LAW AND ECONOMICS SEMINAR **Professor Polinsky**
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4:15 p.m.- 5:45 p.m.
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Room 301

"Legal Markets"

by

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Note: It is expected that you will have reviewed the speaker's paper before the seminar. Because it is longer than average, the speaker was asked to prepare a guide for readers who can't look at the whole paper. This is her response: "The paper, which was commissioned by the Journal of Economic Literature, is the normal length for that journal but apparently about twice as long as normal for this workshop. So if you would like to economize on your reading, I suggest focusing on Section 4 (the performance of our legal markets), the beginning of Section 5 (through the end of 5.1) and Section 6."

Legal Markets

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Abstract
Economic analysis takes for granted the existence of an effective legal system. Our core theories of market exchange presume the availability of clear and enforced rules of property (why pay if you can just take?) and costless enforcement of the contracts necessary to define any good or service over time. Theories of the firm presume the capacity to operate an entity that possesses resources and an objective function distinct from that of its owners—that is, an artificial entity defined only by a legal regime. Theories of incentives and organization presume the ability to write and enforce contracts to distribute risks and payoffs. Public economics presumes the capacity to implement taxes, subsidies, and regulations to fund public goods, redistribute wealth, and correct market failures. Even macroeconomics presumes the legal apparatus of stable and legitimate government entities capable of managing money supply and expending public resources on the basis of policy.

Despite the centrality of law to economic analysis and policy, however, the economics literature has devoted limited attention to the question of how legal goods and services are produced, priced, and distributed. Lawyers' services have been studied in some depth as a subset of professional services, with attention from labor market economists to the determinants of law firm size, composition, attorney selection, and earnings. The regulation of legal markets has also been studied as a subset of occupational licensing. These two literatures deliver important insights into how our markets for lawyers' services function. But they provide little insight into an increasingly critical question: how well do our markets for law and legal services function in producing the basic legal infrastructure needed to achieve goals of economic and social welfare?

In this review essay, I argue that our existing legal markets are not performing well and that a central reason for their poor performance is almost exclusive reliance on self-regulation of the legal profession. Self-regulation of any profession has implications for the cost and quality of services, as the large literature on occupational licensing attests. But self-regulation in law has far-reaching implications that go beyond the efficiency of the market for lawyers' services, largely as a result of the monopolized and insular nature of the markets generated by self-regulation. As I'll argue, an outdated regulatory model is distorting economic activity and growth and hampering our ability to generate investment in legal and regulatory technology. It is also delaying the development of the new models for law and regulation needed to address the transformation of the economy through globalization, digitization, greater aspirations for inclusion, and the coming of artificial intelligence.

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1. Introduction

Economic analysis takes for granted the existence of an effective legal system. Our core theories of market exchange presume the availability of clear and enforced rules of property (why pay if you can just take?) and costless enforcement of the contracts necessary to define any good or service over time. Theories of the firm presume the capacity to operate an entity that possesses resources and an objective function distinct from that of its owners—that is, an artificial entity defined only by a legal regime. Theories of incentives and organization presume the ability to write and enforce contracts to distribute risks and payoffs. Public economics presumes the capacity to implement taxes, subsidies, and regulations to fund public goods, redistribute wealth, and correct market failures. Even macroeconomics presumes the legal apparatus of stable and legitimate government entities capable of managing money supply and expending public resources on the basis of policy.

Despite the centrality of law to economic analysis and policy, however, the economics literature has devoted limited attention to the question of how legal goods and services are produced, priced, and distributed. Lawyers' services have been studied in some depth as a subset of professional services, with attention from labor market economists to the determinants of law firm size, composition, attorney selection, and earnings. The regulation of legal markets has also been studied as a subset of occupational licensing. These two literatures deliver important insights into how our markets for lawyers' services function. But they provide little insight into an increasingly critical question: how well do our markets for law and legal services function in producing the basic legal infrastructure needed to achieve goals of economic and social welfare?

In this review essay, I'll argue that our existing legal markets are not performing well and that a central reason for their poor performance is almost exclusive reliance on self-regulation of the legal profession. Self-regulation of any profession has implications for the cost and quality of services, as the large literature on occupational licensing attests. But self-regulation in law has far-reaching implications that go beyond the efficiency of the market for lawyers' services, largely as a result of the monopolized and insular nature of the markets generated by self-regulation. As I'll argue, an outdated regulatory model is distorting economic activity and growth and hampering our ability to generate investment in legal and regulatory technology. It is also delaying the development of the new models for law and regulation needed to address the transformation of the economy through globalization, digitization, greater aspirations for inclusion, and the coming of artificial intelligence.

2. The production of law

The 'law' that is assumed in economic models is the product of three components: rules, enforcement services, and legal services. Rules—more generally, classification services (Hadfield and Weingast 2012)—designate which actions are and which actions are not subject to sanction.[1] They establish what is supposed to happen in relationships between legal actors. For example, non-owners are not supposed to gain access to resources that are the real or intellectual property of others; agents promised compensation contingent on the realization of output and other variables are supposed to receive that compensation. Most economic analysis simply assumes that rules are implemented—that once a rule exists, what is supposed to happen does happen. But implementation of rules does not, of course, follow seamlessly just because a rule is established. Implementation is the result of other economic activity. Enforcement services include monitoring behavior to detect possible rule violations, conducting procedures (themselves defined by rules) to determine whether rules have in fact been violated, and implementing sanctions for rule violation. Legal services consist of information about rules and services needed to develop strategy in light of rules (organizational and product choices to optimize tax or intellectual property protection, for example, or minimize regulatory liability) and to participate in enforcement procedures (contract drafting, regulatory approvals, tax filings, adjudications, etc.)

2.1. The production of rules

For most purposes in economic analysis it is sufficient to define legal rules, as distinguished from norms, as the rules produced by government (Ellickson 1994, Dixit 2006). But if we want to evaluate the welfare effects of alternative means for producing legal rules, it is important not to start with this definition.

Barry Weingast and I, in a series of papers, have proposed a different starting point for the economic analysis of law (Hadfield and Weingast 2012, Hadfield and Weingast, Microfoundations of the Rule of Law 2015, Hadfield and Weingast, Is Rule of Law and Equilibrium Without Private Ordering? 2018). In our approach, law is a centralized classification

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[1] In common usage, a legal rule is often understood as a government directive to a person or entity to engage or not in specified conduct, with penalties for failure to comply. Some rules appear in the abstract to be permissive, rather than directive: rules that say people can write contracts, for example, or elect to form a corporation. But even these permissive rules are ultimately connected to an enforcement scheme, perhaps directed at officials. For example, if a corporation is formed, a court is required to refuse to enforce the claims of creditors of the corporation against the assets of the owners and to refuse to enforce the claims of the creditors of the owners against the assets of the corporation. To benefit from this reciprocal asset shielding, the owners will have to take the steps necessary to create a legally-recognized corporation. As another example, once a contract is formed, a court is bound to adjudicate an alleged breach of that contract if asked and award damages if breach is found, and state officials with proper authority are bound to seize assets to satisfy court damage awards if asked. To participate in that enforcement process, the parties to a contract may want (or be required) to draft a formal document specifying their agreement.

scheme that is capable of taking on deliberate content (hence capable of serving as a policy instrument) and displays the attributes of the rule of law, notably generality, stability, neutrality, clarity, prospectivity, and common knowledge. These attributes constrain the behavior of the classification institution. This definition distinguishes law from emergent classification schemes (which characterize much of what we call social norms or culture) and dictatorial classification schemes (in which powerful elites unconstrained by the rule of law can declare any action to be illegal and subject to sanction, without regard to the constraints of stability, generality, prospectivity, clarity, common knowledge, neutrality, and so on.) This approach to a definition of the rule of law aligns with the approach taken by legal philosophers (Raz 2009, Hart 1961, Fuller 1964). For purposes of this review, the key is to recognize that legal rules are produced in processes that are themselves governed by rules[2] and they can be deliberately designed by individuals or groups seeking to alter incentives and behavior. This is what make them of interest to economists.

With this more functional definition of law, it becomes clear that legal rules are produced not only by governments but also by many private individuals and organizations. The most obvious are the cases of privately negotiated contracts and the corporation (in regimes in which the founders of the corporation have substantial scope to choose the rules they want.) Less obvious are the many cases in which privately-produced legal rules are developed to displace default publicly-produced rules. This occurs whenever a settlement agreement or consent decree is reached with a private party before or during litigation. The rules produced by settlement or consent can be limited in scope—a rule requiring the transfer of money from one litigating party to another—but they can also be elaborate, long-lived, and govern third parties. Examples range from bankruptcy (Schwartz 1998) to patents (Shapiro 2003) to civil rights (Schlanger 2006). Many of the rules governing organizations—setting workplace standards, for example—are privately created by the organization as policies that are incorporated into the employment contract. Trade associations privately supply rules governing their members (see e.g. (Bernstein 1992) and online platforms supply rules through terms of service and private dispute resolution systems (see e.g. (Liu and Weingast 2018)).

Rules created by private organizations play a large, and growing role, in regulatory systems (Braithwaite 1982, Ayres and Braithwaite 1992, Cogliagnese and Lazer 2003). Professional associations frequently generate standards that are incorporated directly into legislation.[3] Privately-developed rules (established and sometimes monitored by industry bodies or by individual firms such as insurers) can also be imposed by government as a condition of obtaining a government contract or permit. Private membership organizations are sometimes

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[2] (Hart 1961) calls the rules governing how rules are made "secondary" rules. He treats the existence of secondary rules, which provide a means of determining the validity of primary rules, as the hallmark of a legal system.

[3] See, e.g., 16 CCR § 3351.6 "Equipment Requirements for Automotive Air Conditioning Repair Dealers" (all automotive repair dealers engaged in service or repair of air conditioning systems in vehicles must have refrigerant identification equipment that meets or exceeds Society of Automotive Engineers standard J1771, "which is hereby incorporated by reference.")

delegated authority to regulate their members on behalf of government actors—examples include the Financial Regulatory Authority (FINRA) and, as I'll discuss in detail below, bar associations. There are also numerous examples of cases in which public regulation has piggybacked on systems initially developed privately and this creates an incentive for industries to organize self-regulation in order to shape what is seen as inevitable public regulation (Braithwaite and Drahos 2000). And there is a now-classic literature in law and economics on the role of private actors in supplying information and instigating rulemaking in common law courts with implications for the evolution of legal rules (Posner 1973, Rubin, Why is the Common Law Efficient? 1977, Priest 1977, Goodman 1978, Cooter, Lewis and Lane 1979, Hadfield, Bias in the Evolution of Legal Rules 1992, Gennaioli and Shleifer 2007).

The demand for transnational regulatory standards in our increasingly integrated global economy has also resulted in increasing reliance on private actors to regulate. As with domestic regulation, there has long been widespread reliance on international standard-setting bodies to supply the rules governing goods and services sold in global markets (Braithwaite and Drahos 2000, Büthe and Mattli 2011). Suppliers in developing countries with underdeveloped regulatory systems are increasingly subject to standards, in areas such as quality control, environmental practices, workplace safety, and child labor, established by purchasing companies (Nike, Apple, Walmart etc.) in their global supply chain contracts (Locke 2013). In many cases, supplier compliance with supply contract obligations is monitored and enforced by private sanctions (contract termination, fines) imposed by the purchasing company—which may outsource oversight to a third-party monitor (Short, Toffel and Hugill 2016).

2.2. The production of enforcement

Conventional definitions of law define law as a set of rules not only produced but also enforced by governments, through a specialized, centralized enforcement apparatus: police, public prosecutors, and courts (Ellickson 1994, Dixit 2006). But many recognizable legal orders exist in which there is no centralized enforcement authority of any kind (Hadfield and Weingast 2013)—including the international legal order (Hathaway and Shapiro 2011). Even in advanced settings, there may be reliance on non-government enforcement mechanisms, such as reputation and social or business exclusion, to enforce legal rules.[4] Moreover, recognizing that enforcement consists of three components—monitoring or investigation to identify when a rule violation has occurred, procedures to determine if a rule violation has occurred, and mechanisms to impose sanctions on rule violators—it is clear that private, non-governmental actors play significant roles in enforcement.

[4] I do not include voluntary compliance—cases in which compliance is an optimal strategy for an agent without regard to whether any other agents will impose penalties on the first agent—within the domain of enforcement. Such cases include the important settings in which law coordinates behavior by selecting an equilibrium in a pure coordination game (Sugden 1986, McAdams 2005, Myerson 2004).

The role of private enforcement has long been a staple of the law and economics literature. As Landes and Posner (1975) observed, private enforcement in modern systems plays a central role in enforcing private law (the domain in which we find legal rules of contract, property and tort.) These rules are enforced by private actors who file a lawsuit seeking damages or some other consequence for harm they believe they have or will suffer as a consequence of rule violation. Becker and Stigler (1974) proposed extending this enforcement scheme to violations of public law—the domain in which we find legal rules that benefit the public generally such as environmental regulation, antitrust, securities, and discrimination laws—by creating a competitive market in which the first to successfully challenge an alleged violation receives payment equal to the total harm caused by the violation. Landes and Posner (1975) argued this scheme would lead to overenforcement; Polinsky (1980) argued it would lead to underenforcement. McAfee, Mialon, and Mialon (2008) is a more recent contribution to this literature, showing (in the context of strategic use of the antitrust laws by competitors) that pure private enforcement is never optimal, but that both public and private enforcement can achieve the social optimum with appropriate adjustments such as litigation fees, damage multipliers, and a decoupling of fines paid and payments received.

This literature on public versus private enforcement, however, addresses only a subset of the components of an enforcement mechanism. Even if private actors monitor or investigate to identify violations, when they initiate (and bear the cost of) proceedings to determine if a violation has occurred, this literature assumes that they do so in a public court. Those proceedings are still a largely public product, governed by publicly-determined procedures and overseen by publicly-appointed judges. Moreover, any sanctions imposed are imposed by a public authority.

Adjudication is often, however, supplied by the private sector through arbitration. Private arbitrators supply private judging services and facilities; they can also supply privately-designed rules of procedure and evidence. And even public adjudication produces outcomes that can still depend heavily on private inputs, beyond the triggering of the lawsuit itself. In addition to the analysis of the disclosure of parties' private information noted above in connection with the classic literature on the evolution of the common law, economists have considered the incentives governing information production for third-party fact witnesses (Friedman and Kontorovich 2011, Levmore and Porat 2012, Givati 2018)and expert witnesses (Posner 1999). Hadfield (2011) presents a model in which the quality of law is a function of the incentives for private litigants to supply information needed for welfare-enhancing adaptation within public courts. Moreover, in Anglo-American jurisdictions, almost all publicly-appointed judges began their careers as private practitioners and hence have accumulated experience shaped by their years in private practice.

Enforcement services also encompass evaluation and certification of rules or standards that must be met in order to be a licensed or approved provider in some markets. Many industries rely on private providers to certify compliance. Food safety regulation, for example, frequently relies heavily on private certification, if not private standard setting (Rouvière and Royer 2017). A recent innovation in medical device regulation has introduced a regime in which government

or private international (ISO) standards for quality are certified by private certifiers who are approved and overseen by government regulators.[5] In some cases, regulators rely on regulated entities themselves to establish internal certification offices. Implicated in the Boeing 737Max crashes of 2018 and 2019, for example, airplane manufacturers in the U.S. are delegated responsibility for certifying their own compliance with airline safety standards by the FAA.[6]

What about the private supply of sanctions for rule violation? Although this question tends to conjure up images of the mafia in people's minds, there is in fact a broad scope for legitimate private sanctioning. Relational contracting, for example, is built on private sanctioning: breach of the contract generates penalties imposed in the form of reputational harm or the loss of valuable economic relationships. Although most relational contracting theory presumes that relational penalties are conditioned on informal contracts (see e.g. (Baker, Gibbons and Murphy 2002, Levin 2003), Levin 2003), even firms that rely exclusively on informal relational penalties for enforcement may use formal publicly-supplied contract law to determine when a breach has occurred (Hadfield and Bozovic 2016). The availability of declaratory judgments—which adjudicate whether a rule violation has occurred but provide no remedy beyond a declaration to that effect—demonstrates a demand for public formal adjudication decoupled from public sanctioning. It is also clear that reputational and other informal penalties are often tied to public declarations of rule violation—firms are well aware that they may suffer a penalty with consumers, employees, and business partners if they are found by a court to have engaged in fraud, criminal activity, or discrimination, for example.

