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Benjamin H. Barton

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The Future of American Legal Tech

Regulation, Culture, Markets

Benjamin H. Barton

America's legal technology boom presents a puzzle. On the one hand, America's market for legal services is among the most tightly regulated in the world, suggesting infertile ground for a legal technology revolution. America has the world's most robustly protected lawyer monopoly. Its version of the prohibition against the unauthorized practice of law (UPL) is among the broadest and most aggressive in the world because it theoretically bans all non-lawyers from giving any "legal advice" in addition to the more typical bar against filing papers or appearing in court. Likewise, America's barriers to entering the legal profession are exceedingly high: generally speaking, an undergraduate degree, another three years of law school, a challenging bar exam, an intrusive character and fitness process, and so forth. Between these two barriers, the American lawyer's monopoly has historically been capacious and jealously guarded. Given this regulatory environment, one would expect America to have a small and beleaguered legal technology sector. Surely wealthy and politically connected bar associations would nip any potential competitors in the bud.

Actually, not so much. The other side of this puzzle is America's advanced and free-wheeling market for legal tech, which is probably the most robust in the world, as the Sako and Armour chapter herein establishes. The present chapter seeks to explain this seeming puzzle, and then uses that explanation to make some predictions about where legal technology will continue to flourish in America. The explanation is that both America's seemingly monolithic market for legal services and its uniform regulation of lawyers are, in fact, quite segmented. In some parts of the market, lawyer regulation is almost non-existent (or at least very rarely enforced) – typically at the high end in so-called BigLaw and at the low end in non-profits and legal aid offices serving the indigent. In so-called PeopleLaw, where lawyers serve middle-class Americans and small businesses, regulation plays a significant role and has hampered technological advancement, especially in areas like providing legal advice. This chapter demonstrates how these different markets operate, how they are

regulated, and how that explains the current explosive growth in legal tech in some areas, but not others.

This insight also raises a note of caution as we celebrate current efforts at “re-regulating” the market for legal services in states like Utah, Arizona, and others. These jurisdictions have rightfully (so far) been praised for allowing non-lawyer and technological innovations into a very constricted market. And yet any lawyer-led regulatory effort, no matter how well-meaning, could easily slide into lawyer self-protection, as many (most?) prior regulatory efforts have. The status quo favors innovation in at least the top and the bottom of the market, but we need to push regulators to loosen barriers in the PeopleLaw space, rather than surreptitiously raising barriers where innovation is currently blossoming.

1.1 AN EXTRA-BRIEF OVERVIEW OF AMERICA’S UNUSUAL LAWYER REGULATION

The first oddity is that America’s legal profession is regulated primarily by its judicial branch, rather than its legislative or executive branches. In America, state supreme courts control lawyer regulation in the first instance. This is unusual domestically – every other American occupation, from cosmetologists to doctors, is governed by legislatures – and internationally.¹

Unsurprisingly, given that the judiciary is staffed by former elite lawyers, the resulting regulation has turned out to be pretty lawyer-friendly.² The upshot is a uniquely well-defined and defended lawyer monopoly. Requiring seven years of higher education followed by notoriously difficult licensing exams makes it very expensive in time and money to become an American lawyer.³

Regulators also fight to keep non-lawyers *out* of the market. That’s where the uniquely American version of UPL comes in. UPL is prohibited in all fifty states.⁴ The definition of the “practice of law” and the levels of enforcement differ from state to state, but at a minimum in no state may a non-lawyer appear in court on behalf of another party or give “legal advice.”⁵ For decades the combination of UPL

¹ Benjamin H. Barton & Deborah Rhode, *Legal Services Regulation in the United States: A Tale of Two Models*, in INTERNATIONAL PERSPECTIVES ON THE REGULATION OF LAWYERS AND LEGAL SERVICES (Andy Boon ed., 2017).

² I wrote a whole book about this one sentence. BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN AMERICAN COURTS* (2011).

³ Gillian Hadfield, *Legal Markets*, 60 J. ECON. LIT. (forthcoming 2022) (manuscript at 18); BARTON, *THE LAWYER-JUDGE BIAS*, at 146–47.

⁴ Tanina Rostain, *The Emergence of “Law Consultants,”* 75 FORDHAM L. REV. 1397, 1407 & n.53 (2006).

⁵ Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

and high barriers to entry left the American legal profession uniquely powerful and protected, and through at least the 1990s likely increased lawyer earnings.⁶

Given a monolithic regulatory structure, run largely by friendly actors, one would expect American lawyer regulation to favor lawyers. That has indeed been the case historically. If past were prologue, then we would expect that non-lawyer-driven legal tech would either be barred altogether or severely stunted in this country. After all, consider the lengthy battle by some lawyer regulators to hang on to real estate closings as “legal work” protected by UPL.⁷

1.1.1 *Legal Tech Thrives Regardless: Why?*

Yet, in this regard history has proven a poor guide. Legal tech has actually flowered in the United States. There are three primary reasons. The first is that the American lawyer’s monopoly has been taking on water since the most anticompetitive regulation came under attack in the 1970s. Initially the Supreme Court held bar association mandatory fee schedules and some advertising bans were unlawful.⁸ In the 1990s the Justice Department investigated whether the ABA’s role in regulating law schools violated antitrust law. The investigation resulted in a pretty far-reaching settlement and much looser regulation of law schools.⁹

Most recently, in 2015, the Supreme Court held that the enforcement of the dental equivalent of UPL against non-dentist teeth whiteners violated antitrust law in *North Carolina Board of Dental Examiners v. Federal Trade Commission*.¹⁰ As of yet no court has extended this case to lawyers, but even the chance that one might has chilled the ardor of bar association UPL enforcement.¹¹

Some states and localities have launched pretty aggressive reforms. Famously, Utah has created a new “regulatory sandbox” that allows for non-lawyers and new technologies to apply for approval to offer some legal services.¹² Oregon is considering adding two new ways to join the profession in addition to three years of law school and a bar examination: an “experience-based learning pathway” and a

⁶ CLIFFORD WINSTON ET AL., *FIRST THING WE DO, LET’S DEREGULATE ALL THE LAWYERS* 20–27 (2011).

⁷ Margaret Onys Rentz, *Laying Down the Law: Bringing Down the Legal Cartel in Real Estate Settlement Services and Beyond*, 40 GA. L. REV. 293 (2005).

⁸ Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975); Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

⁹ BENJAMIN H. BARTON, *FIXING LAW SCHOOLS* 133–36 (2019).

¹⁰ 574 U.S. 494 (2015).

¹¹ Deborah L. Rhode & Benjamin H. Barton, *Rethinking Self-Regulation: Antitrust Perspectives on Bar Governance Activity*, 20 CHAP. L. REV. 267 (2017).

¹² Lucy Ricca, *The Reregulation of Utah: Managing Risk with Better Protections*, GPSOLO, July–Aug. 2021, at 31.

