice*]

171. 131 S. Ct. 1740 (2011).

172. Janson v. LegalZoom.com, Inc., 727 F.Supp.2d 782, 787 (W.D.Mo. 2010) (refusing to apply forum selection clause in LegalZoom's online contract with consumer).

vation due to regulation. Three exceptions to the rules governing the unauthorized practice of law affect this side of the market: the cleansing of what would be unauthorized practice by the supervision of a lawyer, the ability to ship work out of U.S. jurisdictions, and the ability of "consultants" to offer law related services that do not claim to be the practice of law. Short of the barrister function of appearing live in U.S. court proceedings, there appears to be little non-lawyers do not do for U.S. corporations.[173]

Looking at what non-lawyers do for U.S. corporate law departments operating in the U.S. helps make the point clear. Corporate law departments, despite unauthorized practice of law provisions, can and do get help from non-lawyers to review the language of the form contracts they use in their U.S. business,[174] review and produce documents related to U.S. court litigation,[175] advise on litigation management and strategy,[176] put in place programs advising employees on how they should act to comply with U.S. laws,[177] and draft briefs and memoranda to be filed with U.S. courts.[178] In purchasing these services from non-lawyers, corporations can work with vendors following value chain as well as solution shop business models.

Those arguing that innovation on the corporate side of the legal services market has come too slowly should look for

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173. In some cases, LPO firms and consultants apparently also offer work alongside licensed, but lower status, lawyers such as contract lawyers, with the systems and processes from the LPO firms or consultants enhancing the ability of the lawyers to deliver acceptable work.

174. *Case Study*, INTEGREON (2011), http://www.integreon.com/phpapp/wordpress/wp-content/uploads/2011/05/Contract-Drafting-Modification-Global-Internet-Retailer-Integreon.pdf.

175. *Case Study*, INTEGREON (2011), http://www.integreon.com/phpapp/wordpress/wp-content/uploads/2011/05/Onshore-Document-Review-Top-10-Technology-Company-Integreon.pdf (replacing thirty law firms costing $60 million per year, and reducing cost to $15 million annually for similar levels of work).

176. *Ediscovery*, KROLL ONTRACK, www.krollontrack.com/e-discovery/ (last visited Oct. 30, 2012).

177. *See, e.g.*, *Legal and Regulatory Compliance Program Development and Monitoring*, DUFF & PHELPS, http://www.duffandphelps.com/services/legal_management/Pages/LegalandRegulatoryComplianceProgramDevelopmentandMonitoring.aspx (last visited Oct. 30, 2012).

178. L.A. Cnty. Bar Ass'n 75, *Op. 518: Ethical Considerations in Outsourcing of Legal Services* (2006), *available at* http://www.lacba.org/Files/LAL/Vol29No9/2317.pdf.

explanations beyond regulation. In-house lawyers have substantial leeway to obtain services from a diverse range of vendors. Some have; others lag. Disruptive innovation theory points to a cause other than regulation. To the extent adoption of disruptive change has been slow, the explanation might lie with habitual resources, processes and values that lock corporate counsel into established patterns. In-house law departments developed in partnership with outside law firms, hiring law firm alumni as counsel and assigning work back to those law firms. Law department resources, processes and values reflect that linkage, and are not as directly sensitive to market pressures as they would be if law departments were profit-driven entities. In a changing world, these patterns may no longer serve the best interests of the in-house legal departments or the companies they serve.

IV.
The Interaction of Legal Services Regulation and Disruptive Innovation Theory

Both the regulation of lawyers and the forces described by innovation theory impact innovation in the legal services market. The regulation of lawyers defines not a product, but a business model. This value configuration applies to all lawyers, even though the legal marketplace breaks into corporate and individual submarkets with very different clients with very distinct needs. Innovation theory teaches that incumbents—both the large law firms dominating the corporate market and the solo practitioners and small firms dominating the individual and small company side of the market—will welcome sustaining innovations but will not embrace disruptive innovations that do not fit their resources, processes and values.[179]

The impact of regulation must be considered in light of disruptive innovation theory's core insight – dominant legacy providers of products and services are not unwilling to pursue disruptive innovation; they are unable. The values, resources and processes of those organizations prevent them from adopting disruptive models. Moreover, the legacy providers

179. *See* Christensen, *supra* note 12, at 191-93.

are especially unable to move down market to smaller or less lucrative niches.[180]

To the extent that lawyers provide legal services, the innovations that take hold will be sustaining, rather than disruptive, innovations. Such innovations can benefit consumers. In Christensen's study of the disk drive industry, for example, the legacy providers were able to use sustaining innovation to increase quality and lower prices until the time they were driven from the market by the disruptive entrants.[181] In the same way, lawyers can leverage sustaining innovations to improve services or lower costs. The service provided, however, must by definition involve enough customized, solution shop components to comply with the regulatory environment, and hence remain a personalized service inherently resistant to transparent price competition.[182]

While the business model decreed by the regulatory structure applies to all lawyers, it does not apply to all vendors of legal services, and non-lawyer competitors have become important market participants. On the corporate side of the market, unauthorized practice of law has been less aggressively enforced, and appears to be less of a barrier to innovation than the market structure forces that generally circumscribe incumbents.

The rise of the general counsel's office has enabled innovation in the corporate legal services market. While general counsel are subject to their own resource, process and value restraints, in meeting those demands they are consumers who can mix and match vendors and products. If a "job" that needs doing by a corporate legal department can be better done by access to an automated database, by purchase of standardized products, or by the use of "good-enough" non-lawyers, corporate counsel can and have pursued those options. Innovative disruptors can find an entry into such a market.