Private sanctioning can also serve as the exclusive form of sanction, and can be formal in the sense of being limited to the imposition of penalties that are set according to rules. In Ancient Athens, for example, highly formalized procedures for adjudicating private claims under legislatively-written law generally resulted only in a declaration that the claimant was (or was not) entitled to obtain compensation from the defendant. Collecting that compensation was left to the efforts of the claimant and his (only male citizens could bring suit) friends and neighbors (Carugati 2019). The same held true in medieval Iceland (D. Friedman 1979)and in California during the gold rush (McDowell, From Commons to Claims: Property Rights in the California Gold Rush 2002, McDowell, Real Property, Spontaneous Order, and Norms in the Gold Mines 2004, Clay and Wright 2005). And it is clear that decentralized enforcement mechanisms played a significant role during the medieval period, particularly for non-criminal claims, throughout Europe and the Muslim Mediterranean at the dawn of the commercial revolution (Greif 2006). This was a time when governments were still interlaced with private organizations such as guilds and before the emergence of the modern comprehensive (and well-funded) bureaucratic state capable of exercising a monopoly on enforcement. As private organizations today take on an increasing role in producing basic transactional infrastructure—

[5] https://www.fda.gov/medical-devices/cdrh-international-programs/medical-device-single-audit-program-mdsap

[6] https://crsreports.congress.gov/product/pdf/download/IF/IF11145/IF11145.pdf/

digital platforms for business and social networks—they may also take on the role of delivering penalties for rule violation, by excluding violators from access to the platform. Most platforms today, for example, include in their terms of service the right to deny access to a user who violates copyright laws. Some social networks and digital platforms have excluded users who have violated laws (and norms) of appropriate treatment of others, such as operators of websites engaged in hate speech and incitement to violence (Meyer 2017). Early in the digital age Lessig (1999) predicted the increasing use of privately-developed computer code to deliver regulation directly, through the ultimate sanction: disabling the ability of someone to violate a rule. This is what happens when copyright owners use encryption, for example, to disable playback of copyrighted content on a device.

2.3. The production of legal services

Legal services connect individuals and organizations to publicly- or privately-produced systems of legal rules and enforcement mechanisms. Suppliers of legal services provide information about law, predictions about the likely classification of behaviors by the law, and strategy advice about how to choose behaviors in light of legal rules. They also provide agency services, participating in legal procedures (drafting documents, filing forms, or conducting litigation, for example) on behalf of a person or organization.

Some legal services are supplied in the public sector. In the U.S. public defenders—available to indigent criminal defendants facing felony charges—are government employees. Private attorneys can also be paid on contract by government to represent felony defendants. But the scope of public provision is relatively small, particularly in the U.S. There are no publicly-provided lawyers available for misdemeanor criminal or civil (non-criminal) matters—even when these matters involve a risk of incarceration or detention. Expenditure of public funds for legal services in the U.S. is very low. In the U.S. only 2% of all lawyers are engaged in either public defender or legal aid work and the total public and charitable expenditure on legal aid is less than 1% of total expenditures on legal services. Other countries provide more robust publicly funded legal aid (Hadfield and Heine 2016).

The vast majority of legal services in modern market democracies are supplied by private actors—and in particular, lawyers operating within comprehensive licensing schemes. I'll examine the nature and scope of these licensing schemes in detail in Section 3. For now, I want only to highlight the dominant means by which legal services are currently supplied and the alternatives ways in which they could, in theory, be supplied.

Most legal services are supplied by lawyers in private practice, meaning lawyers who work as solo practitioners or members of law firms. In the U.S. approximately three-quarters of licensed lawyers are in private practice, with the remainder employed by companies, other private organizations, and governments (American Bar Foundation 2004). Lawyers employed by an entity other than a law firm can provide services only to their employer (as in-house counsel). The vast majority of law firms are solo or small firm practices with a handful of lawyer-partners. In 2004 (the last year for which the American Bar Foundation has data on this aspect of lawyer

demographics), 49% of U.S. private practitioners were in solo practice and another 14% were in small firms of 2-5 lawyers; three-quarters of multi-partner firms had 2-5 lawyers. Large law firms are composed of both equity and non-equity partners and a pyramid of associates (approximately twice as many as partners in the largest firms).

The practice of law is still largely a human-capital intensive, personal services practice. Lawyers meet with their clients in person and communicate over phone and email and with shared electronic documents. Private practitioners today primarily bill for their services on an hourly basis, a practice that emerged in the mid-twentieth century (Shepherd and Cloud 1999). Prior to this, lawyers would simply produce a non-itemized bill for "services rendered."

Just as it is important not to equate law with government, if we are to consider how best to produce the legal rules and enforcement mechanisms needed to support economic activity in the modern economy, it is also important not to equate legal services with conventional lawyering and law firms. The legal services provided by lawyers through law firms can be, historically have been, and in a small set of jurisdictions increasingly are, supplied in other ways.

To begin with, lawyers need not, as they do now, deliver their services only through the partnership form. They could be employed by corporations and other organizational forms to supply legal services to the public.[7] This was the case in the U.S. during the early part of the twentieth century, for example (Christensen 1981). At that time, banks, insurance companies, title companies, unions, automobile clubs, and more began offering legal services to their customers and members (spurring the organized bar to develop rules to prevent corporations from competing with law firms, as I discuss below.) Today, corporations provide limited legal services in a small number of settings: for example, accounting firms (tax advice), title companies (real estate closings), and unions (advice to membership protected by free speech principles).

More fundamentally, much of what lawyers do today could be done with or at least through technology. Legal services are essentially information-based. Lawyers provide information to lay people and businesses about the content of laws. They transmit information to others, by submitting, for example, forms, applications, and compliance documents. They provide predictions, based on education and experience, about how institutions (regulators, courts) implementing legal rules are likely to behave. And, based on the analysis of this information, they craft strategies for how to design organizations, transactions, and goods and services and make recommendations about how to manage potential and erupted disputes. All of these types of information-based services are, of course, increasingly supplied in the modern economy through technology accessed directly by consumers and businesses. Search engines can deliver results in response to keyword searches for laws, regulations, and court judgments. E-discovery vendors use computer-based search techniques to identify documents that must be

[7] Lawyers in many U.S. states can form limited liability corporations, provided the owners are all licensed lawyers.

produced during litigation proceedings. Natural language processing and text analysis augments these searches and machine-learning systems are in development that can process the world's legal information arising from any number of formal and informal sources. Automatic document processing systems can prepare and submit legal documents such as those needed to incorporate a company, file for a patent or a divorce, or register a trademark.

The last decade has also seen the use of automated database analysis and the emergence of artificial intelligence to predict the behavior of lawyers, judges, and regulators. Artificial intelligence is likely to be able to work its way up the value chain, providing an alternative means of obtaining legal services that go beyond mere information transmission and prediction. AI is already available to review contracts and evaluate them relative to industry benchmarks and company strategy playbooks, to draft contracts, and monitor compliance. These systems are soon likely to be able to suggest optimal strategies for contract performance and enforcement. AI-based systems are also in development to read, and draft, legal briefs in litigation. More sophisticated e-discovery systems can use AI to make judgments about whether information is, or is not, protected by attorney-client privilege. AI could also provide broad-based consumer support for those navigating legal processes without legal representation, advising individuals and small businesses about what evidence it could be helpful to submit to contest, for example, a housing eviction, collection action, or administrative proceeding.

Blockchain is also emerging as a platform for automated legal services. Smart contracts execute transactions automatically, transferring digital assets in response to pre-set conditions such as prices or verification of delivery of goods. These are contracts designed and managed not by lawyers but by software engineers and computers. Other legal services—title transfers, authentication of identity, regulatory filings, the design of terms for data-transfer and access—can also be theoretically managed on blockchain systems.

How extensively and how quickly could technology and artificial intelligence substitute for conventional legal services provided by lawyers, and eventually some services provided now by judges, legislators, and regulators? The answer depends significantly on what happens with respect to the regulation of the market for legal services, the topic to which we now turn.

3. Regulation of the market for legal services

As the above overview is intended to show, our conventional methods for making and enforcing legal rules and for connecting individuals and businesses to legal systems, are heavily dependent on the supply of services by lawyers. And this fact is not an accident: it is a consequence of the regulatory regime that lawyers created to regulate their profession and have now used to regulate the entire space of legal services. It is because of this regulatory regime that the market for legal services is still largely a market for lawyers, and not also a market for legal technology. In this section I will provide an overview of the existing regulatory regime. Section 4 will then explore the evidence suggesting that the regulatory regime is not working well. Section 5 will present the case for more open and flexible regulatory approaches

to the production of law and identify where we need further theoretical and empirical research to ground new approaches.

3.1. Professional Self-Regulation and the Lawyers' Monopoly

In modern parlance, and the modern economics literature, the market for legal services is equated with the market for lawyers. In almost all legal regimes, those wishing to provide legal services must be licensed members of the legal profession, and therefore subject to regulation by the profession. Professions, almost by definition, have historically been self-regulating but the impact of self-regulation on the performance of the related sectors of the economy depends first and foremost on the scope of the monopoly, if any, granted to the profession (Abbott 1988). In some sectors, for example accounting in the United States, members of the profession compete with non-members: certified public accountants (CPAs) are the only practitioners who can prepare "audited" or "reviewed" financial statements, but any bookkeeper can prepare "compiled" financial accounts. And among bookkeepers, although a license is available, licensed and unlicensed individuals compete on all services. In other sectors, for example medical services, licensed MDs have a monopoly over some services, such as surgery and advanced diagnosis and treatment, while other licensed professionals—nurse practitioners, pharmacists, physical therapists, etc.—can compete to supply other services such as simple diagnosis, prescription of some medications, and some treatments such as vaccinations or rehabilitation. The fact that medical care is supplied by multiple professions implies that medical services can be delivered through multi-disciplinary teams in organizations such as hospitals that coordinate services.

Today, the monopoly held by the legal profession in the U.S. and Canada extends to almost all legal services: a licensed lawyer is required to perform any legal task that requires applying general legal knowledge to a particular person's or entity's circumstances, ranging from reviewing a simple legal document such as the terms of service on a website to conducting a criminal trial at which the defendant is at risk of loss of life or liberty. Any other practice is known as the "unauthorized practice of law" (UPL). UPL laws in most jurisdictions make it a criminal offense (misdemeanor or felony) to practice law without a license. By analogy, if medical care were regulated in the manner of legal services, it would be illegal for anyone other than a licensed physician to deliver any form of medical care, from drawing a blood sample to performing neurosurgery.

The scope of the lawyers' monopoly has not always been as broad as it is today. Although legal specialists may well have existed at earlier points in time,[8] the first regulation of legal professionals emerged in the Roman Empire during the fourth century under Constantine (311-

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[8] Formal written law dates back to at least the 3rd millennium BCE. The oldest surviving code is that of Ur-Nammu, founder of the Sumerian city state of Ur in Mesopotamia (2047-2030 BCE); it reveals an already sophisticated formulation of legal rules (establishing, for example, damages for flooding the field of another), suggesting that formal statements of law may predate the emergence of writing.

337 CE). Practitioners were required to show completion of legal training, pass an oral exam, and be a member of the occupational association (*collegium*) that had a monopoly in a given court; the numbers allowed to practice were limited and ethical obligations (to maintain loyalty to the client and avoid conflicts of interest, for example) imposed (Brundage 2010). After the collapse of the Roman Empire in the fifth century, however, professional legal practice largely disappeared in the West and did not reemerge until law schools and formal legal training on the Roman model reappeared in Europe, starting at the University of Bologna, in the twelfth century. Self-regulation of the profession began with the power exercised by courts to decide who could appear before them and to establish ethical standards to protect the integrity of judicial proceedings. Express limits on numbers admitted also served the interests of practitioners (Brundage 2010). Professional organization among lawyers developed by the fourteenth century in England. Exclusivity was again achieved through the exercise by courts of control over who could appear in argument before them (barristers) and who could file the papers needed to manage litigation (solicitors). The numbers of both groups were limited by the control barristers and solicitors themselves exercised over access to the apprenticeships required to qualify as a member of the profession. Importantly, there was no regulation of legal work—no licensing requirements and no professional monopoly—other than that which involved the conduct of litigation, appearances in court, and land transfers (conveyancing).

The English system of professional regulation carried over to the North American colonies in the 17th century. But efforts to control the number of people admitted to practice failed in the U.S during the 19th century: there were no licensing requirements at all. Limitations emerged, largely through the efforts of state bar associations and the ABA in the U.S., at the turn of the 20th Century (Hadfield 2017, Rigertas 2009).

Today the licensing requirements in the U.S. and Canada give lawyers a monopoly over any form of the "practice of law", which is defined to effectively mean anything lawyers do: give legal advice, draft contracts or other legal documents, represent parties in litigation, and so on. The only forms of legal work not covered by the licensing requirement are "scrivener" duties—simply inserting language dictated by the client into a legal template[9]—and providing general legal information, that is, information about the law that is not tailored to the particular circumstances facing an individual consumer or business.

In other countries, the scope of the license requirement is narrower. In England and Wales today, for example, a license is required only for a defined set of "reserved activities", primarily involving appearances in higher courts and the conduct of litigation; a license is not required to provide legal advice or draft legal documents (other than transactions involving the transfer or encumbering of land). In many European jurisdictions, a license is not required to provide legal work to one's employer; in fact, in some of these jurisdictions, members of in-house legal departments are not permitted to become members of the licensed bar. In the U.S. and Canada, individuals—but not businesses or organizations—may represent themselves in court,

[9] Web-based document preparation services, such as LegalZoom.com, provide this service electronically, for example.

that is, appear without a lawyer; in other countries (the Netherlands, for example) individuals require legal representation in at least some matters in court.

American and Canadian jurisdictions have a single license, required for all forms of legal work. In other jurisdictions, there are multiple licenses. Many European countries, for example, have separate licenses for lawyers who appear in court and those who provide non-court-based services. In others, notaries—with educational requirements comparable to lawyers and generally with numbers highly restricted by the state—are exclusively authorized to prepare certain kinds of documents.[10] In recent years, a handful of Canadian and American jurisdictions have introduced limited licenses, authorizing individuals without full law degrees (many of whom are former paralegals, previously authorized to work only under the direct supervision of a lawyer) to provide a limited set of services.[11]

Licensing tends to be local. U.S. lawyers have to be licensed in each state in which they wish to provide services; there is little reciprocal recognition of licenses. In some European countries, lawyers may only appear in courts in the local area where they have been admitted (Garoupa 2008). Under European mobility law, however, lawyers licensed in one Member State are allowed to practice law under their home license if they move to another European jurisdiction.

3.2. Professional Licensing: Constraints on Entry

In almost all legal regimes, those wishing to become a licensed lawyer must complete mandatory education, pass an exam, and in many cases (but not in the U.S.) undergo a period of apprenticeship.