“supervised practice pathway.”¹³ Arizona has allowed non-lawyer ownership of law firms under a new “alternative business structures,” or ABS, model, and it also created a class of “legal paraprofessionals” who are allowed to perform some activities previously limited to lawyers.¹⁴ There are working groups considering similar changes in California, Illinois, New York, Michigan, and other states.¹⁵

Taken together, the bar’s ability (and desire) to maintain tight control over its monopoly has lessened quite a bit over recent decades. This partially explains why the market in PeopleLaw is so competitive and why lawyer earnings in that market have shrunk since the 1970s.¹⁶

The second reason is America’s ever-deepening access-to-justice crisis. Characteristically, Deborah Rhode led the way in this area with her 2004(!) book *Access to Justice*, which explained that poor and middle-class Americans struggle to afford lawyers or to address serious legal problems.¹⁷ The most recent and comprehensive study is the 2020 World Justice Project (WJP) Rule of Law Index, which ranks the United States thirty-sixth in the world in terms of the fairness of its civil justice system, placed snugly between Malaysia and Jordan.¹⁸ By one estimate, four-fifths of the legal needs of poor Americans remain unmet.¹⁹

Gillian Hadfield has repeatedly demonstrated that the problem affects more than just the poor. Middle-class Americans also cannot afford legal help, despite living in a “law thick” society where legal help is often desperately needed.²⁰ As demonstrated below, lawyers have, so far, been relatively uninterested in meeting these acute needs, mostly because their business model requires bespoke work and hourly fees and most Americans can’t afford to pay for that sort of help. Nevertheless, nature abhors a vacuum, so legal tech has bloomed in this space, despite regulatory concerns.

A final point – and it holds the key to understanding the past, present, and future of legal tech – is that, while America’s regulation is monolithic, its market for legal services is anything but. So, regulations that nominally apply to every

¹³ Natalie Runyon, *Oregon Takes a Step Forward in Alternative Licensure of Attorneys*, REUTERS (July 23, 2021, 8:31 AM PDT), <https://www.reuters.com/legal/litigation/oregon-takes-step-forward-alternative-licensure-attorneys-2021-07-23/>.

¹⁴ Daniel J. Siegel, *Playing in the Regulatory Sandbox*, LAW PRAC. MAG., July 2021, at 44, 47–48.

¹⁵ Unlocking Legal Regulation Knowledge Center, IAALS, <https://iaals.du.edu/knowledge-center/state-action>.

¹⁶ BENJAMIN H. BARTON, GLASS HALF FULL 121–29 (2015).

¹⁷ DEBORAH RHODE, ACCESS TO JUSTICE (2004).

¹⁸ WORLD JUSTICE PROJECT, RULE OF LAW INDEX 28 (2020), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf.

¹⁹ LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW INCOME AMERICANS 1–13 (2009), http://www.lsc.gov/pdfs/dcoumenting_the_justice_gap_in_america_2009.pdf.

²⁰ Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129 (2010).

lawyer and provider of legal services operate quite differently depending on the market segment.

1.2 FOUR BROAD CATEGORIES OF AMERICAN CIVIL LAW LAWYERS

America's market for legal services is also unique. Start with a number count of lawyers. In 2021, America claimed 1,327,910 licensed lawyers.²¹ This was actually a slight *decline* from the number of American lawyers in 2019 and 2020, interrupting a 105-year streak where the profession grew every year. Nineteen-fifteen is the last time the profession shrank. America may have the most lawyers in the world, depending on how you count India's.²² America is second in lawyers-per-capita at one lawyer for every 249 Americans, behind only Israel.²³ By any measure, America has a lot of lawyers.

America's legal services market is the largest in the world, with total revenues of \$314 billion in 2018, accounting for a staggering 47 percent of global revenue in that sector by one estimate.²⁴ The United States runs a substantial trade surplus in law and is the world's largest exporter of legal services.²⁵ America's corporate law firms are the largest and most profitable in the world.²⁶

For our purposes we can divide America's lawyers into four super-broad categories: (1) corporate lawyers, including so-called BigLaw firms and in-house lawyers; (2) "main street lawyers" or "PeopleLaw," private-sector lawyers that represent small businesses and less wealthy individuals ranging from the working poor up to the upper-middle class; (3) government-supplied civil legal services for the poor (legal aid); and (4) plaintiff's side lawyers that make a living suing large corporations or wealthy individuals.

I am well aware that, like my aggressively brisk overview of lawyer regulation, these categories may cause some consternation and that exceptions abound. The point of this very rough taxonomy is to think about how regulation and legal tech work in these broad areas, not to perfectly describe the market.

²¹ AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY 3 (2021), https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf.

²² Barton & Rhode, *Legal Services*, at 27 (noting that in 2013 India appeared to have more lawyers, but that as many as 30 percent of India's lawyers may be unlicensed).

²³ *Id.*

²⁴ *Legal Services in the United States*, MARKETRESEARCH.COM, <https://www.marketresearch.com/MarketLine-v3883/Legal-Services-United-States-12187455/>.

²⁵ Letter from Thomas M. Susman, Dir. Governmental Affs. Off. of the Am. Bar Ass'n, to Chairman Devin Nunes and Ranking Member Charles Rangel, Trade Subcomm. of the House Comm. on Ways and Means (Mar. 27, 2013), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/2013mar27_usindiaterelations_1.pdf.

²⁶ Staci Zaretsky, *The Global 100: The Richest Law Firms in the World*, ABOVE THE LAW (Sept. 25, 2020), <https://abovethelaw.com/2020/09/the-global-100-the-richest-law-firms-in-the-world-2020/>.

1.2.1 *BigLaw/In-house Counsel*

BigLaw looms large in the public imagination and in the popular press, but it has never represented even a plurality of the profession. For example, in 2019 the *National Law Journal* estimated that 169,477 lawyers worked at America's 500 biggest law firms.²⁷ This works out to roughly 13 percent of the American lawyers that year. There are even fewer in-house counsel. In 2005 the American Bar Foundation estimated that 8 percent of licensed lawyers worked in "private industry," that is, as corporate or in-house counsel to large businesses.²⁸ The numbers of in-house counsel have reportedly grown since 2005, but still these lawyers represent a relatively small portion of the market. In terms of revenue, however, BigLaw does dominate. In 2019 *Statista* estimated that just the hundred largest law firms earned roughly a third of the total industry revenue for legal services in America.²⁹

It may seem strange to lump these two very different types of lawyers together. BigLaw lawyers are ever hustling to find as many wealthy clients as they can to pay their high rates. In-house counsel naturally work for just one organization and seek to cut costs on legal matters. BigLaw lawyers are encouraged to specialize and generally work within defined practice areas. Many in-house counsel are by nature and requirement generalists.

Yet, the similarities outpace the differences, and for regulatory purposes these groups of lawyers operate in similar ways. First, the bulk of in-house counsel, and especially for larger and wealthier companies, come from BigLaw originally.³⁰ Second, the clients are the same. BigLaw's revenue is driven by providing services to the largest and wealthiest businesses and individuals. Smaller or poorer clients cannot afford BigLaw. One sure sign that a company is big enough to afford BigLaw is hiring their own BigLaw lawyer as in-house counsel.

The last similarity is how lawyer regulation affects these lawyers. Historically these lawyers have been virtually unregulated. This may strike some readers as too strong, because if you have worked in BigLaw or a top corporate legal department, you

²⁷ ALM Staff, *The NLJ 500: Our 2019 Survey of the Nation's Largest Law Firms*, NAT'L L.J. (June 25, 2019), <https://www.law.com/nationallawjournal/2019/06/25/the-nlj-500-our-2019-survey-of-the-nations-largest-law-firms/>.

²⁸ AM. BAR ASS'N, ABA LAWYER DEMOGRAPHICS 1 (2016), <https://45e2ly1gtqp9jmqrme2fw751-wpengine.netdna-ssl.com/wp-content/uploads/sites/3/2016/11/Incubators-The-Next-Wave-in-the-Access-to-Justice-Movement.pdf>.

²⁹ *Industry Revenue of Legal Services in the U.S. from 2012 to 2024*, STATISTA, <https://www.statista.com/forecasts/311177/legal-services-revenue-in-the-us> (total revenue); *Total Revenue of the Leading Law Firms in the United States from 2015 to 2020*, STATISTA, <https://www.statista.com/statistics/878140/total-revenue-of-the-leading-law-firms-united-states/> (AmLaw 100 revenue).