On the individual side of the market, both regulation and market structure impede disruptive innovation. While lawyers

180. *See* CHRISTENSEN & RAYNOR, *supra* note 19, at 35.

181. *See* CHRISTENSEN, *supra* note 12, at 8-25.

182. For a detailed discussion of the challenges involved in providing limited scope services within the framework of practicing law, see Stephanie L. Kimbro, LIMITED SCOPE LEGAL SERVICES: UNBUNDLING AND THE SELF HELP CLIENT (2012).

may use sustaining innovation to reduce costs and improve quality, they must necessarily provide solution shop answers. The popularity of class actions against alleged unauthorized practice of law violators has made the business risk related to unauthorized practice of law greater than ever before.

It remains clear that unauthorized practice of law enforcement has the capacity to deter innovation. In some cases, the impact is direct—the challenges brought against We The People seem to have accelerated the firm's bankruptcy. In other cases, the impact is indirect.[183] The potential for enforcement creates uncertainty that inhibits investment in methods of delivering legal services that might be prohibited as unauthorized practice of law. The potential for enforcement can also lead vendors to offer products that fall short of their technological potential in order to avoid charges of providing personalized services; businesses just outside the scope of unauthorized practice of law may avoid taking the logical next step that would make their products or services more desirable to consumers.

The impact of this on the individual side of the market, where unauthorized practice of law provisions retain substantial bite, can be significant. Evidence suggests there are masses of unserved and underserved legal consumers in the United States.[184] The lack of access to legal services impacts not just consumers but the court system itself.[185] Disruptive innovation theory teaches us that traditional solution shop providers cannot move down market to serve consumers. The new, disruptive vendors that might deliver services inferior to those delivered by lawyers—but better than nothing—will have to overcome unauthorized practice of law barriers in order to participate in the markets and reach these unserved and underserved consumers.

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183. *Legal Barriers*, *supra* note 1, at 1720-21.

184. *See* Rhode, *Access to Justice*, *supra note* 170, at 1785; Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 541-44, 567 (1994); John T. Broderick Jr. & Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 1, 2010, *available at* http://www.nytimes.com/2010/01/02/opinion/02broderick.html.

185. *See* Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. Pub. L. 373, 384 (2005).

V.
The State of Innovation in Legal Services: What Is Happening and What to Expect

We now turn to the state of innovation in the legal services market today, and what we can expect in the future. As shown, innovation will not be just a matter of technology. The laws regulating lawyers will surely play a role. Just as importantly, however, value configurations and market structures will confine the ability of incumbents to disruptively innovate. Looking at the near future of legal services allows us to show how these forces interact.

Regulatory requirements in the United States require many legal services to be delivered through the particular "solution shop" value configuration that helps define the practice of law. This reflects and also institutionalizes the historical solution shop model of professional firms, which means that many of today's incumbents will be locked into the solution shop model. Both the markets and the regulatory reality differ based on whether we are discussing the corporate or individual client submarkets. We treat the large corporate client marketplace as being significantly different from the individual client, small business marketplace.

One current question is whether the solution shop value configuration will survive as a significant part of the legal services solution mix. Susskind has projected that legal services innovation will occur along a continuum.[186] In his view, legal services will move from the traditional bespoke services model to, ultimately, commoditized products, as problems become routine and as technology allows more sophisticated and complex automated solutions.[187] Disruptive innovation theory and value configuration analysis teach us that, if this shift does occur, the players in the marketplace will very likely change.[188] Those processes, resources and values that make firms succeed

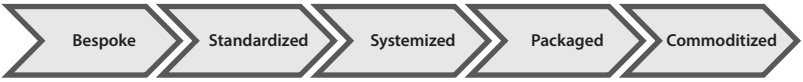
186. *See* Susskind, *supra* note 89, at 28-29.

187. *Id.*

188. This occurs as a function of the Resources, Processes and Values theory discussed above. Organizations evolve in a way optimized to perform a certain kind of task in a certain way, and are unlikely to be able to adapt to a new way of functioning, especially if the new way is down market or lower margin compared to their origins. See *supra* pp. 11-15 (discussing RPV theory).

at bespoke services will set them up to fail in a world of low cost commoditized products. Law firms, like other incumbents faced with disruptive change in the structure of a market, will find it difficult to move downstream in the value chain.[189]

Richard Susskind - Legal Services Evolution



Christensen, Stabell and Fjeldstad suggest, however, that the change will not be as total as Susskind's chart suggests. Susskind is surely right when he suggests that not all legal services will be delivered through "bespoke" or solution shop models, and that services that are now custom can be delivered as standardized commodities. It would be an unusual market, however, that ends up in a place where all vendors operate from the value chain configuration that delivers commoditized product and services. Networks (as Susskind recognizes elsewhere) will likely become increasingly important parts of the mix, and solution shops will remain important for complex problems. Innovation will more likely take the form of more business models and value configurations entering the mix.

As the transition toward a different mix of value configurations proceeds, law firms that offer standardized products as marketing tools should not be confused with those few rare firms that might try to pursue new business models. If a law firm publishes a periodic newsletter or circulates white papers on significant cases to clients and potential clients, that does not mean that they are considering a shift to a publishing business model. Rather, they are hoping to market their solution shop services to those who are impressed by the content of the free publications. Similarly, if a law firm offers a free online term sheet generator, that should not be misread to suggest that the firm is moving to online delivery of standardized products.[190] Rather, just as with print or email newsletters, the firm most likely is marketing its solution shop products.