The legal education required to obtain a license is generally prescribed by lawyer professional organizations, which also can serve as the accreditation body for law schools. In the U.S. the American Bar Association, which is a trade association and does not otherwise directly regulate lawyers, is designated as the official accreditation body by the U.S. government for purposes of accessing federal student loans and by those states that require candidates for a license to attend an accredited law school.

3.3. Licensing: Business Practice Restrictions

The most striking feature of modern licensing schemes for the legal profession is the extent to which ethical rules, originally developed by courts to ensure the quality and integrity of the lawyerly role in judicial decisionmaking, have morphed into detailed and highly restrictive

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[10] For discussions of European regulation, see (Garoupa 2008) and (Pagliero and Timmons 2013).

[11] In 2015, the State of Washington, for example, introduced the Limited License Legal Technician (LLLT) designation. LLLTs are authorized to provide assistance in family law matters such as explaining and completing legal filings. They may not provide representation in court or negotiate with lawyers on the other side.

command-and-control-style economic regulation of the conduct of legal businesses. I'll focus on the rules in the U.S., but with the exception of the U.K. and Australia, which have substantially relaxed practice rules and which I will discuss later, the rules are comparable in most countries (more restrictive in some, less restrictive in others).

3.3.1. Advertising and Marketing

Advertising restrictions are pervasive in legal regulation. Although outright advertising bans have been struck down in the U.S. as a violation of constitutional guarantees of free speech[12] and been relaxed in several other countries in response to competition concerns (see e.g. (Shinnick, Bruinsma and Parker 2003)), advertising regulations still persist in many U.S. jurisdictions and around the globe. These regulations can, for example, prohibit the advertising of a specialty without certification supplied by a bar-approved entity, require extensive disclaimers and labeling on any advertising materials include online platforms that collect lawyer profiles and reviews, or pre-publication approval of advertising material. In many jurisdictions, legal practitioners cannot operate under a brand name other than the name of partners in the firm. There are also restrictions on recommendations or referrals. In several U.S. states, a lawyer may not make any payment for referrals or recommendations, except from another lawyer or an approved referral service (generally operated by a state or local bar association).

3.3.2. Contracting Restrictions

Historically, in addition to restrictions on the advertisement of prices, professional rules have placed significant controls on how lawyers are paid for their services. In many jurisdictions, including in the U.S. prior to antitrust cases brought against the bar in the 1970s, lawyers have been required to bill according to fee schedules set by a bar association or court. Contingency fees are allowed in the U.S. but prohibited in many jurisdictions.

Restrictions on lawyers' contracts go beyond price. Although this is changing in some jurisdictions, lawyers have been prevented from selling "unbundled" services ("ghostwriting" legal filings, for example). This has the greatest salience in the context of litigation, where a client might want or be able to afford only to obtain legal assistance with some documents and appearances but not all. Some of the restrictions on lawyers' contracts stem from the interpretation of ethical duties to exercise independent judgment and competence in resolving a client's legal issues; in a recent challenge to an online service in which lawyers offered, for example, 30 minutes of advice without document review for a fixed price, the New York State Bar Association issued an ethics opinion that such an arrangement might violate these duties.[13]

The most significant constraint on lawyers' contracting is that lawyers are not permitted to enter into incentive contracts in which they share profits or revenues with people who are not

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[12] *Bates v State Bar of Arizona,* 433 U.S. 350 (1977).

[13] New York State Bar Association, Committee on Professional Ethics, Opinion 1132 (8/8/17)

also licensed lawyers or businesses that are not wholly owned and managed by licensed lawyers. This prohibits profit or revenue sharing with, for example, other professionals, managers, software developers, or online platforms. Lawyers can pay others to perform services for them—such as providing marketing services or technology development—but those payments cannot be computed as a share of payments received for legal work. These are known as "fee-sharing" or "fee-splitting" rules.

Contracting restrictions also extend to the contracts between lawyers. Law firms are prohibited from enforcing agreements with departing lawyers (employed associates or partners) not to compete with the firm by going after the firm's clients, a standard provision in partnership agreements in other fields.

3.3.3. Financing restrictions

The restrictions on profit or revenue-sharing also extends to financing arrangements. In most jurisdictions, law firms can finance their business only with withheld profits, capital contributions from partners, and loans. They cannot issue equity, meaning they cannot raise capital on public or private capital markets. These restrictions arise from bar association interpretations of rules that allow the sharing of profits or revenues only with other licensed lawyers.

Contingency fees, where they are allowed, are a form of financing for litigation. These fees are computed as a percentage of any amounts recovered on behalf of the client as a settlement or award in litigation. Other forms of litigation financing are also beginning to emerge, with private equity funds investing in lawsuits by contributing funds to cover the cost of litigation in exchange for a share of a plaintiff's recovery, structured as a non-recourse loan (Avraham and Sebok 2018). But many jurisdictions prohibit or limit these forms of financing.

3.3.4. Organizational form

In the U.S. and Canada, under what is known as the corporate practice of law doctrine, entities that are not exclusively owned, managed, and financed by licensed lawyers may not provide legal services to the market and lawyers may not be employed by such entities to provide services to anyone other than their employer (as in-house counsel.) Similar rules apply in many countries, with the exception of a handful of jurisdictions, most notably some in the U.K. and Australia, (where these non-law firm entities are known as "alternative business structures") (Hill 2017).[14] All U.S. jurisdictions, with the exception of the District of Columbia, also prohibit multidisciplinary practices (partnerships formed between lawyers and accountants, for example); these are permitted in the U.K. and Australia and some other European jurisdictions (Hill 2017).

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[14] A few jurisdictions permit a small percentage of non-lawyer owners of legal practices such as Spain (25%), the Netherlands (10%) (Hill 2017).

By ruling out business entities, such as technology platforms, in which non-lawyers have invested or participate in profits, and even non-profit organizations that are not controlled by lawyers[15], the corporate practice of law doctrine and the rule prohibiting multidisciplinary partnerships fairly ensures that all legal services supplied to the public in the U.S. and Canada and in many countries around the world are supplied only by lawyers operating within a solo practice or law firm composed entirely of lawyer-partners and employed associates. This is what makes the market for legal services effectively only a market for lawyers.

4. What do we know about the performance of our legal markets?

In order to determine whether there is a call for policy change in how legal services are produced and regulated, we need to know how well our markets for legal services are performing. But determining this is very challenging. The law and economics literature has largely been confined to questions of interest to lawyers and law firms. For example, the large law firm has proved a fertile context for applying models from the robust literature in labor economics on rank-order tournaments and up-or-out promotion schemes (Gilson and Mnookin 1985, Spurr 1987, O'Flaherty and Siow 1992, Rebitzer and Taylor, Efficiency Wages and Employment Rents: The Employer-Size Effect in the Job Market for Lawyers 1995, Landers, Rebitzer and Taylor 1996, Ferrall 1996, Rebitzer and Taylor, When Knowledge is an Asset: Explaining the Organizational Structure of Large Law Firms 2007, Garicano and Hubbard 2007). Another well-established literature has looked at determinants of the supply of lawyers. Friedman and Kuznets (1954) analyzed legal markets in connection with their pioneering study of the economics of the professions, focusing attention on the decision to invest in costly professional training and the possibly supra-competitive returns earned by professionals including lawyers. This has been a theme in the literature, often prompted by noticeable shifts in law school enrollments or employment for recent graduates (Freeman 1975, Pashigian 1977, Siow 1984, Rosen 1992, Foot and Stager 1989, Simkovic and McIntyre 2014).

There has been much less systematic attention to examining empirical evidence of the welfare effects of the organization of legal markets. Underscoring, and partially explaining, the weakness in the available literature is the fact that existing data sets on law are few and far between, and often of poor quality. In the U.S., employment data from the federal Bureau of Labor Statistics and the Economic Census are confined to employed lawyers, and so miss lawyers who are solo practitioners or partners in law firms that have not formed an LLC or other corporate entity. This makes it difficult to interpret the substantial gap between the number of holders of law licenses in the U.S. as reported by the ABA (approximately 1.3 million in 2017) and BLS estimates of the number of employed lawyers (approximately 700,000), and implies that changes in reported employment over time are sensitive to changes in the rules

[15] There are a few exceptions in the U.S. For example, free speech principles have been held to prohibit restraints on the ability of unions to provide legal advice to their members; under federal law, non-profit organizations can provide free legal advice to those appearing in U.S. immigration proceedings using lawyers employed by the organization.

and practices regarding the incorporation of law firm partnerships.[16] Census data on law office revenues don't include reports on the number of lawyers in the law firm, only the total number of employees (not broken out by lawyer and non-lawyer staff). Lawyer earnings in law offices that are organized as corporations are hard to track because of a lack of clarity about whether the lawyer-shareholders are taking their income in the form of salary or profits. More detailed census data are presumably available, but not presented in public statistics.

Data on lawyer employment has garnered at least some systematic attention, reflecting the interest that labor economists have taken in the study of the legal profession as an instance of occupational licensing. But we have next to no data on price, quantity, or quality for legal goods and services—the data we need to evaluate how well our legal markets are working to produce value for the direct and indirect consumers of law. There are no systematic and official data on lawyer fees, for example; data are gleaned from surveys conducted periodically by bar association and legal consulting companies or based on billing data for users of a particular brand of billing software. There is no official data collection with respect to the quantities of legal services purchased by individuals and businesses to achieve particular legal objectives, such as resolving a contract dispute or enforcing housing rights. Census data are limited to aggregate reports of the revenues coming into private law firms and identifying whether the purchaser of the services was a household or a business.

In this section, I'll report what we know from the handful of empirical studies that report careful analysis of data. The picture of how well the legal services markets are performing, however, must largely be inferred from incomplete information and anecdote. The picture that emerges will prompt, I hope, more careful work and data collection.

4.1. Multiple markets for lawyers

Most economic analyses assume a single market for lawyers. This makes some sense when looking at questions about the supply of lawyers and in particular incentives to invest in legal education and licensing. But a more fine-grained look at legal practice reveals that there is not one market for lawyers but several. Before embarking on an analysis of what we know about the performance of the legal services sector, then, it's helpful to present the big picture of the multiple markets for lawyers.

Heinz and Laumann (1982), in their survey of Chicago lawyers, first showed that the lawyers who serve individual clients are systematically different from those who serve business clients: they are more likely to have graduated from a lower tier law school, earn lower incomes, practice in solo and small firms, and enjoy lower prestige and influence in the profession. Sander and Williams (1989) documented that in the U.S. these solo and small firm practitioners serving the individual client market took in a share of total law firm revenues that shrank from

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[16] (Hillman 2003) presents data on the percentage of law firms organized using different vehicles, nationally and by state.

55% to 45% between 1967 and 1982. As of 2012, the individual client market had shrunk further, to 24%.[17]

Sander and Williams (1989) argued that these two (or more) markets operated relatively independently from each other. Whereas lawyers in the individual client market experienced flat or declining incomes from 1967 to 1982, those in the elite corporate market saw significantly increasing incomes over the same period. As they put it, "the largest firms have successfully insulated themselves from direct competition with non-elite firms, which have in turn insulated themselves from direct competition with sole practitioners" (p. 474). Excess demand in the high-end corporate market, they found, was not relieved by supply coming from lawyers struggling in small firms and solo practice.

Current data confirm that the relative independence of the different markets for legal services continues today. Starting salaries for new law school graduates after about 2000 show a distinct bimodal distribution, with a sharp peak at the high salaries paid by large corporate law firms ($160,000 and up in recent years) and a fatter peak at numbers closer to $50,000 (W. D. Henderson 2008). Reliable data on earnings for lawyers after their first jobs, however, are hard to come by, even more so if we want to compare solo and small firm practitioners with large firm lawyers.[18] But the indicators support the conclusion that there are wide differences in earnings between these groups. IRS data reveal a mean net income for legal services providers operating as individual proprietorships of about $49,000; $64,000 if those without positive net income are excluded. This category is both under- and over-inclusive for lawyers practicing solo: it includes legal services providers besides lawyers, and practitioners who may have other sources of income (that is, those who practice as a sideline to other employment), and it excludes solo practitioners who organize as an LLC or professional corporation.[19] The 2012

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[17] Economic Census, Professional, Scientific, and Technical Services: Subject Series – Misc Subjects: Receipts/Revenues by Class of Customer for Selected Industries for the U.S.: 2012 (NAICS 54111: Offices of Lawyers)

[18] BLS data show average annual income for employed lawyers—which spans the gamut from entry level government lawyer to general counsel at a large corporation—was $136,880 in 2016, with a median of $118,160.

[19] The numbers in the text are based on NAICS code 5411—Legal Services—which includes offices of lawyers as well as other legal providers such as notaries, title abstract and settlement offices, process servers, and paralegals; other legal providers account for approximately 5% of total receipts and 2% of individual proprietorships in the "legal services" category in the Economic Census. The total number of income tax returns reporting sole proprietorship income in legal services was 342,911 in 2013. The Economic Census counted 49,740 individual proprietorships with payroll in NAICS Code 5411 Legal Services (48,890 of which were offices of lawyers) in 2012. These proprietorships do not include solo practitioners who incorporate their practice. On the question of how many of these sole proprietorships are reporting supplemental as opposed to only income, we have little guidance. A 2011 survey of 1,800 California lawyers indicated that 21% of all lawyers worked fewer than 35 hours a week in their legal practice and noted (without publishing the data) that solo practitioners were "much more

Economic Census indicates that the bottom 40% of law firms, comprised of firms with total receipts less than $250,000 and an average of 1.6 employees, had average receipts of approximately $135,000.[20] With average payroll of about $48,000 this yields net receipts of $87,000, out of which all remaining office and business expenses are paid. This suggests that income on the order of $65,000 (that is, the IRS estimate for those who are earning positive net income) may not be too far off the mark.[21] These low-earning firms would appear to be the solo practices of lawyers serving individual and small business clients.

Estimating the earnings of small law firms (for example two-person partnerships) is difficult. A few plausible assumptions, however, suggest that the individual /small business client sector makes up the bottom 92% of law offices (including solo practices) in the 2012 Economic Census. These law offices collected 25% of all law office revenues—which is roughly the share of revenues coming from individual as opposed to entity clients. These firms each earned revenues less than $2.5 million, had an average of 3.3 employees (including perhaps one or two employed, that is, non-partner, lawyers) and average receipts after payroll of about $306,000. In 2005 (the last year for which we have data on this aspect of lawyer demographics), 49% of private practitioners were in solo practice and another 14% were in small firms of 2-5 lawyers; three-quarters of multi-partner firms had 2-5 lawyers. Even assuming the average is 2 partners in the firms earning revenues less than $2.5 million, this suggests average partner income of less than $150,000.[22]

Compare these estimated earnings for solo and small firms to the 11,500 largest firms. These large firms accounted for 8% of all law firms and collected 75% of all law firm receipts in the 2012 Economic Census. These firms have an average of 53 employees and payroll of $5.7 million (indicating an average salary for employees of about $107,500—this includes both lawyers employed on a salary basis and administrative/paralegal staff). With average receipts of $15.7 million, this leaves an average of about $10 million after payroll.

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likely than other attorneys to work fewer hours in their legal practice" (Hertz Research 2011). In this survey, 47% of lawyers in private practice (that is, not employed in corporations or government) were solo practitioners.

[20] This is based on all firms operated the entire year.

[21] The 50,000 individual proprietorships that are included in the Economic Census, those with payroll, averaged net receipts after payroll of $233,000 in 2012—significantly higher than the average for the bottom 40% in the receipts distribution. Some solo practitioners clearly are high earners—this would include, for example, those with successful contingency-fee personal injury practices and some boutique lawyers in areas such as entertainment or real estate.