³⁰ See David B. Wilkins, *Is the In-House Movement Going Global? A Preliminary Assessment of the Role of Internal Counsel in Emerging Economies*, 2012 WIS. L. REV. 251, 252–53.

know that they generally take the Rules of Professional Conduct and other ethical mandates very seriously.

Nevertheless, it is fair to consider these compliance efforts largely voluntary because bar regulators almost never investigate, let alone censure or punish, lawyers in BigLaw or in-house counsel.³¹ This surely reflects the fact that most in-house and BigLaw lawyers are excellent, ethical practitioners. It also reflects that few if any of the corporations that hire in-house counsel or BigLaw are going to complain to bar regulators about their lawyers, especially when any alleged ethical violation or UPL is to the benefit of all parties concerned. When discussing legal tech and UPL, it is always worth asking who is harmed and who might complain about it. Here UPL in particular is a victimless crime. Other lawyers don't complain. The clients don't complain. In fact, they often request it.

For decades BigLaw has operated as if UPL is a flexible standard and have probably never fully followed the requirement that only lawyers do "legal work." Consider the great Tom Morgan's thoughts:

Law firms have long used paralegal and other support personnel nominally working under the lawyer supervision that ethical standards require. In addition, corporations now use non-lawyers to help deliver the total package of services they need done. Negotiating contracts, troubleshooting discrimination claims, even writing court documents can all be done by non-lawyers within an organization receiving a level of lawyer supervision and training to which unauthorized practice rules cannot effectively speak.³²

Technology has further pushed the boundaries. Consider JP Morgan's computer program snappily entitled "Contract Intelligence or COIN."³³ JP Morgan claims this program reviews approximately 12,000 new wholesale contracts per year and replaced "360,000 hours" of staff time between lawyers and loan officers.³⁴ This news was met by some fear for the future earnings of lawyers – a Harvard Business School blog warned COIN "spells disruption for the legal industry"³⁵ – but nary a peep from lawyer regulators or UPL enforcement. In a separate context, in an FLSA

³¹ Kyle Rozema, *Lawyer Misconduct in America* 15 (Jan. 2, 2020) (unpublished manuscript), <https://www.law.umich.edu/centersandprograms/lawandeconomics/workshops/Documents/Paper%20.%20Kyle%20Rozema.Lawyer%20Misconduct%20in%20America.pdf>.

³² Thomas D. Morgan, *The Last Days of the American Lawyer* 10 (2010) (unpublished manuscript), https://scholarship.law.gwu.edu/faculty_publications/828.

³³ Christian Sundquist, *The Future of Law Schools: COVID-19, Technology and Social Justice*, 53 *CONN. L. REV.* (ONLINE) 1, 16 (2020).

³⁴ Hugh Son, *JP Morgan Software Does in Seconds What Took Lawyers 360,000 Hours*, *BLOOMBERG* (Feb. 27, 2017), <https://perma.cc/J548-GSUB>.

³⁵ Legal ML, *JP Morgan COIN: A Bank's Side Project Spells Disruption for the Legal Industry*, *HBS DIGIT. INITIATIVE* (Nov. 13, 2018), <https://digital.hbs.edu/platform-rctom/submission/jp-morgan-coin-a-banks-side-project-spells-disruption-for-the-legal-industry/>.

overtime suit by a contract lawyer, the Second Circuit held that “tasks that could otherwise be performed entirely by a machine” are not the “practice of law.”³⁶

Contract review is just the tip of the iceberg. Outsourcing to India, outsourcing legal work from one state to another, or using computer programs to perform discovery tasks all fall into at best a gray area for UPL. A BigLaw or in-house counsel would argue that all of these tasks are “supervised” by a lawyer, and thus not UPL, regardless of how much actual supervision occurs.

1.2.2 *Legal Aid/Pro Bono Programs for the Poor*

Ironically, there is another group of lawyers who operate with great impunity under an otherwise strict regulatory regime: legal aid and other lawyers that primarily serve the very poor. The irony here is that legal aid lawyers offer civil legal assistance to the exact opposite end of the spectrum from BigLaw: the poorest Americans, typically households earning 125 percent of the poverty line or less.³⁷ These lawyers do yeoman’s duty for low pay. The need radically outstrips the supply and has basically since at least the 1980s.³⁸

In 2016 the *Justice Index* estimated that there were 6,953 legal aid lawyers, or 0.64 legal aid lawyers for every 10,000 eligible clients.³⁹ These lawyers and other volunteers far outpunch their numbers and help a massive number of people. The 2019 Legal Services Corporation report claims that “LSC grantees closed over 743,000 cases, including more than 231,000 Family cases and more than 214,000 Housing cases. In addition, LSC grantees helped more than 1.5 million people with legal education and information at court help desks and in workshops and clinics.”⁴⁰

How did approximately 7,000 lawyers handle so much work? They didn’t. They had a lot of assistance, often from non-lawyers, technology, or pro bono lawyers working around the edges of their license. LSC’s report itself baldly states: “Private attorneys, law students and graduates, paralegals, and other legal professionals were involved in closing 80,592 cases.”⁴¹ There is roughly one paralegal for every three legal aid lawyers, and, given the workflow and a tsunami of client need, these

³⁶ *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 F. App’x 37, 45 (2d Cir. 2015).

³⁷ Frequently Asked Questions – Find Legal Help, A.B.A., https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/.

³⁸ BENJAMIN H. BARTON & STEFANOS BIBAS, *REBOOTING JUSTICE* 63–67 (2017).

³⁹ Hanna Kozłowska, *There’s a Devastating Shortage of Lawyers in the US Who Can Help the Poor with Eviction or Child Custody Cases*, QUARTZ (May 12, 2016), <https://qz.com/681971/for-every-10000-poor-people-in-the-united-states-theres-less-than-1-lawyer-who-can-help-them-with-an-eviction-or-child-custody-case/>.

⁴⁰ LEGAL SERVS. CORP., *LSC BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS* 8 (2019), <https://www.lsc.gov/our-impact/publications/numbers>.

⁴¹ *Id.*

paralegals naturally handle some (or a lot) of what might otherwise be termed “legal work,” from drafting documents to giving advice to prepping clients for court.⁴²

Nor has legal aid shied away from using technology to forward its mission. In 2013, LSC called a “Summit on the Use of Technology to Expand Access to Justice” that announced an aggressive new stance toward computerized solutions.⁴³ LSC created a technology grant program that has funded some of the most innovative work on providing basic legal services to those in need, as detailed below.

Legal aid is ground zero for the access-to-justice crisis, and they have, appropriately, tried to meet their statutory mandate to serve the legal needs of the poor by hook or by crook, which often means by bending UPL in ways that weirdly resemble BigLaw’s behavior. Non-lawyers do a lot of work. Volunteers, whether lawyers or not, do a lot. More recently, technology has come center stage and lets legal aid expand their reach exponentially. Once the time and money are spent to routinize a legal task and place it online, additional users are essentially free. Rather than trying to solve the access-to-justice crisis one case at a time with bespoke work, legal aid is trying to automate simpler matters to then focus their time and energy on areas of high impact or the greatest individual need. For decades, the brilliant legal futurist Richard Susskind has predicted this model of providing computerized legal services.⁴⁴ In the US the clearest examples tend to occur at the high end and the low end.

All of this is happening with little to no input from lawyer regulators, again for reasons that mirror BigLaw. Few to none of legal aid’s desperate clients are going to complain to bar regulators about tech solutions. Anecdotally, these clients are actually *thrilled* with these DIY-type services. Likewise, lawyers in private practice are not threatened because legal aid serves only the indigent, which is hardly a client base for main street lawyers.