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189. INNOVATOR'S DILEMMA, *supra* note 12, at 248 ("[W]ell managed companies are generally upwardly mobile and downwardly immobile . . . .").

190. Susskind seems at times to hope that firms that offer such products are moving to selling automated and commoditized products rather than

Regulation will also play a role in which innovative ideas can succeed.[191] In a world where class action attorneys stand ready to enforce unauthorized practice of law rules against would-be innovators, not every innovation that could succeed in an unregulated market will survive. The regulatory hand seems likely to be heavier where individuals and small consumers are involved. In the corporate setting, the ability to work with attorney oversight and to change jurisdictions has and will continue to make regulatory barriers less effective.

The matrix below sets forth the possible generic value configurations and target markets for legal services. On the market side, the matrix distinguishes between large corporate customers on the one hand, and small businesses and individuals on the other. On the value configuration side, the matrix tracks the three generic value configurations developed by Stabell and Fjeldstad and used by Christensen—solution shops, value chains, and networks. I list for illustrative purposes an example of at least one possible innovation in each cell of the matrix.

	Solution Shop	**Value Chains**	**Network**
Individual or Small Business Client	Automated Document Assembly Paraprofessionals	Legal Document Assembly (e.g., LegalZoom.com)	Peer Support Groups
Corporate Client	Alternative Billing Legal Consultants	Legal Process Outsourcing	GC Peer Support networks – ACCA, LegalOnRamp

A. *Solution Shop – Small Client*

Lawyers have claimed the solution shop value configuration as their own. Private and public attorneys general have been very solicitous about protecting individual consumers from solution shop models that do not conform to the prac-

customized services. *See* SUSSKIND, *supra* note 89, at 29. But, Kobayashi and Ribstein note that the automated service sometimes serves as a marketing tool to sell traditional legal services. *See* Bruce H. Kobayashi and Larry E. Ribstein, *Law's Information Revolution*, 53 ARIZ. L. REV. 1169, 1196 (2011) ("Bundling" automated services in order to sell traditional legal services). For an example of this kind of marketing, see WILSON SONSINI GOODRICH & ROSATI, http://www.wsgr.com/WSGR/Display.aspx?SectionName=practice/termsheet.htm (last visited Sept. 8, 2012).

191. *Legal Barriers*, *supra* note 1, at 1729.

tice of law requirements. Innovators offer services in this cell of the matrix at their peril. At the same time, innovations can impact how lawyers price and deliver their services.

1. *Automated Document Assembly Back Ends*

Automated document assembly can be a sustaining innovation if it is used to make the delivery of services by lawyers better and more efficient. In the alternative, taken to its potential it can be a disruptive technology.[192] For the general small firm lawyers that inhabit this cell, automated document assembly can help accelerate their delivery of services, and can even help ensure that the documents they provide are correctly drawn and compliant with the most recent changes in the law.

Small firm generalist lawyers face a nearly impossible task in staying current on legal requirements across a variety of fields. To serve clients properly, they must take into account complex new statutes that were not part of their law school curriculum and deliver advice and documents that comply with the most recent changes in the law. At the same time, they bring to the task diagnostic skills that are lacking in current automated document assembly services, helping to make sure that the clients are getting the right kind of form for their needs.

Automated document assembly services (and related decision tree software that helps ensure all the bases are touched in diagnosing issues) can be a sustaining technology in such a setting. It is not hard to see a world where small firm lawyers routinely subscribe to inexpensive document assembly services along the lines of what is now offered by LegalZoom. As was true with franchise law firm clients unaware that their supposed lawyer-drawn will was actually being created by a secretary using boilerplate forms, the client may not be aware that the scrivener has a silicon brain.[193] Due to efficiencies of scale, the firm providing the document assembly service can afford

192. *See* Darryl R. Mountain, *Disrupting Conventional Law Firm Business Models Using Document Assembly*, 15 INT'L J.L. & INFO. TECH. 170 (2007) (arguing that document assembly will be a disruptive innovation).

193. See VAN HOY, *supra* note 141, at 74. *See, e.g.*, Jerry Van Hoy, *Selling and Processing Law: Legal Work at Franchise Law Firms*, 29 L. & SOC'Y REV. 703, 727 (1995) (describing a staff attorney misleading clients, so as to conceal the automated production process of their simple will).

to hire specialists to stay current on developments in the law, modifying the form documents as needed and spreading the cost across many users.

Some firms have gone beyond virtual secretaries to online law offices providing what are, in fact, computer-assembled documents. Firms such as DirectLaw and products such as the VirtualLawOffice offering of TotalAttorneys provide lawyers with sophisticated document assembly services they can offer online. Attorneys can then review the product created by the software after input and subsequently deal with the client. There are numerous ethical rules implicated by such systems, all beyond the scope of this article and most quite solvable.[194] However, the geographical restrictions on the practice of law[195] create a mismatch between the borderless marketing potential of the Internet and the practitioner's authorized zone of practice. Only time will tell if this burdens the model too much for economic efficiency to be achieved.

If such practice-enhancing software takes hold and becomes sufficiently sophisticated, it could even become a disruptive innovation with regard to large and medium sized firms currently occupying a higher rung than small firm lawyers. To the extent the software can help guarantee that appropriate documents are produced, smaller firm or in-house lawyers can offer good enough services to companies that currently are paying more than they would like to retain specialists. The larger firms could be forced to retreat up market to areas the software does not serve.

2. *Paraprofessionals*

As a response to a lack of access to lawyers that has left some communities woefully underserved, some scholars have proposed allowing paraprofessionals to offer some legal services in defined areas.[196] A question arises: will these

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194. *See generally* Mountain, *supra* note 192 (describing the disruptive effects of automated document assembly systems).

195. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2012).

196. *See, e.g.*, Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 229-30 (1990); COMM'N ON NONLAWYER PRACTICE, A.B.A., NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS (1995); *Report of the Working Group on the Use of Nonlawyers*, 67 FORDHAM L. REV. 1813, 1816 (1999); Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2241 (1999); Denckla, *supra* note 150, at 2599. *See*

paraprofessionals possess sufficient intensive technology to deliver reliable and valuable services to clients? While unauthorized practice of law provisions as applied are neither necessary nor sufficient to protect the public,[197] it does not necessarily follow that protectionism is the only justification for unauthorized practice of law enforcement. The solution shop model depends on an information asymmetry between the vendor and the consumer, and on the vendor having access to an intensive technology not readily available to the consumer. This is not an artifact of regulation, but related to developing a sustainable value proposition. The laws licensing lawyers have a rational if imperfect relationship to assuring that those offering solution shop services in the legal services market have the information advantages and command of the intensive technology that the model assumes.

The challenge, as yet unsolved, for paraprofessionals in the legal field is defining and perhaps expanding the zone in which they do possess an information advantage that would sustain a value proposition. The organized bar has opposed efforts to train paraprofessionals who could solve simple problems.[198] Some states allow nonprofessionals[199] or paraprofessionals[200] to provide help in the clerical aspects of filling out forms, but this provides a very constrained ambit. When such vendors go beyond clerical aid, perhaps in response to consumer desire, to advise on which form to use or which answers might work best, a real risk arises that they do not possess the necessary asymmetric knowledge to be helpful.[201] More to the point, regulators and private attorneys have

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generally Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 764-65 (2001) (recounting work of ABA Commission on Nonlawyer Practice and noting the ABA's subsequent disregard of the committee's recommendations).

197. *See generally,* Rhode, *Professional Monopoly*, *supra* note 2 (offering a critical view of the ABA's current monopoly over the practice of law).

198. *See* Rhode, *Access to Justice*, *supra* note *170,* at 79-91.

199. Dressel v. Ameribank, 664 N.W.2d 151, 157 (Mich. 2003) ("In general, the completion of standard legal forms that are available to the public does not constitute the practice of law.").

200. *See, e.g.*, CAL. BUS. & PROF. CODE § 6400 (West 2003).

201. Some of the enforcement actions against We The People franchises suggest that those asserting the chain could harm consumers could at least point to anecdotal evidence. *See* Thomas v. State, 226 S.W.3d 697 (Tex. App. 2007).

been quick to enforce unauthorized practice of law provisions in such settings.

One solution would be licensing and training paraprofessionals competent to handle specific tasks, such as transferring title or assisting in uncontested divorce proceedings.[202] Providing a sufficient asymmetric skill base in well-defined areas can be done with far less expense than providing a full legal education. Some states have taken limited steps toward this kind of licensing.[203] Such paraprofessionals could provide solution shop models in areas where they have expertise, much as nurse practitioners or midwives provide services in the medical arena. Their ability to deliver valuable services could be enhanced by technology that provides appropriate documents or helps to channel interactions. To the extent enforcement against those providing services to individuals remains a threat, however, this is only likely to happen in the wake of clearly defined regulatory change.

B. *Solution Shop – Corporate Client*

Large law firms offer solution shop services. The rise of the general counsel's office has pressured them to change the kinds of services they provide, moving increasingly to specialization so as to offer services of value to clients who are themselves lawyers. Disruptive innovation theory suggests they will not easily switch from the solution shop value configuration to another configuration. Stuck in that configuration, they have been and will increasingly be impacted by the entry of new vendors of legal services.

These new vendors put pressure on the big firms. Disintermediation and competition from value chain vendors have stripped away sources of revenue without alleviating the pressure to maintain high profits per partner so that the firm does not disintegrate. To remain strong, these firms must continue to develop expertise in areas not yet appropriate for commoditization and where in-house departments do not have the depth of experience to develop comparable exper-

202. *See* Rhode, *Professional Monopoly*, *supra* note 2, at 98.

203. For example, in some states the legal aspects of real estate closings can be handled by non-lawyers licensed to perform just that task.

tise.[204] Value configuration analysis suggests the path forward for large law firms involves what amounts to a specialization arms race, with large firms seeking to develop and market asymmetric expertise in specialized areas of law, and necessarily moving on to new areas of specialization as older areas become commoditized. Cutting-edge practice groups will be mobile and desirable, while groups with devalued specialties will become disposable. Managing careers and firms in such a setting will pose substantial challenges.

Large firms are not the only players, however, in providing solution shop services to corporate clients. Recent years have seen franchise level lawyers depart large firms to create new firms with alternative billing and organizational models. Non-lawyers have also begun openly offering legally rich solution shop services while disclaiming professional status or obligations.

1. *Alternative Billing Structures*

There are two ways to look at alternative and flat fee pricing: flat and alternative fees simply shift the risk for runaway engagements to the law firm, or they require law firms to redesign their business model and processes for delivering services. If it is the former, the impact on innovation will be small. Law firms that engage in alternative pricing must become acutely skilled at forecasting costs, and must develop contractual structures that allow some room for adjusting for the unexpectable. Aside from how they price, the basic solution shop model for delivering value will remain in place.

With the second option more interesting questions arise. To prosper, alternative billing shops must deliver compensation to mobile partners that matches or exceeds that of traditional firms. Such firms must develop resources, processes and values consistent with the new billing structure.