[22] 54% of law offices in the Economic Census use a corporate form, making the identification of income to their lawyer-owners a bit tricky. Although tax rules require S-corporations (39% of law offices) to pay their lawyer-owners reasonable salaries before distributing profits (this ensures these entities pay appropriate payroll taxes), the fact that 92% of law offices have an average payroll of approximately $167,000 shared among an average of a little over 3 employees suggests most lawyers in these entities in fact take the bulk of their income in profits.

What we don't know from the public census data is the average number of equity partners sharing the take-home after overhead.[23] Some clues come from the *American Lawyer* magazine's statistics, based on self-reported data, for the 200 largest law firms. In 2015, for the top 100 firms by revenue, average profits per partner (meaning total revenues less all expenses except partner compensation) were $1.6 million; for those in the second 100, the average was about $740,000. Even within these categories, however, the spreads are very wide: the firm ranked first in profits per partner paid out an average of $6.6 million per partner; the firm ranked 200th averaged $320,000 per partner. Oyer and Schaefer (2016) find these wide spreads start early, even among the elite who graduated in 2002 from one of the top 20 of the roughly 200 law schools in the U.S. Those who attended either a top 10 law school, or a law school ranked 11-20 after attending a top 25 undergraduate college, enjoyed a modal income of $140,000; those who attended a law school ranked 11-20 and a non-elite undergraduate college had a modal income of $70,000.

The persistence of these spreads in compensation across the entire legal profession underscores that competition takes place within several sub-markets, with the major dividing line being between a small number of lawyers who are practicing in large law firms and serving corporate clients and the large remainder who are practicing solo or in small firms and serving individuals and small businesses. The first group takes home the lion's share of all law firm revenues.

The distinction between these two markets is important from an economic point of view because legal services are not ordinary consumer services. They are constitutive of the legal infrastructure on which other markets, and social and economic policy, are built. How well the market for corporate legal services works has implications for the performance of every other sector of the economy and for the aggregate economy. How well the market for personal legal services works has implications for whether and with what efficacy policies aiming to guarantee health care or retirement benefits, protect against employment discrimination, or correct market failures in consumer or housing markets, for example, are implemented.

4.2. Problems in the corporate market

The careful empirical work needed to test this hypothesis has yet to be done, but there is substantial reason to believe that our corporate legal markets have not been performing well over the last few decades. I mean here performance in the sense of generating value for their customers by improving the corporation's ability to make decisions in response to the legal landscape. In a series of informal interviews that I conducted with General Counsel at leading tech companies including Google, Cisco, and Apple beginning in 2006, for example, I was surprised to discover that these overseers of multi-million dollar legal budgets, with access to the best of the best in corporate law firms, felt that they could not find enough lawyers who

[23] (Garicano and Hubbard 2007) use confidential office-level census data that discloses number of partners and associates as well as area of specialization.

were able to do all the things they wanted or needed them to do (Hadfield 2012). The Google GC told me that in his career he'd only met two lawyers he felt comfortable putting in front of his Board of Directors; that most lawyers he worked with did not understand the nature of the advice that he needed from them; and that no-one had a good solution for how to make sure that deals were not lost or damaged by excessive lawyering or risk-aversion or how to manage complex contracting systems across a global enterprise. The GC at CBS Television told me about having to fire top Los Angeles law firms because they came to every meeting armed only with a list of risks to worry about in the context of new media, and no solutions for how to manage those risks. The GC at Cisco shared his criticisms with me about lawyers who conducted litigation without an awareness of how litigation strategy could impact the company's position in financial markets. He didn't only share his criticisms of law firm cost management with me; he also shared them on his company blog (picked up by the Wall Street Journal) that law firms were "the last vestige of the medieval guild system," continuing in a business model geared to generating hourly billings for equity partners rather than value for their customers (Lattman 2007). Legal scholars for the last decade have been pointing to the unprecedented collapse of major law firms beginning in the 2000s as evidence of the weaknesses in the business model of the large law firm, organized not to develop a better value proposition for their clients but to maximize profits to rainmaker partners who now routinely leave with their book of business when they are offered a better deal (Henderson and Bierman 2009, Ribstein 2010, Morley 2019).

Anecdotes like these are not data, of course. And hard data are hard to come by. But industry surveys and a handful of scholarly studies also suggest that the quality of legal services, even in the high-end market for high-priced corporate lawyers, is not matching demand well. Legal industry consultants consistently find that two-thirds of general counsel at large companies would not recommend their primary law firm (BTI Consulting Group 2018). A study of 166 chief legal officers at S&P 500 firms done in 2006 found similar results: 80% of companies had reduced the quantity of work given to an outside law firm in the previous three years, almost always (88% of the time) because of a failure of quality and responsiveness to the company's needs (Coates, et al. 2011).

The hypothesis that corporate clients are not satisfied with what the market for corporate legal work is providing is consistent with data collected in industry surveys about the financial performance of corporate law firms. Among top law firms, demand dropped precipitously at the time of the 2008 recession, from an average annual growth rate of 4% in 2004-2007 to contractions averaging 5%-6% per year from 2008-2010 (Citi Private Bank/Hildebrandt Consulting 2018, Georgetown Law Center for the Study of the Legal Profession 2018). But unlike the economy overall and corporate profits in particular, which have long recovered from the recession, demand for corporate law services has remained essentially flat. Indeed, average hours of billable work for lawyers employed in these law firms decreased between 2007 and 2017 and realization—the percentage actually collected for work billed at standard rates—fell from about 92% in 2007 to a little over 80% for the top 100 law firms in 2017. What the legal industry calls profits (essentially, compensation for equity partners) also declined over the past decade (Georgetown Law Center for the Study of the Legal Profession 2018).

These data are evidence of weak demand for corporate law firm services—but not necessarily for corporate legal work. Other industry surveys show that while use of outside law firms is shrinking, in-house legal departments are growing (Altman Weil 2018, Altman Weil 2019). Census data confirm that between 2007 and 2017 law firm employment for lawyers (recall this does not include equity partners or solo practitioners) grew about 30%, while in-house employment in legal departments increased over 200%. This is consistent with the anecdotal evidence that outside lawyers aren't meeting corporate legal needs and corporations are responding by training lawyers and organizing their work differently in-house. To this point, the GC of Apple told a workshop I coordinated in 2010 that the first thing he needed to do when he hired lawyers in-house away from law firms was to teach them how *not* to "think like a [law-firm] lawyer."

Demand for hours from corporate law firms, however, does not tell us much about economic welfare. Fewer hours could be consistent with increased efficiency. Reduced payments to law firm partners (in the form of reduced 'profits' per partner) could be evidence of robust competition, benefitting clients. To evaluate the efficiency of legal markets, we need systematic data about the cost of obtaining a legal result. But there are almost no official data.

The most comprehensive and long-running annual surveys of hourly rates have been conducted by Altman Weil, a legal industry consulting group, going back to the mid 1980s. Other surveys are conducted by consulting and law firm analytics companies such as Thompson Reuters, BTI Consulting, Citi Private Bank, and Hildebrant Consulting. But survey participants are largely confined to those who have purchased services from one of these providers, making these data of limited use to track trends. Legal magazine *The National Law Journal* publishes annual surveys of billing rates at top corporate law firms; like other industry studies, however, access to the data is expensive and is primarily targeted at benchmarking rates and compensation.

Lawyers' hourly rates are, of course, not particularly illuminating from an efficiency point of view. What matters is the value produced in an hour and how many hours how many lawyers bill to achieve results. Overbilling is a persistent concern in legal markets (Lerman 1999, Ross 1993, Parker and Ruschena 2011, Nelson and Simek 2013) but has not been the subject of systematic analysis. Moreover, hourly billing persists as the dominant form of pricing, accounting for about 84% of law firm revenues in 2014 in one industry study (Citi/Hildebrandt Consulting 2015), despite the disincentives it generates for adopting cost-saving practices and technologies.

The total cost of achieving particular legal results is also not the subject of careful data collection, although corporations have increased their use of internal metrics and tracking (Altman Weil 2018). It is possible to access systematically reported data on legal costs in some cases, such as bankruptcy, where public court records reflect the universe of bankruptcies filed in a jurisdiction (see e.g., (Bris, Welch and Zhu 2006) or using insurance claims data (see e.g., (Rahmati, et al. 2016)). Mostly, however, we have only anecdotes and self-reporting industry surveys. One such survey is conducted annually by the American Intellectual Property Lawyers

Association. In 2017, AIPLA respondents estimated the median cost of litigating a patent suit worth less than $1 million at about $500,000—per side, meaning that total costs will often exceed the amount at stake; this was a drop from the 2013 high of $700,000 per side. Combined costs for a suit valued between $10 million and $25 million were $4 million, down from $6.7 million in 2013 (American Intellectual Property Lawyers Association 2017). Studies have also been done of the costs of large corporate litigation. In a survey conducted among Fortune 200 firms by industry legal reform groups for a conference held by the policymarking arm of the U.S. federal judiciary at Duke University in 2010, Lawyers for Civil Justice et al (2010) found that average litigation costs in cases with over $250,000 in costs nearly doubled from $66 million per respondent to $115 million between 2000 and 2008, increasing in a sub-sample with consistent data over the period from .37% of firm revenues to .66%. U.S. expenditures on litigation were four to nine times higher than non-U.S. expenditures as a percent of revenue in multinational companies. Average legal fees for these large cases were $2 million. Whether these amounts are "too high," however, is difficult to assess (Lee and Willging 2010).

The Duke survey concluded that the cause of the increase in legal expenditures on litigation was not hourly rates but rather the number of hours and other litigation costs. Among these other litigation costs are the costs of engaging in pre-trial, increasingly electronic, discovery. In the Duke study, of the average $2 million in outside legal fees per case, $620,000 were attributable to discovery (Lawyers for Civil Justice 2010). A set of case studies conducted by RAND with a sample of Fortune 200 firms found expenditures on e-discovery in self-selected representative cases ranging from $17,000 to over $27 million, with a median of $1.8 million (Pace and Zakaras 2012). In the abstract, it is hard to say whether these costs are too high relative to the value generated, but study participants emphasized the lack of predictability of rules governing discovery as a component of the burden of e-discovery. And a telling statistic suggests the underlying inefficiency of the process: for every 1 page of evidence actually submitted in a trial, over 1000 pages are produced in discovery (Lawyers for Civil Justice 2010). Microsoft Corp. estimated for a rules advisory committee for the U.S. federal judiciary that for the average case in which the company is involved, they bear the cost of preserving close to 50 million pages, of which only about 150 are used in evidence.[24]

Further evidence of problems in the corporate legal market comes from the shifts in the partnership structure of the largest corporate law firms over the past two decades and their surprising fragility in the wake of the 2008 financial crisis (Ribstein 2010). Galanter and Henderson (2008) documented what they called "the elastic tournament" that emerged in large law firms in the 1990s and early 2000s: no longer was it true that an associate who put in long hours and hard work was rewarded with an equity partnership, to enjoy the fruits of the partnership into retirement. Instead, even partners could find themselves in a permanent tournament to hang onto their position and share of compensation in the firm. There was a substantial increase in the number of permanent non-equity lawyers associated with the firm,

[24] Advisory Committee on Civil Rules, Washington D.C. November 7-8, 2011, Appendix S, Microsoft Submission https://www.uscourts.gov/sites/default/files/fr_import/CV2011-11.pdf

including some newly "de-equitized" partners; indeed, the percentage of partners in the largest 250 law firms that were non-equity grew from about 10% in the early 1990s to close to 25% by 2006. Moreover, lateral partner hiring increased substantially. This shift was perhaps driven by the capacity for increasingly savvy and powerful general counsel at the largest clients (Gilson and Mnookin 1985) to judge lawyer quality and thus less dependent on law firm brand; sophisticated clients focus on which lawyer to hire, not which firm. What Rebitzer and Taylor (2007) called grabbing and leaving was clearly no longer restrained by the partnership payoff and, as Levin and Tadelis (2005) discuss, this could explain the shift from seniority- to productivity-based ("eat what you kill") compensation. Observers suggest that these changes also help to explain the increasing fragility of the large law firm model, as demonstrated by the spectacular collapse of venerable firms like Dewey LeBoeuf (Ribstein 2010, Harper 2013, Reeser 2015, Morley 2019).

Developing comprehensive and reliable measures of how well our corporate law firms are performing is essential and needs to be done not from the perspective of the law firms—whether and how they can increase their profits per partner—but from the perspective of corporate clients, and the economy as a whole. The anecdotal and incomplete data we have suggest that our legal markets are inefficient, failing to produce, at reasonable cost, the legal goods and services businesses need to compete in innovative and global markets and to comply with increasingly complex regulatory environments. This is what theory would predict, as I'll explore in more detail in section 5.

4.3. Problems in the personal services market

Turning from the corporate sector to the legal markets serving individuals and small businesses, the claim that these markets are not performing well is somewhat easier to make. The reason is not that we find lots of careful data collection here about what legal processes cost or how much lawyers charge or how much value the services generate—we don't—but because the most dramatic statistics we have in law show up here. These statistics are the ones that show that these markets are performing badly because, despite the density of legal rules and requirements in modern life, almost no-one can afford to purchase legal services.

Law defines the vast majority of daily interactions for ordinary consumers and citizens: the terms of employment, housing, health, family relationships, consumer credit, and more. Most of this law grows more complex and fragmented over time—meaning that successful navigation of myriad economic choices depends in part on access to legal help understanding the rules. Just about everyone regularly signs or clicks to agree to legal documents—leases, employment contracts, credit card, cell-phone, and other consumer agreements, online terms of service that they almost never read (Bakos, Marotta-Wurgler and Trossen 2014) or understand. For example, people routinely sign agreements that include arbitration clauses that in one study were identified and understood by fewer than 9% of subjects (Sovern, et al. 2015). Legal needs surveys show that at any point in time over half of all households are facing at least one significant problem—and on average two or three—for which legal assistance would be valuable (problems with work, housing, accessing health care, paying or collecting child support, etc.) (Hadfield and Heine 2016). Small businesses have regular legal issues to deal

with, just as larger corporations do: entering into contracts and managing disputes with suppliers, customers, and employees, managing regulatory requirements and compliance, filing for patents or trademarks. And, in one of the more unanticipated findings from the U.S. Department of Justice's investigation into the shooting of Michael Brown in Ferguson Missouri in 2015, investigators found that almost 16,000 people in that town of 21,000 had an outstanding arrest warrant—largely due to unpaid municipal fines and fees and failures to appear for hearings (the notices for which were often legally defective) (U.S. Department of Justice Civil Rights Division 2015). In another shooting highlighted by the Black Lives Matter movement, family evidence suggested that the reason Walter Scott ran away from police who had stopped him for a motor vehicle violation, leading to his being fatally shot in the back, was that he had an outstanding arrest warrant for unpaid child support. This was an issue that had trapped him for years in a cycle of falling behind on payments, being arrested, losing his job while in jail, and falling further behind. He had just landed a good job and was on track to pay what he owed, according to his family, and he feared losing the job and being back at square one if he was jailed (Robles and Dewan 2015). Legal assistance would have helped here: the use of jail to punish someone for contempt of a court order—such as an order to pay fines or child support—is not allowed by law if the reason for non-payment is inability to pay. But without legal assistance, getting a judge to observe this law can be difficult.[25]

Despite extensive daily interaction with law, fewer than 20% of households get legal assistance, even with erupted legal problems (Hadfield and Heine 2016, Sandefur 2014). An industry survey of small businesses found that 60% dealt with legal problems—contract disputes, compliance issues, problems with employees or customers—without seeking legal assistance (Legal Shield 2014). And over 80% of people facing eviction, collection, foreclosure, or resolving family disputes appear in court in the U.S. without lawyers (Hadfield and Heine 2016). A New York study found even more dramatic results: 99% of tenants facing eviction and borrowers facing consumer credit problems, 97% of those with child support problems, and 44% of those facing foreclosure were in court without a lawyer (Task Force to Expand Access to Civil Legal Services in New York 2010). The father of modern law and economics, and no bleeding heart, Judge Richard Posner resigned from the U.S. Court of Appeals in 2017 because, he said, of the high percentage of unrepresented litigants—55% - 60% in his appellate court—whom he felt were treated unjustly by the courts and his colleagues' refusal to allow him to step in to help them out (Liptak 2017).