To offer a personal example of this phenomenon, I run two programs here at the University of Tennessee that may edge toward UPL in spots: the A2J Lab and the Homeless Legal Advocacy Project. In the A2J Lab, I teach a class that tasks student teams with creating online guided interviews that result in desperately needed legal documents for poor Tennesseans. In the Homeless Project I bring groups of students down to a local homeless shelter every other week and we meet with the homeless, try to answer their questions, and if there’s a local legal case we can actually handle, we try to take it.

⁴² *Id.* at 82 (paralegal count).

⁴³ LEGAL SERVS. CORP., REPORT OF THE SUMMIT ON THE USE OF TECHNOLOGY TO EXPAND ACCESS TO JUSTICE (2013), https://www.lsc.gov/sites/default/files/LSC_Tech%20Summit%20Report_2013.pdf.

⁴⁴ RICHARD SUSSKIND, EXPERT SYSTEMS IN LAW: A JURISPRUDENTIAL INQUIRY (1988); RICHARD SUSSKIND, THE END OF LAWYERS (2010); RICHARD SUSSKIND, TOMORROW’S LAWYERS (2013); RICHARD SUSSKIND & DANIEL SUSSKIND, THE FUTURE OF THE PROFESSIONS (2017).

Sometimes when I describe this work to our alums or other groups of lawyers, I get some pushback as to whether either of these projects might run afoul of UPL. I point out to them that I'm a licensed lawyer and "oversee" this work (echoing the BigLaw/in-house/legal aid excuse), but I also say that as a law professor and gadfly in this area I'd be *happy* to defend this work against a UPL claim or any other regulatory complaint. This may explain why none has been forthcoming.

1.2.3 *PeopleLaw*

While UPL barely touches BigLaw and legal aid, the story is very different for what I call PeopleLaw – the small firm and solo practice lawyers that work for small businesses and individuals. The most recent American Bar Foundation survey (2005) estimated that around 75 percent of American lawyers worked in private practice.⁴⁵ Of those lawyers, a little fewer than half worked as solo practitioners, making solo practice the plurality status within the profession. If you add in the lawyers that worked in "law firms" of two-to-ten lawyers, you get closer to a full majority of lawyers. While not all of these lawyers work in PeopleLaw, it is fair to conclude that the biggest share of American lawyers work in this space, serving individuals and smaller businesses.

Most solo and small firm lawyers operate in a fashion that is largely unchanged from their predecessors from hundreds of years ago. Admittedly, some small firms and solos behave more like BigLaw (e.g., small boutique patent firms) or more like legal aid (a small firm that does only disability work or consumer bankruptcy work actually runs more like a legal aid office than a traditional solo practitioner's office), but the bulk of the lawyers in this category are generalists, hustling to make it.

This market has been flooded with lawyers for decades and is highly competitive, resulting in shrinking earnings and an even clearer demarcation between "two legal professions." In 1976, John Heinz and Edward Laumann conducted a groundbreaking study of the Chicago Bar Association and came to the then-surprising conclusion that there were essentially two separate legal professions: lawyers who represent individuals and made a decent living and lawyers who represent corporations and earned much more.⁴⁶ Heinz and his co-authors repeated the Chicago survey in 1995.⁴⁷ The distance between the two hemispheres had grown dramatically, with tremendous growth in the incomes and numbers of corporate lawyers, while lawyers in small firms, government, and public-interest practices constituted a declining

⁴⁵ AM. BAR ASS'N, LEGAL SERVICES REGULATION IN THE UNITED STATES, at 1.

⁴⁶ JOHN HEINZ & EDWARD LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 3–5 (1982).

⁴⁷ JOHN P. HEINZ ET AL., URBAN LAWYERS xv–xx (2005).

proportion of the profession, and had lower incomes.⁴⁸ Many of the lawyers in the latter group experienced a loss in real income over the period.⁴⁹

IRS data shows the same. Every year from 1967 forward the Internal Revenue Service has gathered, anonymized, and released two different sets of tax returns from people who provide legal services: solo practitioners and partners.⁵⁰ The data show two clear trends. First, the gap between partners and solos has grown *a lot* over the last sixty years. In 1967 law firm partners earned about 2.5 times more than solos. In 2014 it was roughly 7 times as much. If you use the much smaller list of AmLaw100 partners, those partners earned 16 times as much as the average solo practitioner in 2014. Second, the gap between partners and solos reflects rising partner earnings, but also a collapse in solo practitioner earnings. Between 1967 and 2016 solo practitioners' real income shrunk by a third.

If the regulatory structure and UPL are designed to prop up lawyer incomes, why have these lawyers struggled? Part of the answer is law school avarice and law grad overproduction. More law grads have crowded into this market and driven down earnings, particularly since the 1990s. Part of the answer is the more recent arrival of competition from tech providers like LegalZoom and Rocket Lawyer, who explicitly target this market and peel away at least some potential customers.⁵¹

Part of the answer is the business model itself. In a market that has too many providers, one would expect prices to decline to match what demand exists. As the access-to-justice crisis establishes, there is hardly a lack of demand for legal services from the poor or middle class. To the contrary, the need is acute and growing. If there is copious need *and* there is market over-supply in lawyers, surely prices will fall to meet demand?

Sadly, no. This is because the vast majority of these lawyers are still practicing law in the old-fashioned, bespoke manner they learned in law school and from their predecessors: providing individualized services for a fee to individual customers. Given that IRS data suggests the average solo practitioner is earning less than \$60,000, there just is not much room to lower prices, and in fact the average hourly rate for lawyers in this space remains stubbornly high. In 2016 Clio, a leading practice management software provider to small firms and solo practitioners, estimated that the average hourly rate for solo practitioners/small firm lawyers is \$232 an hour.⁵²

If \$232 is the average hourly rate, how are these lawyers possibly struggling? If they collected that rate on 20 hours of work a week, and worked 48 weeks a year, they

⁴⁸ *Id.* at 3–28.

⁴⁹ *Id.*

⁵⁰ For a fuller discussion of this data and a lengthy discussion of the academic kerfuffle it provoked, see BARTON, *FIXING LAW SCHOOLS*, at 45–51.

⁵¹ Hadfield, *Legal Markets*, at 44.

⁵² CLIO, *LEGAL TRENDS REPORT* (2016), <https://perma.cc/E7UK-6ZH2>. For a helpful discussion of these Clio reports, see Hadfield, *Legal Markets*, at 35–37.

should be grossing \$222,720 annually.⁵³ Unfortunately, this is not the case. The same Clio report showed that in practice these lawyers actually are only able to collect on about 1.5 hours of billable work a day.⁵⁴ These lawyers are hardly lazy though. They bill more than they can collect from their clients and then spend the rest of their time hustling to find paying customers and running their small businesses.⁵⁵

Unlike BigLaw or legal aid lawyers, main street lawyers are actually pretty heavily regulated. These lawyers are the most likely to face client complaints, bar investigations, and the more serious punishments of public censure, suspension, or disbarment.⁵⁶ Critics of bar enforcement note that even these results are too infrequent to protect the public at large, but insofar as the regulatory system has teeth at all, it is in this market.