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204. It would be premature to conclude that some large law firms cannot meet this challenge. Law firm specialty groups lead naturally to communities of practice that allow them to develop levels of expertise hard to duplicate in other settings. *See generally* ETIENNE WENGER, RICHARD MCDERMOTT & WILLIAM M. SNYDER, CULTIVATING COMMUNITIES OF PRACTICE (2002). While "generic" big law firms will face problems, those with sufficient intensive technologies to meet the solution shop value configuration should still find clients in a legally complex world. In a world of hyper-specialization, however, the skills needed to avoid commoditization must constantly change.

Evidence exists that some of these new structure firms are doing just that. Bartlit Beck Herman Palenchar & Scott LLP, for example, boasts of its "diamond" structure in contrast to the leveraged "pyramid" of the traditional hourly fee firm.[205] Bartlit Beck hires fewer associates, suffers lower attrition, and staffs cases with more experienced lawyers. In order to do this, Bartlit Beck sends some commoditizable work out to other, lower cost law firms or to legal process outsourcers. Bartlit Beck's resources, processes and values make it easier for them to incorporate inputs from different value configurations, even as they deliver a solution shop service.[206]

Traditionally structured law firms will face challenges in offering flat rates. Their business model has been built on leveraging the "inventory" of non-partner hours. Shifting to other profit models will require a reconfiguring of resources, processes and values that disruptive innovation theory suggests rarely occur within dominant legacy providers.

The disruptive potential of these firms remains to be seen. Other firms have joined Bartlit Beck in pursuing alternative billing and firm structure models,[207] but most firms continue to default to hourly billing. At present, alternative firms appear to price in the shadow of hourly fees, committing to fees that are valued in comparison to traditional hourly packages. Wider adoption of this model may depend not just on law firms reinventing their resources, process and value configurations, but on their clients rebuilding their RPV structures to work with these new vendors. For this restructuring to happen,

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205. *See Nicholas Varchaver, Diamonds Are This Firm's Best Friend, The American Lawyer (Dec. 1995), available at* http://www.bartlit-beck.com/about-news-122.html; *Outcome-Driven Fees in High Stakes Litigation . . . Bartlit Beck's Alternative Approach, Association of Corporate Counsel (Sept. 2009), available at http://www.acc.com/legalresources/resource.cfm?show=743837.*

206. *See* Varchaver, *supra* note 205. The rapid collapse of AmLaw 100 firm Howrey & Simon led to a discussion of whether the firm's embrace of alternative billing options led to its demise. In the case of Howrey & Simon, the use of alternative billing methods was not accompanied by a change in firm structure or revamping of the firm's resources, values and processes. *See* Jay Shepherd, *Alternative Fees Kill Major Law Firm. Or Not*, CLIENT REVOLUTION (Mar. 10, 2011), http://www.clientrevolution.com/2011/03/alternative-fees-kill-major-law-firm-or-not.html.

207. Examples include,Valorem Law Group (former big firm lawyers in Chicago), MoloLamke (former big firm partners in New York), and Boies Schiller (former big firm lawyers in New York).

new kinds of in-house law departments will have to arise, with resources not limited by the paradigm of an in-house law firm, with processes that reach beyond managing hourly work, and with values that shift away from implicit alignments with prestigious law firms to a new sense of what matters.

2. *Legal Consultants*

While academics and the organized bar debated whether lawyers could practice law as lawyers in multidisciplinary practices,[208] an interesting thing happened—lawyers and non-lawyers began dispensing legal services from multidisciplinary firms in the guise of consulting services.[209] Disclaiming any intent to practice law, legal consultants nonetheless operate in a legally infused space. Not all legal consultants offer services equivalent to those offered by practicing lawyers—on the litigation side, for example, they may emphasize preparing demonstrative evidence, preparing expert testimony, or managing electronic discovery. Over time, however, the services offered can broaden. At times, based on their promotional materials and case studies, some services seem indistinguishable from practicing law.[210]

Operating as consultants, rather than as lawyers, frees lawyers from many[211] of the rules that govern legal practice.[212]

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208. *See, e.g.*, 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); Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000); Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947 (2002); Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193 (2010).

209. *See generally* Rostain, *supra* note 147.

210. *See, e.g.*, http://208.71.239.82/services/ifai/litigation_consulting/ (last accessed May 24, 2011).

211. But this does not free them from all rules, so long as they wish to remain licensed lawyers. Rule 8.4 applies, for example, to conduct not related to legal representations, and could apply if a lawyer operating as a consultant engaged in deception. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (forbidding "conduct involving dishonesty, fraud, deceit, or misrepresentation").

212. *See* John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFFALO L. REV. 959, 1042 (2009) ("To the extent that 'law consultants,' not subject to professional rules or benefiting from the lawyer-client privilege but able to offer 'one stop shopping,' compete successfully with traditional law firms, legal

Some partner with experts from other disciplines, delivering solution shop services that go beyond law. Many of these consultants incorporate software platforms or routinized processes in their services, but deliver in the end what often seem to be solution shop services.[213]

The most interesting aspect of these legally infused consultants is that they seem to have drawn little regulatory attention. In part, this could be because their corporate clients are sophisticated players who neither need nor want to be "protected" in a way that interferes with their choice.[214] In other areas, however, merely disclaiming an intent to "practice law," has not sufficed to end inquiries, and the organized bar proved resolute in opposing multidisciplinary practice innovations that would have created organizations similar to these consulting shops. Whether these consultants continue to expand their footprint will tell much about the risk of unauthorized practice of law enforcement against innovators in the corporate half of the market.