Lack of legal help can be the result of beliefs that a problem is not "legal" (Sandefur 2014). In the New York study cited above, for example, only 4% of respondents answered "yes" when asked if they had legal problems. But people are so unused to working with lawyers that they don't really know what a 'legal' problem is. 47% of respondents in that study said "yes" when asked if they had specific problems which, an expert knows, implicate legal considerations such as problems with eviction, employment, consumer credit, divorce, or child custody and support. Moreover, although a systematic study of this has yet to be conducted, individuals appear to

[25] The entitlement to state-paid legal representation in the U.S. is limited to criminal matters; failure to pay fines or child support is a civil matter.

think that the only reason to contact a lawyer is to get help with a lawsuit, and indeed the legal needs surveys focus almost exclusively on erupted problems that have reached that stage. But corporate clients of course think differently: they routinely consult lawyers about the legal implications of decisions about products, organizational design, employment policies and actions, contracts, regulatory compliance, and so on. Corporate counsel are increasingly integrated into core business and risk decisionmaking. As one GC put it, "We are here to enable and protect value. It's not a question of legal says 'no', it's legal says 'I understand what you want to do, here's how you can approach it." (KPMG 2012, 9). Individuals and small businesses would similarly benefit from knowing the implications of the agreements they are signing (usually with the corporations who have plentiful high-end legal advice) and the actions they are taking to manage disputes with employers, co-workers, family members, and so on.

The principal reason that so few individuals and small businesses avail themselves of legal services is cost and availability. There are few systematic studies of the use of legal services (for an exception see (Institute for the Advancement of the American Legal System 2016)) but even without empirical investigation, it stands to reason that few can afford help when the average cost to ordinary consumers is roughly $270 (CLIO 2018) to $300 (Maheshri and Winston 2014) an hour.[26] Nearly 40% of Americans cannot afford $400 in unexpected expenses (Board of Governors of the Federal Reserve System 2019) and at $270-$300 an hour it does not take long to reach the point at which pretty much no-one outside the top income tier can afford legal assistance. Indirect evidence comes from U.S. Census data, which suggests that Americans (including those who are operating small businesses as proprietorships or partnerships) consume an average of 1.3 hours of legal help a year (Hadfield and Heine 2016). That number is very low relative to what we know casually about the frequency with which ordinary life involves a need to understand the legal dimensions of a situation or choice in our "law-thick" world.

Moving beyond the simple prediction that a procedure of almost any level of complexity becomes too expensive for many to manage at $250 an hour, there are some studies trying to estimate the cost of using the law. The National Center for State Courts surveyed lawyers in 2013 to develop estimates of the costs of a typical civil lawsuit in state court (where more than 95% of litigation takes place).[27] The survey produced a median estimate, per side, of roughly $120,000 for a professional malpractice case, $90,000 for a typical employment or contract dispute, $65,000 for a real property dispute, $50,000 for a premises liability action, and $40,000 for an automobile case (Hannaford-Agor and Waters 2013). These estimates are for cases that go to final disposition at trial---which is not how the vast majority of cases are resolved. But they do reflect the resources that a credible litigation threat has to be able to muster and the amount that in general has to be at stake before a lawyer working on contingency will be willing to take a case on. In a survey of closed cases in federal court, median costs were estimated to be about $15,000 for the plaintiff's side and $20,000 for the defendant's side in a stratified

[26]Maheshri and Winson (2014) looked at prices quoted for criminal, family or estate planning work on the websites by solo and small firm practitioners and scraped by Attorneyfee.com.
[27] http://www.courtstatistics.org/

sample that included both settled and litigated cases (Lee and Willging 2010). The median cost of filing a liquidated bankruptcy (Chapter 7) between 2004 and 2005, including court and filing fees as well as attorneys' fees, was $1,400 and $2,850 for a reorganization (Chapter 13), numbers that are high relative to the median income of a person filing for bankruptcy ($28,000) and relative to the amounts recovered by creditors ($800 and $1,6000 respectively) (Lupica 2010).

It is important to recognize that the legal claims brought by ordinary individuals as plaintiffs often do not involve a money recovery (for example, child custody or suits seeking injunctive relief such as reinstatement in a job or a declaration of bankruptcy.) In addition many, if not most, individuals and small businesses are in court in the position of defendant and therefore not in a position to share a monetary recovery with an attorney. Examples of these matters include collection, foreclosure, and municipal, misdemeanor or traffic violations that can trigger a host of disproportionate consequences such as loss of a driver's license, jail resulting in job loss, or loss of scholarships. Nonetheless, contingency fee cases, which receive a disproportionate share of attention in the literature, provide another window on the high cost of litigation. Hyman et al (2016) found that the median recovery in a medical malpractice case closed in Illinois between 2000 and 2008 was $300,000, yielding fees of about $100,000 for a contingency fee plaintiff's lawyer at the standard rate of 33%. In a remarkable data set that includes all cases conducted under contingency fee arrangements in New York (including cases never filed), Helland et al (2017) found a median recovery of $12,000 in settled cases and $30,000 in the 1.3% of cases that were adjudicated and won by plaintiffs. Even these lower amounts, however, are high relative to the amounts that might matter or be at stake for ordinary households in the U.S., where the median income is about $60,000 and an employment or injury dispute might well be simultaneously critical for the household but involve less than $5000. Contingency fees help to ease the access problem generated by high legal costs but they do not eliminate the obstacle of high cost. Kritzer (1997) found in a survey of Wisconsin contingency fee lawyers that about two-thirds of potential plaintiffs were turned away; presumably a substantial number of these are turned away because the amounts at stake are worth less than the anticipated legal costs.

From a welfare point of view, the question is why prices for legal services are so high as to price most individuals and small businesses out of the market. Economists looking at this question have approached it in terms of the labor market. Rosen (1992) emphasized the role of the substantial human capital investment required to practice law in explaining high lawyer incomes, calculating that properly adjusted, the rate of return to legal education for those with the ability to continue on to law school was not out of line with the rate of return to higher education generally. This account is overly narrow. It fails to ask whether the costly educational and licensing requirements to practice law and the costly procedures designed by lawyers are themselves efficient (Hadfield 2000). Put simply, does everyone with a demand for legal services need one-on-one personal services delivered by someone with 7 years of post-graduate education? Does the resolution of every legal problem require complex documents and procedures? I'll discuss this further in Section 5 below, but the answer is clearly, no.

There is also important indirect evidence that, even assuming existing educational and licensing requirements are efficient, the existing business model in the personal services market is highly inefficient. A study of actual billing data from almost 70,000 solo and small law firm lawyers using CLIO-brand law practice management software found that these lawyers were engaged in billable work only 2.4 hours a day. Of that, they invoiced only 1.9 hours and collected for only 1.6 hours (CLIO 2018)—for gross revenues of roughly $100,000 a year.[28] For an average 8 hour day and at the average hourly rate in the study of $270, this implies that the *effective* hourly rate for legal work in these small firms is about $50, or about 20% of the price charged to clients. Taking into account that lawyers in this dataset reported working an average of 50 hours a week, the numbers are even worse: barely more than $40 an hour and just 15% of the rate clients have to pay.

Data from the Economic Census (2012) suggests that the CLIO lawyers are in the lower tiers of law firms by revenue, with the average among the 13% of law firms (with payroll—many solo practitioners practice without any paid employees) with revenues of $100,000 a year or less. But these Census data also suggest that CLIO lawyers are not an exception in the solo and small firm market as a whole. As discussed earlier, the bottom 40% of law firms by revenues bring in an average of $135,000 a year. Assuming these are solo practitioners working 48 weeks a year implies a daily take of about $560, which is the equivalent of collecting for 2.1 hours a day at the CLIO average hourly rate of $270—fewer if these higher-revenue lawyers charge higher rates. And, as discussed earlier, if the bottom 92% of law firms correspond to the firms serving the personal services market, and the average number of lawyers in those firms is 2, then average annual revenues throughout this sector are about $150,000—or about $625 a day. Again, at $270 an hour, that equates to a daily average of being paid for 2.3 hours of work.

What are lawyers doing all day if not engaging in billable legal work that makes use of their expensive human capital? Lawyers included in CLIO studies report that they spend 3 of the "missing 6 hours" on administrative tasks: office administration, generating and sending bills, configuring technology, and collecting payment. They spend about 2 hours a day trying to acquire clients. The remaining hour is spent on meeting licensing and continuing education requirements (CLIO 2017). These results make it clear that throughout the personal services sector, law office practice is highly inefficient. Lawyers are highly educated professionals. Why are they spending the bulk of their days engaged in tasks for which they are untrained and ill-suited, and often ones that could be done by lower-paid workers or technology?

Putting all of this together, it is clear that the high price of legal services is not the consequence of high compensation for lawyers. If compensation to lawyers were the only determinant of price (of course administration, client acquisition, and continuing education costs cannot be driven to zero), then hourly fees for lawyers in the personal services market would be closer to $50 or $60, instead of $270. High prices, and therefore lack of access for the vast majority of individuals and small businesses, is a consequence of an inefficient business model. As I'll discuss further in Section 5, that business model is imposed by the regulatory environment

[28] Assuming 48 weeks of work a year.

lawyers have created through self-regulation. It is the most important determinant of the high cost of legal services.

Pricing practices also hinder access to legal services, because of a lack of transparency and the tendency for services to be offered only on full-scale representation terms. The hourly rate that is the dominant form of pricing does not provide consumers with reliable information about how many hours might be required for the problem they face, or much capacity for monitoring. In one study, "the overall/final cost is not clear" is the third-most frequent reason given by consumers for not obtaining legal help ((CLIO 2018). (Corporate clients devote substantial resources to monitoring hourly billing.) Even contingency fees, in those settings with sufficient monetary recoveries at stake that they are feasible, present obstacles to competition as consumers have little basis for evaluating the value a particular lawyer is offering. Rules about how costs are paid—which generally require that costs be deducted from recoveries before the lawyer's share is calculated and therefore which are paid 100% by the (successful) plaintiff--make this evaluation even more complex. There is a robust literature on contingency fees, but we still don't know how to assess from a welfare point of view the fact that despite the presence of dramatic differences in the quality of lawyering in this sector, contingency rates rarely depart from an industry standard of 33% (Kritzer 2004, Brickman 2003).

The most transparent and useful form of pricing is a flat or fixed fee. In a world with robust advertising, these forms of pricing allow comparison shopping, on both quality and quantity. Some legal services, such as uncontested divorces, wills, traffic, immigration, and criminal matters that are not expected to go to trial, are available at flat rates (Kritzer 2002, CLIO 2017). Flat fees, however, represent only a small fraction of billing arrangements—less than 16% (CLIO 2017). This low availability persists despite the fact that in a survey of consumers, flat-fee pricing is the third-most popular answer to the question of what attracts them to a law firm, following on "responds to first call/email right away" and "offers free initial consult" (CLIO 2017). It may be that the availability of flat fee pricing has fallen over time. In a 1978 survey conducted in Phoenix, nearly 80% of lawyers quoted a flat fee for routine matters including uncontested divorce, uncontested bankruptcy, and simple wills (Cox, DeSerpa and Canby 1982). A shift away from flat fees may be consistent with the overall shrinkage of the personal services sector from 45% of law firm revenues in 1982 to 24% in 2012. Shepherd & Cloud (1999) point out that prior to the 1950s in the U.S., almost all lawyers worked on flat-fee arrangements. They argue that hourly fees emerged in response to expanded discovery in litigation and the increased uncertainty this injected into legal practice. It may be that flat fees have also fallen out of use in the personal services sector due to a shift towards litigation work and/or increased uncertainty in even "routine" legal work as a result of increasing legal complexity (Hadfield 2000) Notably, even in the study conducted in the city of Phoenix, the flat fees quoted for routine work varied substantially, leading the authors to comment that "it is difficult to imagine . . . that such fee dispersion could exist unless consumers were almost totally ignorant of available market alternatives" (Cox, DeSerpa and Canby 1982, 312). A drop in the use of flat fees may also be a consequence of a shift in the mix of consumers seeking legal services, away from those willing to accept lower quality to those able to afford higher quality. Smith and Cox

(1985) found that the presence of both hourly and fixed fees in the market for lawyers allows firms and clients to sort according to the level of quality sought. In their analysis, firms that invest in reputation are able to offer hourly fees and signal to the market that they produce high quality results; those that do not invest in reputation charge fixed fees and, they assume, attract clients who prefer lower quality (fewer hours). This would be consistent with the hypothesis that the shrinkage of the personal services sector from 1982 to 2012 is due to lower- and middle-income clients being priced out of the market. And the disappearance of flat fees may also be a perverse result of the relaxation of the advertising restrictions in the landmark case of *Bates v Arizona Bar* (1977) that prompted the Cox et al (1982) Phoenix study: still retaining market power by virtue of the regulatory constraints that persist (and which I discuss below), lawyers may have shifted away from flat fees to hourly rates to recreate the low transparency that a world without advertising allowed.

5. The impact of self-governance on the production of legal services

Although a precise characterization of the nature and the extent of problems in both the corporate and personal legal services markets is not possible, given the dearth of reliable data and careful studies, it seems likely that these markets are not working well. Most consumers are completely priced out of access to services that seem essential to so many features of daily life, and corporate clients express high levels of dissatisfaction and have moved relentlessly to find substitutes for the services provided by corporate law firms. Why?

The answer almost certainly lies in the regulatory environment in which legal services are produced and sold. The markets in which private legal services are delivered are more restricted than other professional markets; indeed, they are some of the most restrictively regulated markets in the economy. As laid out in Section 3, above, in the U.S. and Canada, and many other jurisdictions around the world, only licensed lawyers may do any type of legal work, and there are extensive restrictions on business models and contracting.

Many professions, of course, are subject to occupational licensing: Kleiner and Krueger (2013) estimate 29% of American workers require a license to operate, in occupations ranging from practicing medicine to braiding hair.[29] Licensing can serve legitimate economic functions. The most commonly articulated goal of licensing is to solve a lemons problem (Akerlof 1970, Leland 1979): increase the quality of an experience or credence good by requiring practitioners to demonstrate minimum levels of competence in order to enter the market. Licensing can also help to solve moral hazard problems. Professionals (even those with sufficient skill) have an incentive to cheat on quality and/or supply unneeded services when they combine the function of diagnosis and treatment; licensing can reduce the incidence of cheating by raising the threat of fines or the loss of future rents for cheaters who are caught by licensing boards. Even if quality is perfectly observable, licensing may increase welfare by discouraging entry by potential entrants who learn during a licensing phase (education or apprenticeship) that they will not be competitive because of either higher costs or lower ability (Alderighi and Piga 2014).

[29] (Gittleman and Kleiner 2016) suggest this number may be a bit high.

Professional associations may increase quality by blunting competition that undermines the efficacy of reputational incentives (Kranton 2003) and licensing can raise the number of practitioners choosing to supply high quality services by imposing minimum human capital requirements that reduce the marginal cost of quality (Shapiro 1986).