Humorously, this market is also the source of the great bulk of UPL complaints and prosecutions, almost always generating from the lawyers themselves rather than aggrieved members of the public.⁵⁷ There are, of course, unfortunate victims of scammers who claim to be lawyers and are not and then do little or no work. There has been a spate of these cases where “notarios” claim to be qualified to represent immigration clients and then steal their money.⁵⁸ Nevertheless, the bulk of the cases involve aggrieved *lawyers* complaining about UPL, reflecting that UPL has always been more focused on protecting lawyers than the public. As Deborah Rhode put it, “bar leaders and case doctrine insist that broad prohibitions on unauthorized practice serve the public, [but] support for that claim is notable for its absence.”⁵⁹

1.2.4 *One Last Hybrid Category – Plaintiff’s Side Firms and Settlement Mills*

The plaintiff’s side tort and class-action bar is sort of a hybrid of the other categories but is unique enough for some separate thoughts. First, unlike a more traditional generalist practice, plaintiff’s side firms tend to specialize more, and sometimes quite narrowly.⁶⁰ Second, the business model and client base is completely different, since plaintiff’s side firms almost always work on a contingency basis rather than charging by the hour or per activity. This means the client base spans from the very poor upward. In fact, these firms are more easily grouped by whom they *sue* (typically the deep-pocketed, whether wealthy individuals, insured individuals, or

⁵³ Benjamin H. Barton & Deborah L. Rhode, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955, 985–86 (2019).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Rozema, *Lawyer Misconduct*.

⁵⁷ See Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2014).

⁵⁸ Kati Daffan, *Notarios Are No Help with Immigration*, FTC CONSUMER ADVICE (Sept. 26, 2019), <https://www.consumer.ftc.gov/blog/2019/09/notarios-are-no-help-immigration>.

⁵⁹ Rhode & Ricca, *Protecting the Profession or the Public?* at 2605.

⁶⁰ JOHN C. COFFEE, *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* (2015).

large businesses) than whom they represent. Third, the regulation hits quite differently here, as much of the most anti-competitive regulations, like limits on advertising or in-person solicitation, are squarely aimed at these lawyers.

Like other lawyers, it is quite typical for these lawyers to stretch the limits of UPL in the name of profit and efficiency. The best example is the settlement mill, which has a few titular lawyers at the top and is otherwise completely staffed and operated by lower paid non-lawyers. Nora Freeman Engstrom has pioneered the study of these firms.⁶¹ Settlement mills run high-volume personal injury practices where their lawyers carry as many as 200–300 cases at a time.⁶² How is this possible? Because non-lawyers actually do all of the work. Settlement mills almost never take a case to trial and actually try to avoid litigation altogether; they let non-lawyers handle intake and negotiating with insurance companies.⁶³ The titular lawyers “oversee” this work. UPL is again not typically strongly enforced in this market (although other regulatory and client complaints are quite common).

1.3 HOW REGULATION, CULTURE, AND MARKETS HAVE SHAPED AMERICAN LEGAL TECH

This section describes the current state of American legal tech from areas that are booming to areas that are in a slow burn. Unsurprisingly, the parts of the market that operate with less regulation are seeing explosive growth; the rest of the market, less so.

1.3.1 *Penthouse to Outhouse – Boomtown USA*

In America the very top of the market and the very bottom are leading the way in legal tech/justice innovations. The strangeness of this result should jump off the page. In what other market is the very bottom and very top the most forward-looking and aggressive technologically?

1.3.2 *BigLaw*

Large corporate legal departments are leading the way on legal tech, and BigLaw is following, sometimes reluctantly and sometimes aggressively, depending on the firm. Some readers will immediately object here. The individual lawyers that run BigLaw are by reputation notoriously tech-ignorant and change-averse. *Above the Law* summarizes: “Law firms are notoriously averse to change and, relatedly, technology. I worked with partners who responded to email with handwritten notes

⁶¹ Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009).

⁶² *Id.* at 1491–92.

⁶³ *Id.*

circulated via intra-office mail. I knew another who dictated responses to his secretary rather than draft an actual response.”⁶⁴ BigLaw’s internal systems are often outmoded. Their tech security lags. Some of the senior lawyers have declined to adopt email, let alone Slack.⁶⁵ True.

Bill Henderson has noted that trying to sell innovative technologies directly to law firms has often been a losing game, even when those technologies would increase firm-wide efficiency.⁶⁶ Why? Because law firms are risk-averse by nature and because in some ways law firms get paid for their inefficiencies. Telling a business that primarily runs on hourly fees that you can make them more efficient is not necessarily a winning strategy.

But don’t mistake the employee’s reticence for the employer’s desires. If there is a single story of corporate legal work over the last decades, it is cutting costs, increasing efficiency, and using technology to replace humans wherever possible.⁶⁷ Some press reports on legal tech seem to suggest that this is a new process, but it has been going on for years. It started with “in-sourcing.”⁶⁸ In-house legal departments have grown relentlessly and are incentivized to seek cheaper solutions. Simple work is sloughed off to non-lawyers. More complicated work is offshored to cheaper jurisdictions like India.⁶⁹ AI (like the COIN program described earlier) can handle mundane contract or litigation related tasks.⁷⁰ eDiscovery is a prime example.⁷¹ In-house counsel break legal work into constituent parts and only hire expensive outside counsel for sui generis or critically important areas.⁷² Everything else can be handled in the most efficient and cheapest manner.⁷³

The year 2020 was the biggest yet for investment in legal tech startups. The programs covered a bevy of corporate legal needs, including contract analytics and contract review, automated legal spend management, eDiscovery companies, and

⁶⁴ Joe Patrice, *LegalTech 2014: What’s Wrong with You Lawyers*, ABOVE THE LAW (Feb. 5, 2014), <https://abovethelaw.com/2014/02/whats-wrong-with-you-lawyers/>.

⁶⁵ *Id.*

⁶⁶ Joe Borstein, *Alt. Legal: Diffusing Innovation in the Law, the Amazing Work of Bill Henderson*, ABOVE THE LAW (Nov. 8, 2017), <https://abovethelaw.com/2017/11/alt-legal-diffusing-innovation-in-the-law-the-amazing-work-of-bill-henderson/>.

⁶⁷ David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1031–35 (2021).

⁶⁸ Laurel S. Terry, *The Legal World Is Flat: Globalization and Its Effects on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT’L L. & BUS. 527, 542–45 (2008).

⁶⁹ Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 766–67.

⁷⁰ W. Bradley Wendel, *The Promise and Limitations of Artificial Intelligence in the Practice of Law*, 72 OKLA. L. REV. 21, 23–24 (2019).

⁷¹ Dana A. Remus, *The Uncertain Promise of Predictive Coding*, 99 IOWA L. REV. 1691 (2014).

⁷² Bruce H. Kobayashi & Larry Ribstein, *Law’s Information Revolution*, 53 ARIZ. L. REV. 1169, 1219–20 (2011).

⁷³ John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995 (2014).

knowledge-integration platforms.⁷⁴ I have two reactions to the explosion of investment and activity in this area. On the one hand: WOW. The full span of the work is incredible, and after a slow start the market for these sorts of disruptions seems to be really humming. As late as 2011, Gillian Hadfield was asking “where are the ‘garage guys’ in law?”⁷⁵ This question has been answered emphatically.

On the other hand, these innovations often reflect what machines are currently excellent at and what humans sometimes struggle to accomplish: using repeatable and clear rules to wrangle a large quantity of data or documents into a useful format for humans. Computers are already excellent at rules-based legal work. Interactive document production programs from LegalZoom, Rocket Lawyer, or Community Lawyer are other examples. Humans can get tired or bored with these tasks and make mistakes, or they can be too expensive. Once a task is automated, computers are essentially free and never tire.