C. *Value Chain – Individual Client*

Documents assembled by computer without human interaction fit neatly into the disruptive innovation model. As products, at present levels of technology they are inferior to similar documents created or even reviewed by a competent lawyer. The most substantial defect has to do with diagnostics—consumers have difficulty knowing if the product they have purchased is indeed the right product for them.[215] Automated document assembly currently has limited ability to address the diagnostic function. Consumers can purchase a document that, on its face, has been properly prepared, without really

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ethics will tend to become optional. Clients will have a choice whether it is worth its costs, and lawyers will find themselves switching in and out of professional rules as they change jobs.").

213. For example, Kroll Ontrack provides a technological platform but also provides consultative advice. *See* KROLL ONTRACK, http://www.krollontrack.co.uk/litigation-readiness (last visited Sept. 8, 2012) (discussing litigation and consulting services).

214. Rostain, *supra* note 147, at 1425 (noting that while corporate clients are viewed as being to take care of themselves, the use of non-lawyers can have implications for the protection of third parties).

215. Other defects would include the lack of attorney client privilege and an "insurance" element comparable to the right to sue for malpractice.

knowing if it is the right kind of document for their personalized needs. At the same time, for most consumers with limited assets and simple goals a computer-assembled will, for example, is not just a superior product to no will at all but probably all the will that is needed. The combination of being less expensive and initially inferior positions automated document assembly as a classic disruptive product targeting unserved consumers.

Over time, as computers grow faster, decision tree software grows more refined, and experience helps show where recurrent problems arise, the product can become better and the ability to target the product to individual needs can improve. As the products get better, they can move up the value chain and challenge for more and more of the legal marketplace.

Computer-assembled documents, at least according to the claims of the vendors, do not involve the practice of law.[216] This gives the vendors certain marketplace advantages over licensed lawyers. They do not need to track conflicts, for example, nor need they be cognizant of state borders when providing products.

Many vendors are now offering automated document assembly products directly to consumers. The best known, LegalZoom, claims a customer base in the millions.[217] Based on strong customer response, LegalZoom has been able to attract the support of first tier venture capital firms and is poised for a public offering.

The organized bar has expressed some concern that LegalZoom's model—which currently involves a "clerical" review of the finished documents by a human—constitutes the unauthorized practice of law.[218] State bars have not, however,

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216. Courts and regulators do not always agree with this assessment, even when there is no human intervention. *See, e.g.*, *In re* Reynoso, 477 F.3d 1117 (9th Cir. 2007) (holding that computer software that prepared bankruptcy petitions violated unauthorized practice of law and bankruptcy petition preparer rules where, among other misstatements, website misrepresented to consumers that use of the software would allow them to hide bankruptcy from credit agencies).

217. *Why LegalZoom?*, LEGALZOOM, http://www.legalzoom.com/about-us/why-legalzoom (last visited Sept. 4, 2012).

218. Pennsylvania issued a formal opinion on the matter without hearing or soliciting input from LegalZoom. *See* Unauthorized Practice of Law Com-

filed suits that have led to LegalZoom being prohibited from doing business in their states.

A more aggressive effort has come from the private attorneys general who have taken upon themselves the burden of enforcing the unauthorized practice of law regulations. Actions have been filed in several states, and a class was certified and set for trial in Missouri. Prior to the settlement of the case, potential damages and litigation expenses looked to be substantial in Missouri, and represented potential costs that could drive a less richly funded innovator from the market.[219]

As a technology, automated document assembly looks sure to alter the legal services marketplace. The live question is whether lawyers must mediate between the machine and the client. At present, automated document assembly looks like an example of where unauthorized practice of law regulations could stifle innovation that would benefit consumers. LegalZoom and its competitors do not need to be driven from the market for consumers to suffer; if such companies choose to "dumb down" potential technological improvements that would improve customization and diagnostics in order to avoid legal challenges, consumers will have less choice. Time will tell whether regulatory barriers will block such companies

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mittee, *Formal Opinion 2010-01*, PA. BAR ASS'N, (Mar. 10, 2010), http://www.pabar.org/public/committees/unautpra/Opinions/2010-01LglDocument Preparation.pdf (last accessed Oct. 16, 2012) (asserting that LegalZoom engaged in the unauthorized practice of law in Pennsylvania). North Carolina has also issued a letter of caution stating that creating papers for incorporation of businesses constituted the practice of law. Neither state, to date, has sought an injunction or otherwise taken action to block LegalZoom from operations in the state. For LegalZoom's responses to these actions, see Letter from Charles Rampenthal, Vice President and General Counsel, LegalZoom, to Gretchen Mundorff, President, Pa. Bar Ass'n (Sept. 29, 2010) (available at http://www.legalzoom.com/perspectives/legalzoom-responds-pennsylvania-upl) (discussing response) and *LegalZoom Serves North Carolina: High Quality, Affordable Legal Documents Remain an Option For North Carolina Consumers*, LEGALZOOM.COM, http://www.legalzoom.com/perspectives/legalzoom-serves-north-carolina-high (last visited Sept. 4, 2012) (same).

219. The putative class contained "at least 14,000" members, and damages could be trebled under the applicable Missouri law. Janson v. LegalZoom.com, Inc., 271 F.R.D. 506, 509, 510 (W.D.Mo. 2010). Conservatively assuming an average purchase of $100, that would put potential damages somewhere over $4 million. No information is available on litigation costs, but certified class actions are typically defended vigorously.

from marching up the value chain in a way that could disrupt the incumbent firms offering higher priced services to their potential customers.