Complicating the study of occupational licensing is the fact that, particularly in professional services, licensing is often largely administered by members of the profession. Self-regulation brings with it the benefit of regulation by those who are expert in the field, which may lower the transaction costs of regulation (Trebilcock 1983), improve the quality of regulation (Grajzl and Murrell 2006), and harness the self-interest of honest and competent fellow professionals in ensuring high quality and a solution to the lemons problem (Núñez 2007). But it also brings the risk of deliberate or misguided anti-competitive behavior, raising professional incomes at the expense of consumers and the public. And this is the hypothesis that needs to be entertained, and studied in much greater depth, in the context of legal markets.

In this section, I'll first review the existing literature on the impact of self-regulation and licensing in legal markets and then identify several critical questions that still have not received adequate attention.

5.1. *What we know: the literature on professional self-regulation*

Most existing work on the impact of self-governance and licensing in legal markets has been undertaken by economists interested in the study of professional self-regulation more generally. Indeed, one of the first theoretical analyses of professional self-regulation arose in the context of legal markets and specifically debates in the 1970s in England about the impact of a 'para-profession' supplying an alternative to lawyers' services in the conveyancing of real property. Shaked and Sutton (1981) show that a self-regulating profession will impose a quality threshold that exceeds the welfare-maximizing level of quality (resulting in a profession that is too small) and that allowing a para-profession to enter improves welfare. Moreover, they show that "the size of para-profession which leads to the greatest improvement in welfare is also that which leads to the greatest loss in income for the members of the original profession" (p 234).

Gehrig and Jost (1995) extend the Shaked and Sutton model by considering the incentives of suppliers to establish a self-regulatory "club" to correct market failures due to limited consumer information about quality. Club members, they show, have an incentive, provided monitoring and enforcement costs are not too high, to establish minimum quality thresholds and enforce them if consumers regularly migrate to new providers. Migration undermines the incentive of individual suppliers to maintain quality in a market in which quality is only discovered over time, but migration also creates the incentive for club members to care about the quality provided by other members when migrating consumers expect their new supplier to provide quality at the same level as their previous one. This approach is a version of the more general analysis of collective reputations (Tirole 1996).

Gehrig and Jost (1995) frame a welfare analysis in terms of the comparison between self-regulation and price and quality regulation by a government regulator. In their framework, because the self-regulating group has the monopolist's incentive to limit supply, self-regulation will only be preferred to government regulation if the regulator is sufficiently at a disadvantage relative to club members when it comes to the ability to identify optimal regulatory standards. But this begs a number of questions. What are the information advantages of self-regulatory organizations (SROs)? How effectively will SROs exercise their regulatory authority? Gehrig and Jost do not analyze the behavior of the club itself; they merely verify that individual club members (who are assumed all identical) have an incentive to achieve an equilibrium in which all club members supply minimum quality. (Tirole (1996) provides analysis of cases in which, once spoiled, collective reputations are difficult to repair.)

Some of these questions have been explored in the context of financial regulation. Pirrong (1995) argues that when clubs are competing—as in the case of stock exchanges—they lack incentives to implement first-best regulatory rules (prohibiting price manipulation for example) because club (exchange) members do not bear the full cost of rule violations; Pirrong also questions whether exchanges are sufficiently competitive. (For a contrary view, see Mahoney (1997).) DeMarzo, Fishman and Hagerty (2005) model the incentives of a monopolist SRO to establish an enforcement policy to detect fraud by its members. They show that the SRO will choose an overly lax enforcement policy, relative to the one that would be chosen by consumers (who bear the cost of enforcement in both regimes through a tax on transactions.) They also show that if a government regulator—whom they assume has higher costs of regulating due to poorer information—may also investigate for fraud, the SRO has an incentive to increase the intensity of its enforcement, just enough to deter government enforcement. Stefanadis (2003)) also shows that the threat of government regulation can induce a monopolist SRO to improve the quality of its regulation; his model assumes that government can eventually learn enough to implement optimal regulatory standards (which are regularly changing due to innovation) but that, unlike the SRO, there is a delay in approvals for new technologies. The SRO wants to avoid government regulation in order to introduce new technologies sooner and believes that government will intervene if the SRO gains a reputation for sub-optimal regulation.

In the context of law's SROs—bar associations and law societies—the threat of government intervention if SRO regulation is too lax is very weak. Unlike financial markets, where there is a well-established regulatory apparatus of securities and banking regulators capable of jumping into new regulatory fields as needed, there are no established legal regulators in most governments around the world. In the U.S., after a successful campaign organized by bar associations in the early twentieth century (Hadfield 2017, Rigertas 2009), oversight of legal markets was vested in state supreme courts, which lack any conventional policy apparatus, under a murky assertion of a constitutional separation of powers that deprives legislatures of the authority to act. In jurisdictions such as Canada, where the authority to regulate is formally delegated by legislation to provincial law societies, there is little capacity retained within government to monitor the effects of this delegation and to intervene and little in the way of formal oversight of the delegation (Rhode and Wooley 2012).

Against the theoretical backdrop of the efficacy of SRO regulation, the central questions for empirical economists have been whether the costs of licensing, arising from restrictions on suppliers or the market power of a self-regulatory body, justify the benefit of improved quality, and whether quality could be assured through less supply-restricting means such as certification (Kleiner 2006).

In most occupations, licensing raises earnings. Kleiner and Krueger (2010) estimate that in the U.S. federal licensing requirements raise wages in licensed occupations relative to comparable unlicensed occupations by 15%; the estimate across all levels of licensing (federal, state, and local) is 18% (Kleiner and Krueger 2013)). Within specific occupations, studies have shown that licensing increases earnings for dentists (Kleiner and Kudrle 2000, Kleiner, Introduction and Overview 2006), physicians (Anderson, et al. 2000, Kleiner and Krueger, Analyzing the Extent and Influence of Occupational LIcensing on the Labor Market 2013, Kleiner, Marier, et al. 2016), and teachers (Angrist and Guryan 2004). Licensing also restricts mobility across state borders, which can increase both earnings and prices (see Kleiner (2013) for a collection of these studies.)

Licensing also raises prices (Kleiner and Krueger 2013). Kleiner et al (2016) estimate that increasing restrictions on the scope of practice for nurse practitioners raises the cost of a well-baby visit by 3-16%. Kleiner and Kudrle (2000) estimate that restrictions on the scope of practice by dental hygienists raises the price of dental services by about 11%; Wing and Marier (2014) find an increase of 12%.

The handful of law-focused studies support these more general findings: prices and earnings appear higher under licensing and other restrictions imposed by lawyers' professional regulation. Domberger and Sherr (1989) find that the elimination of licensing requirements for conveyancing in England decreased prices and price discrimination. With respect to earnings, Kleiner (2000) estimates that licensing increases lawyers' earnings by about 10%, based on a comparison of lawyers' earnings with those achieved in occupations with comparable educational requirements (economists and those working in human resources.) Estimates like this, however, may miss other differences between the occupations compared. Two studies have sought to exploit differences in bar examination pass rates between states to identify the impact of licensing. An early study found little evidence that the (relatively slight) differences in regulatory intensity and extent of entry control (as measured by bar passage rates) across U.S. states impact prices for standardized procedures (simple wills, uncontested divorce, defense of first DUI citation, adoption of a child) (Lueck, Olsen and Ransom 1995). But more recently, using a common national exam and the variance in threshold scores required for passage by different state bar associations, Pagliero (2013) finds good evidence that entry-level incomes for recent law school graduates increase as bar passage rates decrease. Winston, Crandall and Maheshri (2011) find the most robust evidence that lawyers throughout the income distribution (that is, small and large firm lawyers) enjoy substantial earnings premiums, which they estimate grew significantly over the past 40 years and were about $71,000 per practicing lawyer by 2004.

The fact that prices and earnings are higher with occupational licensing does not of itself tell us whether licensing increases or decreases consumer welfare. Higher prices may be due to successful rent-seeking through regulatory capture by the profession (Stigler 1971). But they may also be the result of the improved quality of services that the profession and a public interest or market failure theory of occupational licensing assert is the goal of regulation (Arrow 1963, Leland 1979). In many occupations, however, licensing does not appear to increase quality (Kleiner 2006, Cox and Foster 1990). Kleiner (2006) collects several studies showing that student outcomes are not affected by whether their teachers are licensed or not. Studies of dentists are mixed: Holen (1965) concludes licensing increases quality; Carroll and Gaston (1981) finds evidence that quality of care is reduced by stricter licensing requirements and suggest this is due to limited availability of dentists; Kleiner and Kudrle (2000), seeking to improve the quality measures used in these earlier studies, find no evidence that licensing increases quality. Similarly, there is little evidence that doctors provide higher quality care than nurse practitioners across the set of services that nurse practitioners are licensed to provide (Kleiner, Marier, et al. 2016). A randomized controlled trial in the U.K. found that patients receiving care from nurse practitioners received the same quality of care and reported higher levels of satisfaction and information than those receiving care from physicians (Kinnersley, et al. 2000). A review of the medical literature on the use of nurse practitioners in emergency rooms similarly found nurse practitioners provided care at the level of a mid-grade resident, reduced wait times, and generated higher patient satisfaction (Carter and Chochinov 2007).

Studies evaluating the impact of regulation on quality in legal markets, however, are practically non-existent. Empirical work capable of identifying causation is difficult to conduct in the legal sector due to the limited data on legal fees and costs (there is almost no detailed government data collection in this regard), the difficulty of assessing the quality of service, and the low variance and long-term stability and uniformity in regulatory standards across and within jurisdictions. Muris and McChesney (1979) compared consumer satisfaction and outcomes achieved in child support matters between individuals who retained the services of a conventional law firm and those of a clinic that engaged in extensive advertising and lower pricing. They found that satisfaction was higher and results better among the clients of the low-priced clinic—perhaps suggestive that quality does not require propping up prices or limiting advertising. In a more directly targeted and suggestive "secret shopper" study conducted in the U.K. – where significant legal work can be done by providers who are not licensed lawyers — regulators evaluated the quality of wills drafted by licensed solicitors and unregulated will-drafting companies. They found a high rate of errors as judged by an expert panel (25%) but no difference in the rate between licensed and unlicensed providers (Legal Services Consumer Panel 2011).[30] Legal scholars critical of professional regulation limits have

[30] This result echoes a study discussed in Cox and Foster (1990), in which FTC researchers compared three regimes for regulating television repair: a licensing regime, an unrestricted regime, and a regime in which consumer fraud complaints prompted a regulatory board to investigate by having investigators bring a TV with known problems to the allegedly fraudulent shop. The study found a rate of parts fraud (replacing parts that didn't need replacing or

long emphasized the paucity of evidence to support lawyers' claims that services provided by unlicensed providers are inadequate (Rhode, Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice 1996) and studies of alternative providers in the U.K., which has never required a license for the provision of legal advice, review or drafting of ordinary documents, have convincingly shown that non-lawyer services can be both higher cost, and higher quality (Moorhead, Sherr and Paterson 2003).

Seen through the lens provided by the literature on occupational licensing, then, the case for regulating legal services seems weak. On the view that legal regulation is primarily entry control, there is evidence it increases prices and little evidence (or reason to think, based on other professions) that it raises quality. Based on this, Winston, Crandall and Maheshri (2011) and Winston and Karpilow (2016) call for deregulation of the legal profession, meaning elimination of licensing (particularly professionally controlled education) requirements.

But the conventional view of occupational licensing as entry control, which raises prices and may or may not shore up quality, clearly faces limits in helping us understand the state of our legal markets and the costs and benefits of the regulation that self-governance has generated. The existing studies often do not take into account the multiple markets in law, for example, and they don't address the core problem of apparently inefficiently low access to legal help. As discussed earlier, the solo and small firm practitioner market is arguably flooded with lawyers—on average they appear to have lots of excess capacity, doing billable work only two or three hours a day. Few are making incomes that seem out of proportion with their investment in education and their opportunity costs. Meanwhile, the vast majority of consumers face an hourly rate of $250-$300 an hour that puts legal services out of reach. A conventional analysis that points to professional control over supply to prop up prices, either to overcome market failures or to secure rents, doesn't seem to address the core economics of these individual client markets. As discussed in section 2.3, there are clearly numerous technological and organizational efficiencies that could be deployed to lower the effective cost of legal help. On the corporate side, where we find the bulk of the profession, rents may well be generated by supply restriction—although the excess capacity of lawyers in the solo and small firm market suggests there is no need to limit entry artificially. But it is still difficult for the supply-restriction account, alone, to explain why these markets, too, appear not to be effectively satisfying client demand in the sense of generating the type and quality of services that large corporate clients are looking for.

What the literature has missed is two-fold. First, it has not focused on the impact of the control professional regulation has exerted over the business model of law. Second, it has focused on the static impact of regulation, not the dynamic impact. Together, I argue, these two considerations present a much more satisfying account of why our legal markets are not performing well. That account, which I lay out in the next section, emphasizes that the control

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charging for parts not replaced) of 50% in both the licensed and the unrestricted regime. The regime that did not require licensing but investigated fraud reports with this kind of secret shopper activity experienced a fraud rate of only 20%.

professional regulation exerts over the business model of law drives up the cost of legal services, both in the short run by imposing a highly inefficient business model on the practice and, more importantly, in the long run by choking off innovation that would lower costs and increase quality.

5.2. *The impact of professional regulation on legal innovation*

As detailed in Section 3, above, professional regulation imposes multiple restrictions on the business of law that go beyond entry control. These includes constraints on advertising and marketing, contracting, financing, and organizational form. The key limitations go under the rubric in the legal literature of prohibitions on fee-sharing and the corporate practice of law. Together these limitations rule out business models in which lawyers are either employed by or share profits or revenues with people or entities other than locally licensed lawyers.

Hadfield (2008) and Hadfield (2014) explore how these regulations of the business model of law restrict innovation in the corporate and personal services markets, respectively. The impact comes through the combination of a lack of diversity in the composition of accumulated legal human capital and restrictions on access to capital, branding and communication with potential customers, and scale.

5.2.1. Diversity in human capital

Let's start with the lack of diversity in human capital in law. Innovation is a result both of specialization and diversity in knowledge. Feldman and Audretsch (1990) presented early evidence for the proposition that innovation is driven by diversity, both within geographical regions and within the firm. The economics literature has focused primarily on the geographical implications, exploring the relative advantages of specialization and agglomeration or complementary clusters in the distribution of industries. Glaeser et al (1992) first presented evidence that cities displaying industrial variety enjoyed higher growth than those displaying regional specialization and argued that this was evidence in favor of Jane Jacobs's (1969) view that knowledge spillovers between industries were more important than the spillovers within industries emphasized by Marshall (1890), Arrow (1962) and Romer (1986). In a review of the dense literature that has followed on this early work, Beaudry and Schiffauerova (2009) find the evidence mixed on the question of the relative benefits of specialization and diversity, but suggest that the evidence points to greater returns to specialization in low-tech mature industries and greater returns to diversity in high-tech industries. Hong and Page (2001) present a compelling theoretical case for improved problem solving with heterogenous agents. A recent empirical study on Danish firms, finds that educational diversity is positively associated with productivity, especially in white-collar occupations; this study also observes that careful empirical work in this area is scarce but sees a consensus in case studies for the proposition that skill diversity promotes productivity (Parrotta, Pozzoli and Pytlikova 2014).

What does this literature tell us about law? On the one hand, existing legal services are clearly a mature, low-tech but high skill context. On the other hand, it is precisely the failure to innovate with technologies and the excessive reliance on customized handcrafted solutions even in standardized contexts (Susskind 2010) that has arguably kept the price of legal services high. Legal services today use little technology, particularly in the consumer sector, but it is clear (as discussed in Section 2, above) that there are uses of technology that could decrease costs and potentially increase quality in law: web-based legal advice, natural language processing techniques to review and analyze legal rules and documents, AI-based systems for generating legal arguments, discovering patterns in legal decisionmaking and risk exposure and recommending strategies, for example.