But current computer programs still struggle with more *human* tasks that require more nuance and judgment.⁷⁶ In contrast to eDiscovery, due diligence document review has been harder to mechanize, because rather than asking a machine to find a mass of documents with common features (emails about an accident, or featuring legal advice, for example), due diligence before an acquisition often searches a company’s data for weird or non-compliant documents that signal the existence of something undisclosed and potentially harmful (like a future legal liability or some kind of underlying fraud).⁷⁷ Again, computers have improved at this task, and not all due diligence requires a search for anomalies. Still, as you might guess, telling an algorithm to search for things “that might signal a future legal liability” is trickier than an eDiscovery search for all the emails about a particular deal.

1.3.3 Access-to-Justice Work for the Poor

Legal Aid and others are aggressively pursuing tech solutions to legal problems through grant programs and working with community partners.⁷⁸ As an overview, consider the 2019 LSC-funded projects, which are aggressive, creative, and if you care about access to justice, heartening.⁷⁹ The projects can be divided into two baskets: automating legal processes or sharing legal information with the poor.

⁷⁴ Rhys Dipshan, *The 9 Biggest Legal Tech Investments*, LEGALTECH NEWS (Dec. 30, 2020), <https://www.law.com/legaltechnews/2020/12/30/the-9-biggest-legal-tech-investments-in-2020/>.

⁷⁵ See Gillian K. Hadfield, *Equipping the Garage Guys in Law*, 70 MD. L. REV. 484 (2011).

⁷⁶ Dana Remus & Frank S. Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 GEO. J. LEGAL ETHICS 501 (2017).

⁷⁷ *Id.*

⁷⁸ Bob Ambrogi, *LSC’s \$4.2M in Technology Grants Illustrate How Tech Is Driving Access to Justice*, LAW SITES BLOG (Oct. 25, 2019), <https://www.lawsitesblog.com/2019/10/lscs-4-2m-in-technology-grants-illustrate-how-tech-is-driving-access-to-justice.html>.

⁷⁹ *Id.*

Here's a sampling of the processes LSC is seeking to automate: (1) filing for disability benefits in Alaska; (2) filing for consumer debt relief in California; (3) intake for Spanish-speaking clients in Atlanta; (4) making fair housing complaints in Michigan; (5) creating an automated legal help chatbot in Michigan; (6) establishing legal self-help document assembly software in New Hampshire for housing and consumer law problems; (7) online intake and referral in Pennsylvania; (8) filing for consumer bankruptcy (with an assist from consumer bankruptcy tech pioneer Upsolve).

Legal Aid also supported the following new sources of legal information: (1) online tutorials in landlord-tenant law in Georgia; (2) online "classrooms" covering six different areas of poverty law in South Carolina; (3) self-help videos covering evictions and orders of protection in Vermont; (4) redesigns of websites to include much more free information and forms in Kentucky and Minnesota.

This is just a snapshot of the projects in one year! And note that because of the nature of technology, every one of these projects makes the next project easier. Local law and information are not always transferable (although federal law like bankruptcy is easier), but the technology platforms and processes are absolutely transferable, especially here in a non-profit setting where all the players are on the same team and happy to share.

Further, Legal Aid is hardly fighting this battle alone. Felicity Conrad, one of the founders of the pro bono tech platform Paladin, recently launched a database that lists "justice tech" startups.⁸⁰ Conrad describes the "justice tech" sector as "a new breed of legaltech – instead of focusing on modernizing the existing legal services market (contracts, practice management, legal research, etc.), their goal is to leverage technology to *directly* scale legal services to the billions of people underserved by the existing market."⁸¹ I will not endeavor to describe all *twenty-seven* listed entities (as of January 2021), but if you want to feel like technology might actually be doing some good in the world, I strongly encourage you to go to the link and read the spreadsheet. It covers areas from reporting police misconduct, to recording police interactions, to the "do not pay app" for challenging corporate fees and parking tickets, to landlord-tenant, divorce, and immigration services.

There are also a handful of law schools working in this space. Stanford's Center on the Legal Profession, built by and around Deborah Rhode and her decades of leadership in legal ethics, feminism, and access to justice, has been a world leader. Margaret Hagan's Legal Design Lab was originally housed within the Center and focuses on what she calls "human facing" technology, creating apps and programs that help ordinary folks navigate complicated court processes and legal problems.⁸²

⁸⁰ Felicity Conrad, *Meet the 27 Startups Pioneering the Justice Tech Market*, PALADIN (Jan. 27, 2021), <https://medium.com/join-paladin/meet-the-27-startups-pioneering-the-justice-tech-market-dfd4795763aa>.

⁸¹ *Id.*

⁸² STAN. LEGAL DESIGN LAB, <https://www.legaltechdesign.com>.

Suffolk Law School has a Legal Innovation & Technology Lab and Chicago–Kent a Law Lab, among others.

My A2J Lab at the University of Tennessee is a more modest example. We use the excellent Community Lawyer platform to create the interviews and have automated processes to help with immigration forms, orders of protection, convictions expungement, and debt relief. On the one hand, the class is embarrassingly easy to teach, and the platform and our non-profit and legal aid clients do all of the really hard work. On the other hand, I've taught the class for three years, and we've had a pretty big impact in Tennessee! This area is packed with low-hanging fruit.

Some courts are also leading the way, especially those courts on the front lines of the pro se crisis. Courts started to complain about a rise in pro se litigation as far back as the 1980s, but this century the problem has ripened into a true crisis. Courts' and clerks' offices found themselves buried under miserable and angry pro se litigants and could not help but notice that case results, and thus justice, were heavily affected. Encouragingly, many judges and court administrators have gone to work, often using technology, process reforms, or a combination. The pandemic has likewise helped, as online court went from a theoretical idea to a necessity. The trend toward online dispute resolution (ODR) has likewise accelerated, as the chapters by Spalding and Prescott establish. ODR is often pitched as an efficiency measure, but when used in pro se courts, it is also an access-to-justice effort, because these programs are often designed to be used by ordinary people and not lawyers. Like David Engstrom and colleagues' work on AI in government, courts present different, and in some ways more promising, use cases than legal work for individuals.⁸³

These projects are blossoming despite potential regulatory and lawyer opposition because few want to push back against large government entities like courts or legal aid, but also because these projects do not typically compete against flesh-and-blood lawyers, who barely try to serve the middle class, let alone the poor. Some of these projects, especially those aimed at areas where lawyers wish to remain dominant and at least somewhat expensive, like consumer bankruptcy or divorce, have faced some pushback, of course. But overall the A2J tech revolution continues apace.

1.3.4 *Seas Were Rougher, Clear Sailing Now? – Interactive Forms*

The provision of legal forms to the middle class and small businesses initially faced tougher sledding. The public face of American legal tech are LegalZoom and Rocket Lawyer. Computerized legal services (online or via cellphone apps) for the

⁸³ DAVID FREEMAN ENGSTROM ET AL., GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES (2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf>.

consumer market are expanding at a dizzying rate and in direct competition to main street lawyers. If you are a typical lawyer, you may have some idea what these sites offer, but probably have not taken a spin through them recently. I strongly recommend you do, just so you understand the competition.

Both LegalZoom and Rocket Lawyer offer guided interviews and document assembly (or more basic forms) for virtually any kind of written legal document that is not meant to be filed directly in court, and some that are meant for court. They offer everything from LLC formation to wills to contracts to internet terms of service. You name a legal document, they offer it, and often at a radical discount to what a human lawyer would charge. Have you heard of the basic \$500 will offered by your local solo practitioner? LegalZoom's basic will starts at \$89.⁸⁴ LLC University estimates that a lawyer will charge between \$1,000–1,500 to form a basic LLC.⁸⁵ LegalZoom's cost? Seventy-nine dollars plus filing fees.⁸⁶

Given that these are bread-and-butter matters for main street lawyers, it is stunning that LegalZoom and Rocket Lawyer survived UPL. How did the lawyer regulators fail? Partially due to Silicon Valley chutzpah, partially due to poor timing, and partially due to the shifting sands of antitrust and public opinion. But currently there can be little doubt that the horse is out of the barn, and these forms providers seem destined to remain stiff competition for lawyers.