D. *Value Chain – Corporate Client*

On the corporate side, LPO represents a value chain approach to legal services. LPO firms take on routinized and low value work, and handle it with attention to auditable processes. As with most value chain models, close attention is paid to driving down the cost element of the service.[220] Because LPO services can and will be delivered under the supervision of a licensed attorney to the corporate market, they have little to fear from unauthorized practice of law regulation.

LPO has arrived and promises to be disruptive at several levels for the currently dominant large law firms.[221] By stripping off work that historically was done by associates, they take away leveraged associate revenues that have been an important part of large firm profits.[222] To the extent they tempt major firms into competing with firm-branded low cost offerings provided by less elite lawyers, they can help to undermine the brand mystique that is essential to marketing high end solution shop services. Once entrenched in relationships with general counsels, LPOs can begin the march up the legal services

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220. Reducing costs has been a driver of client and firm use of outsourcers. Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2177-78 (2010). Predictably, this in turn puts pressure on outsourcers to keep costs low.

221. *See Innovators at the Barricades*, ADAM SMITH ESQ. BLOG (July 19, 2010), http://www.adamsmithesq.com/2010/07/innovators_at_the_barricades/ http://www.google.com.hk/url?sa=t&rct=j&q=adam+smith+innovators+at+the+barricades; *Will Legal Outsourcing Drive Large Law Firm Innovation?*, PRISM LEGAL BLOG (July 29, 2010), http://www.prismlegal.com/wordpress/index.php?p=1076&c=1http://www.prismlegal.com/wordpress/b2trackback.php/10. For more on LPOs, see Laurel S. Terry, *The Legal World Is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Law Firms,* 28 NW. J. INT'L L. & BUS. 527 (2008) [hereinafter Terry, *The Legal World]*.

222. The work includes not just document review, but contract drafting and modification. *Case Study*, Integreon (2012), http://www.integreon.com/phpapp/wordpress/wp-content/uploads/2011/05/Contract-Drafting-Global-Technology-Company-Integreon.pdf.

Contract Drafting and Modifications for a Global Tech Company.

value chain that ultimately results in the demise of incumbents.

LPO firms originally based their value proposition on labor arbitrage—equally talented and diligent lawyers are available at far lower prices overseas or in smaller markets.[223] That has already begun to change. Able to access the capital markets and with a secure and growing customer base, LPO firms will develop software and proprietary processes that will differentiate them from each other and from law firms. LPO firms will evolve to offer not just sufficiently equivalent services at lower prices, but new types of services and higher quality services.

Disruptive innovation theory teaches us to expect this shift, and to expect the current dominant players in the space—the large multinational firms—to retreat up the value chain as the LPO firms take markets away from below. At present, the generic work of massive document productions and reviews on commoditized cases are being ceded to the LPOs. To a lesser degree, LPOs have moved into legal research and drafting legal documents. In the future, still putatively working under the supervision of attorneys, the LPO firms will move up the value chain, offering higher value legal research and drafting, higher value legal document creation, advice on litigation and corporate transactions, and services designed to prevent the occurrence of future legal problems.

The LPO firms are better positioned than law firms to invest in technology and more robust business processes. Law firms divert earnings from partners at their peril, since such diverting income from current distributions can easily lead to the departure of the firm's most marketable talent. Software development also draws on expertise, both in technology and in business processes, that law firms typically do not hold. At present, LPO software presents digitized versions of documents for coding by category. Already, this software is evolving with greater embedded intelligence, improving accuracy and requiring less human intervention. Over time, the pattern recognition abilities of this software will improve, and not just in

223. Terry, *The Legal World*, *supra* note 221, at 537 (noting that lawyers from India are generally paid much less than $10,000 annually, versus $30 an hour for U.S. contract lawyers and $160,000 for first year big firm associates).

ways that help manage the individual litigation or corporate matter. The software will help identify documents, individuals and even ad hoc collections of individuals that have been associated with problems.[224]

Imagine, for example, an LPO firm that reviews a massive set of documents in connection with a corporate acquisition, either for due diligence or antitrust review. Software can analyze the changing networks of contacts and the timing of communications in ways that can help reveal potential legal problems. Regression algorithms can identify patterns not readily visible to human document reviewers—such as identifying extended networks of individuals or comparing how frequently certain terms are used.[225]

Look also for software development on the legal research and document creation side. As LPOs handle an increasing volume of legal research and drafting tasks, they can invest in proprietary document assembly software as well as data mining. A properly funded LPO could track, for example, not just the reported decisions, but filings in cases that later settle. Again, regression analysis will enable patterns to emerge that will escape even attentive lawyers.[226]

LPO firms will also develop proprietary business processes. Law schools do not teach business process management, and law firms can only teach the version of law process management that they use, a version inevitably tied to their solution shop business model. LPOs can invest in investigating and implementing business processes better designed to deliver lower costs and higher quality. Performing the same dis-

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224. The release into the public domain of a massive dataset of emails from Enron has spawned much research into analyzing such files with artificial intelligence. *See, e.g.*, Bob Brown, *Researcher: Email Wording a Dead Giveaway of Who's the Boss*, PCWORLD.COM (Feb. 14, 2012, 6:00 PM), http://www.pcworld.com/businesscenter/article/249982/researcher_email_wording_a_dead_giveaway_of_whos_the_boss.html.