The topic is ripe for more careful empirical investigation, but it does seem safe to conjecture that law is much too far over on the specialization end of the spectrum. Law is characterized by a highly homogeneous "idea pool." Particularly in North America, where the scope of the professional monopoly extends across the full range of legal work, from simple and routine to complex, essentially everyone authorized to participate in the industry was selected using the same admissions tests, has received essentially the same education, passed essentially the same licensing exam, and now practices in work environments that are dominated by identically-trained lawyers. Legal work primarily involves lawyers interacting with other lawyers—in negotiation, regulation, and dispute resolution. Furthermore, again primarily in North America where legal education is almost exclusively offered at the graduate level for those seeking to become licensed lawyers, few outside the profession are, or perceive themselves to be, competent to evaluate legal work. This differentiates law from, for example, finance and accounting: many outside of the formal financial professions have basic financial competence to evaluate the work of financial experts.

This high degree of homogeneity likely improves performance on specifically legal tasks and processes as currently constituted, through shared knowledge, frameworks, and norms that reduce transactions costs and improve coordination (between opposing counsel in a dispute or negotiation, for example.) But it also likely chills innovation and the development of novel methods, processes, and technology for achieving legal outcomes. Lawyers are trained to execute on existing legal methods; they are not trained to analyze and understand the fundamentals of what their clients are trying to accomplish. Or, as a now well-worn anecdote in modern critiques of the legal profession expresses it, they understand their job to be the production of drills, not holes in wood (Susskind 1998).

5.2.2. Access to capital and diversification of risk

Innovation is an inherently risky proposition. Although economic historians continue to debate the relative merits of the corporate and partnership forms (Guinnane, et al. 2007), the corporate form offers a range of risk-allocation options that are not available to the partnership form. The partnership form may well be optimal for some professional services providers for incentive and monitoring reasons (Fama and Jensen 1983, Greenwood 2003, Levin and Tadelis, Profit Sharing and The Role of Professional Partnerships 2005) but in professional services other

than law—where the corporate form is available as an alternative to partnership—we see that partnerships only comprise a portion of the industry. In a survey of the governance form adopted by the top 100 professional services firms globally, for example, Greenwood and Empson (2003) found that only 56 in accounting, 18 in architecture, 17 in management consulting and 0 in advertising operated as partnerships. All 100 in law operated as partnerships, but this only reflects the impact of professional regulation in law denying access to the corporate form.[31]

Denying legal services providers access to the corporate form limits the capacity to take on the risk of innovation. There are several reasons. First, because any investment in law must be financed by withheld partner compensation or loans secured against partner compensation, we see relatively limited willingness to experiment. This fundamentally makes sense: investments made by law firm partners in the partnership are undiversified. We shouldn't expect undiversified investors to bet on highly innovative technologies, which by their nature have a high failure rate. By cutting law off from capital markets—especially from venture capital—professional regulation cuts law off from innovation. The problem is not that lawyers are inherently risk averse; it is that risk aversion makes sense for undiversified investors.

Second, the prohibitions on the corporate practice of law exclude lawyers from the benefits of a risk-sharing structure in which owners bear most of the risk and employees, compensated with salary or wages, are largely insulated from risk. This effect is reinforced by the prohibition on fee-sharing, which deprives law businesses of access to contracts as a risk-sharing device. Lawyers are unable to enter into the types of co-development agreements that support innovation in other industries. If a law firm wants to draw on the services of technology experts such as software or machine learning engineers to develop data analytic or AI-based products or processes, for example, it has to do so on the basis of a fee-for-service contract, rather than a profit-sharing contract. This not only limits the incentives of the technology expert, it also places all of the risk of the endeavor on the law firm's (lawyer) partners.

Third, a key benefit of the corporate over the partnership form is the ability to lock in capital for long-term investments: partners can withdraw their capital at will whereas shareholders may only sell their shares—changing the ownership of shares but not withdrawing the capital from the firm (Blair 2003). This is recognized by economic and legal historians as an important reason for the emergence and ultimate dominance of the corporate form (Dari-Mattiacci, et al. 2017). Until the last few decades, this shortcoming of the partnership form probably had little impact on law. Law was clearly a human-capital intensive service industry that did not require substantial technology and growth could be accomplished with organizational innovations of the traditional client-lawyer relationship and fee-for-service business model. Moreover, traditional law firms enjoyed long-lived and durable partnership structures, reflected in the

[31] Law firms in many jurisdictions can organize as limited liability corporations or professional corporations, but all shareholders must be lawyers licensed in the jurisdiction and governance is comparable to the partnership form.

promotion-to-partnership tournament well-studied in the economics of large law firms and discussed in Section 4, above.

But beginning in the 1990s, two key shifts likely significantly raised the costs of the imposed partnership form for law. First was the emergence of technologies that could substitute for human capital: digital communications, large-scale data analytics, automated search, and, increasingly, machine learning. Investing in these technologies probably requires long-term commitments of capital and greater risk to innovate business models. Second was the breakdown of the promotion-to-partnership tournament and the emergence of the 'elastic tournament' (Galanter and Henderson 2008) that saw a rapid increase in the amount of lateral movement of partners between firms. As Morley (2019) has documented from a study of the sometimes stunning collapse of 37 large American law firms over the past thirty years, the ease with which partners can withdraw their capital from the firm—and the incentive they have to do so as soon as the firm is at risk of financial difficulties, in order to avoid being the last partners left to bear the full cost of bankruptcy—sets up a fragility that makes long-term investment particularly difficult to undertake.

Even in more stable contexts, the governance structure of a partnership also may play a role in curtailing incentives to undertake the risk of innovation. Even when a law partnership is formally organized as a professional corporation, potentially with a non-lawyer management team, any major decisions in the firm—such as a significant investment in innovation—must pass muster with a majority of the lawyer shareholders of the firm. This governance structure appears to be inherently biased against innovation. Senior partners who are more likely to play a significant role in firm decisionmaking have a shorter horizon for seeing the rewards of investment than their junior partners and associates on the partnership track and hence are less likely to support innovation (Greenwood 2003).

Finally, because only individual lawyers can be licensed in most jurisdictions, significant regulatory risks associated with an innovative approach to legal work are borne by individual lawyers. A corporation that ventures to provide legal services runs the risk of violating laws criminalizing the unauthorized practice of law. With diversified investors this risk may be manageable. But any individual lawyer who works with or for the corporation puts their entire livelihood at risk, if they are deemed to have violated their 'ethical' duty not to aid in the unauthorized practice of law.

5.2.3. Branding and search

The incentive to take on the risk of innovation resides in the ability to capture a future stream of increased revenue. Professional regulation in law, however, significantly limits the ability to capture those future revenues.

Capturing future revenues requires linking any innovation, especially if it relates to customer service and reputation, to the identity of the innovating firm. If (imaginary) legal services

provider ValueLaw PC invests in innovative methods of reducing the cost of legal proceedings, for example, it needs to establish that reputation in the market and consumers need to be able to link past experience to beliefs about future behavior of the firm. Professional regulation in law hampers the ability to do this. To begin with, many jurisdictions directly limit the ability of a law firm to identify with a distinctive brand; law firms in these jurisdictions must be identified with partner names only. This creates some friction in establishing a durable brand—although some jurisdictions make an exception for firms that have named themselves after a now deceased or retired partner. [32]

The bigger obstacle to capturing the returns to innovation, however, arise because it is difficult to assign those returns to a branded entity. This difficulty arises because lawyers are prohibited from signing covenants not to compete and such covenants are unenforceable. This limits the ability of a law firm to prevent departing lawyers from taking clients, and other lawyers on a team, with them. This limits the incentive to invest in innovations, especially process/organizational innovations. (This inability to constrain rainmaking partners from taking clients and their entire team of partners and associates with them also contributes to the fragility of the large law firm documented by Morley (2019).) Moreover, although the proposition has not been seriously tested due to the limited use of technology in today's law firms, it is possible that these professional rules would also enable a departing lawyer to replicate technologies developed at the firm to deliver services. This would follow from an interpretation that prohibiting the use of such technologies would be a restriction on the "right of a lawyer to practice" limiting their "professional autonomy" and could be rationalized as necessary to avoid limiting "the freedom of clients to choose a lawyer."[33]

5.2.4. Scale

Significant investments in innovative technology require the potential for significant scale. Hence perhaps the biggest obstacle to innovation is the way in which professional regulation, mostly indirectly, limits the scale of legal businesses.

The scale of a legal business is limited in the first instance in countries like the U.S. by the state-by-state approach to licensing. This manifests especially in the personal services sector. Large corporate law firms do appear to have national practice, but this is largely achieved because these rules tend not to be aggressively applied in the context of large corporate clients which are themselves operating at national if not global scale (which I discuss in more detail, below.)[34]

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[32] For example, Georgia Rules of Professional Conduct Rule 7.5(e), New York Rules of Professional Conduct Rule 7.5(b).

[33] ABA Model Rules of Professional Conduct Rule 5.6 and Comment on Rule 5.6.

[34] At the global level, nationally-based regulation limits the capacity to form truly global law firms (Hadfield, The Role of International Law Firms and Multijural Human Capital in the Harmonization of Legal Regimes 2009)

A bigger impact on scale arises from the imposed governance structure of a partnership. The partnership model relies on a collegial form of governance, rather than hierarchical control. This form of governance becomes costly and unwieldy at large scale (Greenwood 2003, Galanter and Henderson 2008). In addition, cost-reduction in law depends on finding and exploiting opportunities for standardization and the building of a brand based on consistent application of processes and standards. Delivering standardized and consistent service, however, requires hierarchical monitoring and formal control, which is harder to achieve in a collegial partnership setting. Moreover, as Levin and Tadelis (2005) show, as compared to a company paying fixed wages and bonuses, a partnership will tend to have fewer partners but they will be of higher quality. This incentive to restrict the size of the partnership can generate higher overall profits, however, if quality is hard to judge and hence there is a countervailing incentive to add excessively low-quality practitioners who can be passed off as high quality. This benefit is lost if services become more standardized and experts no longer outperform the market in assessing quality.

The impact of the partnership form on scale may be especially acute in the personal services market. As we have seen, the corporate services market tends to siphon off the highest quality lawyers as judged by, for example, law school rank. Lawyers in the personal services market are likely to be of both lower average quality and greater variance. This makes a partner's formal and informal exposure to the risk of a low-quality partner greater in the personal services market. The formal exposure arises from conventional partnerships, in which partners are liable for each other's malpractice. This risk has been limited or eliminated in some jurisdictions in the last several years as lawyers have been allowed to form limited liability partnerships or professional corporations. The informal risk to reputation from poor performance by one's partners however persists. The corporate form provides more tools for managing the risk of low-quality performance: as employees, lawyers could be monitored more intensively, required to adhere to practice protocols, and fired for poor performance. Getting rid of a partner is more costly and other rules of professional conduct prohibit a lawyer from submitting to oversight of his or her professional judgment.[35] Smaller firms limit the risk of exposure to low-quality partners.

A further restriction on the capacity to achieve scale arises from the rules prohibiting fee-sharing and referral fees with non-lawyers. This prevents lawyers providing their services through a branded website operated at large enough scale to reap the benefits of investments in improved reputation, for example. If the branded website is operated by a technology company, lawyers are prohibited from a revenue-sharing arrangement with that company.

5.3. *What's the evidence that regulatory change is constraining innovation and efficiency?*

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[35] For example, in some jurisdictions an automobile insurance company that pays for a policyholder's legal representation in the event they are sued may not impose practice protocols or limits on how the retained lawyers carry out the representation (Martinez 2003)

As I have emphasized throughout this review, we have little in the way of formal studies of the impact of the professional regulation of the business model in law on the performance of our legal markets. The discussion above is thus still largely theoretical. But it is consistent with the anecdotal evidence.

We can see, for example, that where legal work is not subject to professional regulation—the provision of general legal information and scrivener services in the completion of legal documents—larger scale businesses deploying the corporate form have emerged. LegalZoom is a corporation valued at $2 billion[36] that operates on a national scale in the U.S. with close to 4 million customers; it has recently expanded to the U.K. where it has taken advantage of a more permissive regulatory environment to acquire law firms. It has a consistent brand across that scale of operations, invests heavily in national advertising, and claims to be the most recognized legal brand in the U.S.[37]

We also have some direct evidence that law firms are much too small, at least in the personal services sector. This is the evidence discussed above that the average lawyer in these small firms spends on average a little over 2 hours out of 8 doing legal work, spending the remainder inefficiently engaged in looking for clients and administrative work. This results in a wide gap between the hourly rate charged to the consumer and effective hourly rate received by the lawyer. Clearly increased scale and access to revenue-sharing arrangements with companies and technologies that can take over building a brand, advertising, building customer service and quality protocols, and managing a business could reduce this gap. The company UpCounsel, for example, provides a branded online platform for small and medium-sized businesses to connect with their network of business lawyers who have moved out of corporate law firms and in-house departments to start working solo or in small firms. UpCounsel manages all billing and collection and guarantees lawyers that they will get paid. The company had raised a total of $26 million in funding through 2018.

Even these relatively contained efforts to increase scale and innovate higher quality and lower cost procedures, however, have run into regulatory headwinds. Lawyers joining UpCounsel's network received official warnings from the State Bar of California in 2016 that they could be in violation of the rules of professional conduct prohibiting fee-sharing or paid referrals from non-lawyers.[38] They were also sued in 2018 by a lawyer-owned competitor, alleging unauthorized

[36] https://www.legalzoom.com/press/press-mentions/legalzoom-announces-500-million-investment-among-largest-in-legal-tech-history

[37] https://www.latechwatch.com/2018/08/the-most-recognized-legal-brand-in-the-us-just-raised-500m/

[38] UpCounsel processes payment for lawyers and deducts an agreed percentage; it directs consumers who contact with UpCounsel to members of its lawyer network. https://calcorporatecounsel.com/2016/09/16/state-bar-california-issues-warnings-regarding-upcounsel-inc/

practice of law.[39] This lawsuit also named LegalZoom, which has defended itself in multiple attacks from bar associations over the course of its twenty-year history. Another innovator—Avvo—which introduced a branded website offering to connect consumers to a network of lawyers for low-cost fixed price consultations on legal matters—was effectively driven out of the market in 2018 by a series of opinions issued by state bar ethics committees asserting that lawyers working with Avvo were violating the rules against fee-sharing and paid referrals from non-lawyers.[40] (These actions by bar associations have historically been protected from antitrust prosecution by virtue of the immunity conferred on state actors; a recent decision of the U.S. Supreme Court, however, has put the availability of immunity to licensing boards composed of practitioners at risk if they cannot demonstrate that they are "actively supervised" by government.[41])

In contrast, these business models, and more ambitious ones that bring down the cost of legal services to ordinary consumers, are easily found in the U.K. where professional regulations are less restrictive. In England and Wales, the monopoly accorded licensed legal providers has always been relatively narrow—over higher court representation and land transactions in particular—and so there have been numerous providers of online legal help since the emergence of the consumer internet. Divorceonline.co.uk, for example, launched in 1999 and provides a suite of fixed-price family law services ranging from a DIY divorce for £59 (forms filled out for you by an "experienced divorce professional," likely a paralegal) to a fully solicitor-managed divorce for £299. The English market has seen a full range of legal services, including litigation, offered in a wide variety of business formats online, through branded networks, franchising, business establishments such as grocery stores and banks, consumer and trade associations, unions, and charities (Hadfield 2014). The scale and diversity of these businesses increased after 2012 when England and Wales lifted restrictions that prevented licensed providers (such as solicitors, barristers, and legal executives) from entering into business relationships and employment with nonlawyers, and created a licensing regime for what are dubbed "alternative business structures," meaning business entities with nonlawyer ownership, investment, or management. We are still lacking careful studies of the extent of these innovations and their impact and comparisons with services available in the U.S. and Canada under much more restrictive regulatory regimes. There is a particular need for careful work evaluating the cost of accomplishing basic legal tasks. Studies in the U.K. are emerging. In 2016 the Competition and Markets Authority identified continuing problems with the competitiveness of the legal services market, as evidenced by a lack of price information for consumers and rigidities due to the persistence of a regulatory regime based on professional titles rather than services.[42] A survey of providers in family, conveyancing, and wills and

[39] https://biglawbusiness.com/lawsuit-takes-aim-at-upcounsel-business-model

[40] https://www.hinshawlaw.com/newsroom-updates-avvo-shuts-down-its-legal-services-product-in-wake-of-ethics-opinions-warning-attorneys-not-to-participate.html.