First, consider the gall of LegalZoom. Its founders were surely aware that providing forms and interactive document creation online could violate UPL or skate close to the line. Yet, they went forward guns blazing. LegalZoom was launched in 2001 and it was hardly a sneak attack. It recruited former O. J. Simpson lawyer Robert Shapiro as a co-founder and launched an all-out PR blitz.⁸⁷ This is, of course, a well-known Silicon Valley strategy, most famously pursued by companies like Uber or Airbnb. Plow into a legal gray area and assume/hope that you will be able to grow fast enough to eventually beat back any regulatory resistance.⁸⁸

Second, these companies had some great good luck in terms of initial regulatory disinterest. LegalZoom launched in 2001 but did not face any serious UPL investigations and prosecutions until 2008.⁸⁹ Why? Because of the brokenness of the market for legal services in the United States. Most main street lawyers still focus

⁸⁴ *Last Will and Testament*, LEGALZOOM, <https://www.legalzoom.com/personal/estate-planning/last-will-and-testament-overview.html>.

⁸⁵ *How Much Does It Cost to Setup an LLC?* LLC U, <https://www.llcuniversity.com/how-much-does-it-cost-to-setup-an-llc/>.

⁸⁶ *Business Formation: Choose a Business Structure*, LEGALZOOM, <https://www.legalzoom.com/business/business-formation/>.

⁸⁷ David Rovella, *Campaigns: Web Site Launch – LegalZoom.com Is First in Its Class*, PR Wk. (June 25, 2001), <https://www.prweek.com/article/1237037/campaigns-web-site-launch—legalzoomcom-first-its-class>.

⁸⁸ See Jordan M. Barry & Elizabeth Pollman, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017).

⁸⁹ Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J. L. & BUS. 1, 43–47 (2012).

on very expensive, bespoke, hourly services. Most middle-class customers and small businesses cannot afford these services. This means that solo practitioners (or their receptionists) spend a lot of time explaining to potential customers that they cannot afford to hire a lawyer. These non-clients were the first adopters of LegalZoom and Rocket Lawyer. Fans of Clayton Christensen's Innovator's Dilemma will recognize this exact process, as the innovative upstart focuses on the lowest-end, least-valuable work, before moving up the ladder to more profitable areas.⁹⁰

When LegalZoom started, its products were not as polished as they are now, so the first wave of LegalZoom customers were not really a loss to lawyers at all. These folks likely couldn't afford a lawyer's services. Over time, of course, LegalZoom got better, and lawyers started to notice a pinch on their business. But by then years had passed and LegalZoom was pretty well established.

That said, the first UPL cases were still somewhat ominous. In Washington State in 2011, LegalZoom settled a UPL investigation by paying \$20,000 in costs.⁹¹ That same year in Missouri it paid the state's attorney's fees and changed some parts of its site for Missouri customers.⁹² The Missouri case was particularly worrisome because the district court there concluded in dicta that LegalZoom's interactive forms were very similar to the provision of legal services by a lawyer and thus were likely unlawful as UPL.⁹³

At this point LegalZoom decided to take the fight to the regulators, responding to a UPL sanction by the State Bar of North Carolina with a lawsuit alleging antitrust and constitutional violations.⁹⁴ When the Supreme Court decided that North Carolina's own dental board had violated antitrust law in 2015, the State Bar quickly settled, and on very favorable terms to LegalZoom.⁹⁵ Not coincidentally, this launched a series of LegalZoom wins on UPL, including in South Carolina and Arkansas.⁹⁶ These decisions have put LegalZoom in a good position and plowed the road for Rocket Lawyer and others.

Last, LegalZoom could count on public opinion. Just as Uber has leveraged public distaste for overweening regulators (overweening according to Uber at

⁹⁰ See CLAYTON CHRISTENSEN, *THE INNOVATOR'S DILEMMA* (2011).

⁹¹ See Daniel Fisher, *Entrepreneurs versus Lawyers*, FORBES (Oct. 5, 2011), <http://www.forbes.com/forbes/2011/1024/entrepreneurs-lawyers-suh-legalzoom-automate-daniel-fisher.html>.

⁹² Nathan Koppel, *Seller of Online Legal Forms Settles Unauthorized Practice of Law Suit*, WALL ST. J. (Aug. 23, 2011), <http://blogs.wsj.com/law/2011/08/23/seller-of-online-legal-forms-settles-unauthorized-practiced-of-law-suit/>.

⁹³ *Janson v. LegalZoom*, 802 F. Supp. 2d 1053 (W.D. Mo. 2011).

⁹⁴ Rhode & Barton, *Rethinking Self-Regulation*, at 278–79.

⁹⁵ N.C. Bd. of Dental Exam'rs v. FTC, 574 U.S. 494 (2015); Terry Carter, *LegalZoom Resolves \$10.5m Antitrust Suit against North Carolina Bar*, A.B.A. J. (Oct. 23, 2015), http://www.abajournal.com/news/article/legalzoom-resolves_10.5m_antitrust_suit_against_north_carolina_state_bar.

⁹⁶ Ben Barton, *LegalZoom Fought the North Carolina Bar and LegalZoom Won*, BLOOMBERG L. (Nov. 13, 2015), bol.bna.com/legalzoom-fought-the-north-carolina-bar-and-legalzoom-won/.

least),⁹⁷ LegalZoom could count on some political pressure if it was fully driven from any given state. For example, in the late 1990s the Texas Bar Association attempted to ban a program called “Quicken Family Lawyer” as UPL, only to be overruled by the Texas legislature.⁹⁸

Future signs are mixed. On the one hand, recent UPL developments look good, and the decisions by Utah, Arizona, and others to allow for more provision of legal services by non-lawyers and technology certainly suggests future growth.⁹⁹ On the other hand, today’s announced loosening sometimes leads to tomorrow’s tightening. The 2016 ABA Report on the Future of Legal Services’ seemingly innocuous suggestion that legal tech should be regulated to protect client interests is worrisome given the history of lawyer regulation that allegedly protects the public but does more to protect lawyers.¹⁰⁰

1.3.5 Controls Are Tighter, but Technology Is Still Coming: Legal Advice

If you are wondering whether the market for interactive forms alone is enough to meet the unmet demand from the middle class and small businesses, consider that both LegalZoom and Rocket Lawyer have legal advice subscription offerings staffed by licensed lawyers. Both sites try to sell these plans along with their basic forms.¹⁰¹ For a monthly fee subscribers get a set amount of “free” legal advice from licensed lawyers. These plans skirt the regulations that make fee-splitting with non-lawyers illegal because the lawyers themselves are not paid for any individual consultation. Instead, they get a “small cut” of the aggregated monthly fees.¹⁰² Why would lawyers give what essentially amounts to free legal consultations that mostly serve to enrich their online competitors? Business development. Some of these advice clients may eventually have a “real” case – that is, a case where they will pay a lawyer an hourly rate for more valuable legal work. Yes, the market is so tight for these lawyers that it’s worth offering “free” consultations just for the hope of generating more useful business.

⁹⁷ Suhauna Hussain et al., *How Uber and Lyft Persuaded California to Vote Their Way*, L.A. TIMES (Nov. 13, 2020), <https://www.latimes.com/business/technology/story/2020-11-13/how-uber-lyft-door-dash-won-proposition-22>.