225. For an introduction to regression analysis, see Alan O. Sykes, An Introduction to Regression Analysis, 1992 Coase Lecture (Dec.1, 1992), *available at* http://www.law.uchicago.edu/node/1309. For an example of regression analysis used against a large email dataset to determine factors such as relative hierarchy, see Eric Gilbert, *Phrases That Signal Workplace Hierarchy* (2012), http://comp.social.gatech.edu/papers/cscw12.hierarchy.gilbert.pdf.

226. *See* George S. Geis, *Automating Contract Law*, 83 N.Y.U. L. REV. 450 (2008).

aggregated tasks over and over, they can track how well processes have performed, and in an iterative and planned manner develop better and better processes.

One might ask why, with the rise of LPO firms being so foreseeable, major law firms do not simply pursue the same strategies. Disruptive innovation theory provides the answer. Even aside from restraints imposed by regulation, law firms are captives of their resources, processes and values. The current big law firm model resists migration from a solution shop value configuration to a value adding processes model. Successful companies, even with plenty of capital, typically do not divert that capital to pursuing less profitable markets than the ones they currently dominate.[227]

The possibility remains for a law firm to establish a captive or affiliate LPO, much as IBM spun out its personal computer project to a separate division at a separate location. Some law firms have set up onshore or offshore LPO subsidiaries; most have not.[228] With the leading LPO firms already having achieved scale and having obtained substantial investment capital,[229] the date may have passed when law firms not already up the curve could make a serious run at being a player in the LPO market. Once expertise has been developed, new entrants can have great difficulty displacing the established contenders, and in the LPO value chain space the established players are the LPO firms. That is especially true when the new entrants have less access to investment capital, higher cost structures, and lack essential skills.

At some point, the LPO firms may find that to finish their move up the value chain and fully leverage their assets they

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227. CHRISTENSEN, *supra* note 12, at 89.

228. For example, the Minneapolis based patent firm of Schwegman, Lundberg, Woessner & Kluth established a captive LPO subsidiary. *See* Julie Foster, *Law Firm Cuts Rates By Outsourcing To India*, ST. PAUL PIONEER PRESS, Mar. 3, 2004, *available at* http://www.bearcave.com/misl/misl_other/legal_outsourcing.html.

229. *See, e.g.*, Press Release, Integreon, Actis Invests US$50 Million in Integreon, (Feb. 16, 2010) *available at* http://www.integreon.com/blog/2010/02/actis-invests-us50-million-in-integreon.html; Gavriel Hollander, *Lyceum Capital Injects £25m into LPO Start-up*, THELAWYER.COM (Nov. 19, 2009), http://www.thelawyer.com/lyceum-capital-injects-%C2%A325m-into-lpo-start-up/1002669.article; Daniel Schäfer, *ICG Starts Disposal Process for CPA Global*, FINANCIAL TIMES (Dec. 5, 2011, 9:08 PM), http://www.ft.com/intl/cms/s/0/f9ee6a68-1f65-11e1-9916-00144feabdc0.html#axzz1oRGJUKyn.

will need to hire lawyers of the type now found principally at the Magic Circle and leading U.S. firms to provide a solution shop option. That will be no problem. If there is one thing the current market shows us, talented lawyers at big firms are willing to switch employers on short notice if the pay is right.[230]

E. *Network – Individual Client*

Network business models draw their value from the connections made in the network. In the medical arena, patients with chronic diseases join together at social networking websites such as PatientsLikeMe.com or CarePlace.com. From their peers, they learn techniques and responses that help them deal with their disease. They can seek help either through the named disease or the symptoms they suffer from.

In theory, such websites could also serve a useful purpose in the legal arena. However, a host of legal issues beyond the scope of this article, such as confidentiality and waiver, could arise. Furthermore, to the extent lay people engage in too much mutual help, a problem relevant to this article could arise—the participants, and the site, could be deemed to be engaged in the unauthorized practice of law. This, again, is an example of a situation on the consumer side where unauthorized practice of law provisions could block a potentially useful innovation.

F. *Network – Corporate Client*

In the corporate sector, peer-to-peer networking sites could offer similar benefits. Some such sites have arisen—back in the 1990s, CounselConnect brought together in-house lawyers in private forums. Today, LegalOnRamp.com seeks to build a community centered on corporate counsel, while the American Corporate Counsel Association offers its private members web resources such as law firm ratings.

The issue on the corporate side will not be unauthorized practice of law, and one need not fear that sophisticated corporate counsel will be unmindful of issues such as confidentiality and privilege. Here, the issue goes right to the nature of

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230. *See* Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives On The Future Of The Law Firm In The New Economy*, 2011 COLUM. BUS. L. REV. 1, 15 (2011).

the business model. Networks are only as valuable as their membership. The site must exclude undesirable members while persuading desirable members to participate actively. Given that corporate counsel time is a scarce and valuable resource, getting the networks to sufficient density to be useful has proved a vexing problem. In part, growing these networks to critical mass may depend on sufficient in-house departments developing new resource, process and value configurations to see such networks as meeting core needs.

VI.
Conclusion

Those who would reform and bring innovation to legal services have looked in the past at the regulatory structure governing lawyers, finding there the answer to why radical innovations have not transformed the legal market. As this article shows, however, regulation alone fails to provide an explanation. Regulations fail to block innovation on the corporate side of the market; rather, where innovation lags there, it may be due to clients that cling to resource, process and value patterns that lock them into relationships with traditional law firms. On the individual side of the market, regulation does provide an effective barrier, and it remains to be seen whether technology can deliver all the benefits it might to individual consumers. Market structure, value configurations and business models constrain possibilities even in fully deregulated markets.

Anyone seeking to reform legal markets must take the process of innovative disruption into account or the regulatory changes will not produce the expected results.