[41] *North Carolina State Board of Dental Examiners v. FTC* 135 S.Ct. 1101 (2015).

[42] https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf.

probate law, conducted by the Legal Services Board in 2017, found that services offered on a fixed fee were cheaper than services offered with other forms of pricing, there was wide dispersion in pricing (only 1 in 5 providers provided online information about prices, for example, making shopping around difficult), and prices for unregulated providers were lower than those for regulated providers.

Other anecdotal evidence that professional regulations restricting the business model of law are responsible for the high cost and low rate of innovation in law arises from a close look at how the corporate legal market is evolving. The last decade or so has seen significant shift in corporate legal work from law firms to in-house legal departments: since the 2008 recession, while growth rates in large corporate law firms have remained flat after taking an initial nosedive, the size of in-house legal departments and the amount of work allocated to them has continued to grow (Georgetown Law Center for the Study of the Legal Profession 2018, Thomson Reuters and Acritas 2018). The modern legal department in large corporations is staffed by a combination of lawyers and other professionals who are not licensed as lawyers; in a recent industry survey, legal departments characterized as "efficient" had an average of 57% lawyers, 20% paralegals, 9% legal operations staff and 14% other roles (Thomson Reuters and Acritas 2018). This is a critical workaround of regulatory rules: legal work that does not require high level legal expertise or which can be standardized in protocols and playbooks can be allocated to less expensive staff. Law firms can employ paralegals as well, but their work must be directly supervised in a way that it is easier to forego in the in-house legal department. Furthermore, corporate clients can make greater use of legal technologies, bypassing law firm lawyers, because the sale of legal technology to an inhouse legal department (that is, to a lawyer) is not considered the unauthorized practice of law in most jurisdictions. Corporate clients have made substantial use of this in the past decade, growing their use of legal process outsourcers, e-discovery vendors, and providers of contract legal work. In 2019, the global legal process outsourcing market was predicted to grow at 32% per year, from $4.6 billion to $24 billion by 2024.[43] The corporate legal department has ways around professional regulations that are unavailable to smaller businesses that lack an inhouse lawyer who can purchase alternative legal services and to ordinary consumers (Campbell 2012). The fact that these corporate legal departments are diverting increasing amounts of legal work into these alternatives is consistent with the conclusion that professional regulation is restricting innovation and the development of less costly alternatives to traditional legal practice.

6. The impact of self-governance on the production of law and regulation

At the outset of this review, I emphasized that the production of "law" is composed of the production of three distinct components: rules, enforcement services, and legal services. And I emphasized that although it is conventional to think of rules and enforcement as being produced in the public sector, in fact there are multiple ways in which private actors, working

[43] https://www.reuters.com/brandfeatures/venture-capital/article?id=88026

through markets, contribute to the production of rules and enforcement. Because of this the performance of the markets for legal services has implications for law that go well beyond the consumer surplus generated in those markets. This is another sense in which the existing literature on legal markets and their regulation overlooks critical questions that need economic analysis and empirical investigation.

The efficiency of our legal markets matters for the efficiency of law even in the conventional picture of law as a set of rules produced and enforced in the public sector by governments. Drafting legislation and designing legal procedures for the invocation or enforcement of legal rules is largely done by lawyers and judges and requires legal human capital (Hadfield 2007, Rubin and Bailey 1994, Grajzl and Murrell 2006). Legal human capital is produced, in the first instance, through legal education and, more importantly, through experience in practice. Restrictions on access to legal education and legal practice therefore have a direct impact on the availability of human capital to the public sector. As I have already emphasized, the impact is not merely, or even most importantly, a price effect produced by supply restriction. The more important effect comes from the composition of human capital. A lack of diversity in legal human capital produces a lack of innovation in the design of legislation and legal procedures. If these are produced in the public sector, feedback from users, which might otherwise prompt innovation, is muted. As a result, law itself can become overly complex (Hadfield 2000). Litigation costs are high not only because hourly rates for lawyers are high, but also because complex rules and procedures take a lot of time to interpret and implement, breed error and conflicting beliefs, and can produce wasteful strategic interaction.[44]

The impact of the performance of legal markets on the production of rules and enforcement services, however, goes well beyond the direct impact on actors in the public sector. As the literature on the evolution of the common law has long recognized, litigants—acting through their lawyers, or not—generate the opportunities, and the raw materials (in the form of evidence and argument), for legal rules to evolve. Problems in our legal markets will therefore

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[44] Ashenfelter and Dahl (2012), for example, find in a study of final-offer arbitration that employer win rates are about 40% when both employer and employee are represented and when both are unrepresented, but that hiring a lawyer is a dominant strategy, raising both employer and employee odds of winning. This means that costly litigation has a prisoner's dilemma structure. Ryo (2018)similarly finds that detainees in immigration hearings achieve significantly improved results if they are represented in bond hearings; represented detainees are more likely to submit documents, present affirmative arguments for release, and offer legally relevant arguments. These apparently improved litigation behaviors, however, do not account for the improved results obtained, suggesting that the behaviors themselves produce little value. A handful of randomized control trials have evaluated the impact of legal representation or legal procedures on outcomes or procedures but, as concluded from an effort at a thorough review by Greiner and Matthews (2016), the studies produce at best intermittent and conflicting evidence on the quality of legal services provided by lawyers and judges in litigation.

show up in the evolution of legal rules and doctrines. This has long been a concern with one of the public and private responses to costly litigation: the diversion of disputes from public courts into private arbitration and other forms of alternative dispute resolution (Fiss 1984). And in a practical sense, given high rates of settlement in formal dispute resolution, lawyers play a critical role in the designation of the consequences for rule violation, as well as rules of behavior post-settlement in the form of, for example, confidentiality agreements, which are routine, or consent decrees in regulatory settings. The market for contingency-fee class actions, for example, has led to the emergence of settlements that may provide few benefits to class members and incentivize poor behavior by plaintiffs' lawyers (Hensler et al 2000). At the same time, businesses are increasingly avoiding costly class actions through the use of contractual waivers which eliminate the right to join a class (Hylton 2016). Those contractual waivers, of course, are being produced by lawyers.

Indeed, lawyer-designed contracts are playing a larger and larger role in the legal rules governing economic relationships between consumers and firms. With the rising importance of platforms in the economy (McAfee and Brynjolfsson 2017), large shares of economic activity take place within a set of rules designed by firms and "agreed" to by consumers—practically none of whom read, much less understand, what they are agreeing to (Bakos, Marotta-Wurgler and Trossen 2014). These standard form contracts are known as contracts of adhesion because they are offered on a take-it-or-leave-it basis for access to the platform. To the extent they govern traditional product characteristics and in particular obligations with respect to quality (warranties, products liability, etc.), they are nothing new; standard form consumer contracts have been around for over a century. But platform contracts today govern much beyond product quality. They govern the collection and use of data, with implications for privacy, cybersecurity, and—as we learned in 2018 from the use of data collected from Facebook apps in the Cambridge Analytica scandal[45]—the integrity of public discourse and elections. The rules of the new data economy—amplified by machine learning which creates a powerful demand for huge datasets—are largely being written by corporations and not governments. That means they are being written by members of our legal professions, with the legal human capital accumulated in our closed legal markets. Moreover, because of restrictions on who may provide and invest in legal services, consumers lack access to tools—legal technology—to understand and respond to these rules. We clearly have the natural language processing and, increasingly, the machine learning technology today that could, for example, automatically read legal documents (contracts, insurance policies, employment terms, etc.) and provide users with simple information and advice, and perhaps the ability to form effective organizations to counter the bargaining disadvantages of an individual consumer attempting to "negotiate" with a massive entity. (An entity with the ability to act on behalf of consumers, for example, could offer for a fee to track and negotiate terms of service in online contracts.) But we don't have access to these technologies because companies cannot invest in and sell those technologies directly to consumers. This blunts competition between platforms over rules design (contract

[45] https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html

terms) on dimensions such as privacy or data security and exacerbates the problems of monopoly in platform settings.

The rules governing business-to-business relationships are also affected by the performance of our legal markets. The legal human capital that lawyers bring to their work affects the contracts they write and the entities and joint ventures they help design. And the capacity for transitioning the design of rules and formal relationships to technology is limited by professional regulation, even though larger corporations do have various routes around those limitations. Trade associations that offer legal rules to their members are likely to be using the services of lawyers. Standard-setting bodies, although they are deeply connected to engineering professionals, also are infused with lawyers' approaches to writing and enforcing rules. Many of these standards are voluntarily adopted by organizations; but many are also incorporated by reference into legislation. In a global context, entire lawyer-designed systems of regulation are multiplying through the use of supply contracts to impose rules on suppliers in countries with weak regulatory regimes.

The private production of enforcement services is also linked to the operation of the market for legal services. Lawyers advise on rights under contracts, even in settings in which business partners anticipate relying exclusively on relational enforcement mechanisms such as reputation. And of course, more generally, lawyers advise on rights to file formal legal challenges and estimate probabilities of success in enforcement actions. The limitations on the development of legal technologies, such as machine learning systems that could improve on lawyerly anecdote-based predictions, are felt particularly acutely in this context. The cost of lawyering also affects the cost of obtaining the benefits of enforcement or defending in an enforcement action. Indeed, the inefficiency and high cost of adjudication has generated demands for less-costly private alternatives for dispute resolution. A movement to build alternatives to litigation took root in the 1980s, supported by corporate pledges, court reforms, and legislation (Stipanowich 2004). But the goals of alternative dispute resolution, particularly arbitration, have not been widely met. Corporate arbitration has become effectively as expensive, drawn-out, and complex as litigation (Carver & Vondra 1994, Stipanowich 2010). Professional regulation is a plausible explanation. In some jurisdictions, only licensed lawyers may represent parties in arbitration. Even where non-lawyer representation is permitted, as a practical matter within corporations, arbitrations are deemed the province of the legal department. Arbitration is thus built with the same relatively homogeneous legal human capital as litigation.

7. Conclusion: The welfare consequences of misregulating legal markets

The services and work product of lawyers form the legal infrastructure of the economy. If legal services are too expensive, many of the contracts, organizations, strategies, and policies on which the economy is built are generated with little or no legal expertise; this affects the quality and cost of economic relationships. If legal markets fail to produce cost-reducing or quality-improving innovations, if legal technology investment is curtailed by restrictions on who may invest and who may supply, this also affects the quality and cost of economic relationships

throughout the economy. Even larger corporations, which make use of substantial legal inputs, consuming the lion's share of legal expertise supplied by lawyers[46], are impacted by the low rates of innovation in law. Deals take too long to close, or fail entirely, due to excessive lawyering; contracts are too long and complicated to understand and so poorly implemented and the use of automation is constrained; strategic advice is overly risk averse. These are the complaints we hear from corporate clients and they are evidence not only of consumer dissatisfaction but of sub-optimal economic infrastructure—with implications beyond the market for lawyers.

The basic policy bargains of the social contract are also distorted by weaknesses in our legal markets due to professional regulation. Policy is implemented through law: striking the bargains on housing, banking, social benefits, health care, and political participation and more. But if large shares of the population lack meaningful access to legal services, then policy exists on paper but not in practice. We need many more studies that evaluate the efficacy of formal law in practice, in light of the barriers that exist to making use of formal law.

The impact of online contracting is becoming an especially critical topic for study. It has simply become routine, with the shift to online interaction in both the public and private sphere, to substitute the private law of contract for public regulation. But the enforcement of a contract is fundamentally different from enforcement of public law. A contract is enforceable if there was intent to contract and basic requirements of an exchange and reasonably clear terms are met; a contract is avoidable only in narrow conditions. Public regulation may add to these limits—preventing the enforcement of a waiver of some kinds of tort liability, for example, or giving a citizen rights that the government cannot take away through contract—but it requires access to legal services to know about and enforce those limits. Moreover, whereas public regulations are often enforced through public agencies, contracts are in the first instance enforceable only by the parties to the contract. But contract rights are of little value—and hence limited intended economic effect—if parties (particularly one side) lack meaningful legal assistance. Nearly 40% of the U.S. labor force, for example, has signed an employment agreement containing provisions saying that they cannot work for a competitor for some period of time after they leave the company (Starr, Prescott and Bishara 2019). This includes millions of low-wage, low-skill workers. Such agreements are unenforceable in some states (such as California, where 19% nonetheless were asked to sign them and did so) and in some (complex to determine) circumstances, but most employees would have no idea that even plain language may not be enforceable and so may well forego employment opportunities. There are also widespread misunderstandings about the basic rules of contract law (Wilkinson-Ryan and Hoffman 2015). Employers, on the other hand, will routinely have in-house lawyers to advise on enforceability and sufficient scale and long-term interests to justify the expenditure of legal resources on enforcement, although perhaps only to the level of sending warning letters that would not hold up in a never-to-be-held trial.

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[46] 75% of law firm revenues in the U.S. are earned by the largest 8% of law firms—those serving the large corporate market.

Economic analysis is fundamentally grounded on assumptions about how law works. Markets are defined by law. Policy is implemented with law. Law forms the basic operating system, the transactional platform, of all economic—indeed all social—activity. In many cases it is reasonable to treat law as the invisible infrastructure that it is—to assume away legal costs or asymmetries in information about law, for example. But when that infrastructure is as badly distorted as it is today—as a consequence of professional regulation that is overly restrictive and securely controlled by a small group of existing providers with little economic training or regulatory orientation—it becomes essential to make its production a central topic. A shift from an exclusive focus on the occupational licensing of legal services to the implications of professional regulation for the efficiency with which the markets producing our legal infrastructure seems long overdue.

There are some signs that the regulation of our legal markets is beginning to respond to concerns about the basic economics generated by the legacy of overly prescriptive control of the business model for law. Although there have been calls for decades for bar associations and law societies to reform their rules to allow people and entities other than licensed lawyers to invest in, own, and operate legal businesses, to date most of these have been initiatives have died in the face of opposition from bar association and law society lawyer-members (Reardon 2017, Semple 2017). As 2019 was drawing to a close, however, some renewed efforts to reform may succeed where others have failed. Task forces in both California and Arizona recommended relaxing traditional rules of professional conduct to allow more diverse ownership and business models in law. Most dramatically, Utah embarked on the implementation phase of a dramatic overhaul of the regulatory approach to legal services markets—adopting recommendations of a working group (of which I was a member) that proposed an approach that tracks the U.K. emphasis on evidence-based and risk-sensitive regulation and, for the first time in perhaps any jurisdiction in the world, aims to focus regulation on the services provided rather than the title of the provider (Utah Working Group, 2019). Ideally, these changes will take place with attention to data collection that will allow us to evaluate the impact of regulatory change on the performance of our legal markets and, beyond that, the performance of our economy as a whole. Economists have important contributions to make to this reform agenda, by providing much-needed theoretical and, especially, empirical evidence of the welfare-losses associated with continued professional control of legal markets.

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