⁹⁸ Unauthorized Prac. of L. Comm. v. Parsons Tech. Inc., 179 F.3d 956, 956 (5th Cir. 1999).

⁹⁹ UTAH WORK GRP. ON REGUL. REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION (2019), <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>.

¹⁰⁰ AM. BAR ASS’N COMM’N ON FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES (2016), <https://www.srln.org/system/files/attachments/2016%20ABA%20Future%20of%20Legal%20Services%20Report-Web.pdf>.

¹⁰¹ LegalZoom’s monthly plan for business legal advice is advertised for as little as \$50 a month. *Prepaid Legal Plans – Affordable Legal Help for Your Family or Business*, LEGALZOOM, <https://www.legalzoom.com/attorneys/>.

¹⁰² Aaron George, *10 Best Lead Generation Services for Lawyers*, Clío, <https://www.clío.com/blog/best-lead-generation-services-lawyers-reviews/>.

Other sites like Avvo offer searchable, free legal advice from lawyers.¹⁰³ Potential clients ask a short question, and lawyers volunteer to answer.¹⁰⁴ The answers are publicly available and searchable. Lawyers do this in the hope that some of the answers will lead to actual paying clients and also because Avvo is a lawyer rating service (like TripAdvisor or Yelp for lawyers) and answering questions can help their ratings.

Avvo used to offer a legal services plan that directly connected consumers and lawyers, but bar regulators closed it down for fee-splitting and other alleged violations.¹⁰⁵ If you are wondering whether bar regulators still have teeth, the answer is yes when it comes to direct provision of legal advice or services for a fee.

1.3.6 *Little Immediate Help: Filing Papers or Appearing in Court*

Historically, prohibitions on UPL have been at their strongest in courthouses. Non-lawyers are rarely allowed to represent others in court proceedings or to sign and file papers on their behalf. This is less true in administrative hearings, but generally the more formal the procedural setting, the less the tolerance for non-lawyer assistance.

The actual drafting of legal documents is, of course, subject to encroachment by computerization. The chapter by Nyarko and Frankenreiter establishes that we may still be some ways away from any really high-level work in that regard.¹⁰⁶ As such, the actual filing of papers and appearing in court will remain a human's only proposition for at least as long as judges prefer talking to humans than robots.

1.4 SO WHAT DOES THE FUTURE HOLD?

America will continue to be a world leader in legal tech, regardless of its regulatory structure. The current American demand for legal services is currently grossly underserved by lawyers and their focus on selling bespoke services. There is a massive amount of low-hanging fruit, and the lure of disruption will continue to draw innovators and investors.

Law tech in America will continue to thrive most in the areas that are regulated the least, at the highest and lowest ends of the market. We will continue to see rapid automation of legal processes for the poor and corporate clients, bounded mostly by technological barriers rather than regulatory barriers.

Wealthy corporations will naturally get first access to innovations like eDiscovery or the use of AI to predict legal outcomes. These technologies involve large startup costs, so will be expensive and exclusive at first. Nevertheless, computer processes

¹⁰³ Research Legal Advice, Avvo, <https://www.avvo.com/free-legal-advice>.

¹⁰⁴ Barton & Rhode, *Access to Justice and Routine Legal Services*.

¹⁰⁵ *Id.*

¹⁰⁶ See Chapter 3 in this volume.

are hard to pen in once created and mastered, since the marginal cost of adding new customers can run as low as zero. We can expect at least some leakage downstream, and over time these tech innovations should make law cheaper and better even for main street lawyers and the public at large.

The poor will have some advantages! Regulators have shown remarkable tolerance of tech solutions offered by legal aid or non-profits. Likewise, all the most exciting courtroom innovations, such as ODR, will continue to arrive first in small claims or other pro se courts. In my book *Glass Half Full* I talk about these innovations offering the possibility of a truly bizarre science fiction experiment: a world where courts for the poor are fairer and more efficient than courts for the rich.¹⁰⁷

Further, and this is not necessarily a good thing, legal work for the poor does not need to be perfect, just better than nothing. Corporate clients will only accept automated processes that work perfectly or near perfectly. Technology aimed at the poor, like interactive order-of-protection forms, face a lower bar. Let me be absolutely clear, there are *significant* reasons to feel uncomfortable with this fact of American life, but still, it is what it is. The bar for an interactive form for the poor is often “Is it better than nothing?” This allows for more aggressive experimentation.

That said, making the perfect the enemy of the good is part of the reason we are mired in the current access-to justice crisis. We cannot afford to offer BigLaw style services to the poor for free, and of course the middle class could never afford such services. Rather than pretending that is our goal, realistic attempts to do our best should be encouraged and accepted. The status quo is so bad that experimentation and triage are not only recommended; they are desperately needed.

As Engstrom and Gelbach aptly note, technical challenges in natural language processing will make advances in automated legal advice or reasoning slower and on a different time horizon.¹⁰⁸ Note that even in looser regulatory environments, such as England or Australia, we have not seen anything resembling a for-profit “robot lawyer,” at least partially due to the current limitations on natural language processing. Chatbots that handle intake or more basic questions exist now and will, of course, improve and expand over time. For now, at least, most of these applications will require human lawyer inputs, so they will exist “under a lawyer’s supervision.” As long as a lawyer is even nominally involved, regulators are likely to be copacetic. In-person work, especially in court, stays the province of lawyers for the longest time.

The current regulatory atmosphere, where the top and the bottom of the market are essentially unregulated, is, of course, not set in stone. In fact, seemingly salutary efforts like those in Utah, Arizona, and other states could turn sour quite easily. Historically, most lawyer-driven consumer protection efforts like UPL or the bar

¹⁰⁷ BARTON, *GLASS HALF FULL*, at 208–9.

¹⁰⁸ Engstrom & Gelbach, *Legal Tech*, at 1018–30.

exam eventually tend to favor lawyers over the public.¹⁰⁹ Reform advocates have taken to calling the Utah approach “re-regulation,” to avoid the implication of willy-nilly deregulation. But these reforms might turn out to be “re-regulation” in the strong sense of bringing regulation (via a sandbox entry process or other routes) that currently doesn’t exist for much of the market, especially at the high and low ends of the market. We must be vigilant to avoid the “we’re from the Bar Association and we’re here to help” type of regulation.¹¹⁰

In my preferred version of the future, lawyers of all stripes leverage technology to work more efficiently and to focus on the work that humans are especially excellent at: talking to other humans, high-level reasoning, and strategic thinking. There is a version of the future where technology solves the access-to-justice and related pro se crisis and makes an immeasurable difference in the lives of the poor and middle class in America and all over the world. Done properly, technology could even improve the lives of lawyers, as they spend more of their time doing the activities that likely drew them to the profession in the first place and less time on repeatable grunt work. I have, admittedly, been called a Pollyanna on this front, with Deborah Rhode’s reactions alternating between “good luck with that” to the more generous “from your lips to God’s ears.” For the millions of Americans with unmet civil justice needs, we can all hope the latter ends up the more apt of the two.

¹⁰⁹ BARTON, *THE LAWYER-JUDGE BIAS*.

¹¹⁰ This is a riff on the famous Ronald Reagan quote: “The nine most terrifying words in the English language are: I’m from the Government, and I’m here to help.” See *August 12, 1986 News Conference*, RONALD REAGAN PRESIDENTIAL FOUND. & INST., <https://www.reaganfoundation.org/ronald-reagan/reagan-quotes-speeches/news-conference-1/>.