

ACCESSIBILITY OF LEGAL SERVICES IN THE UNITED STATES:  
LAWYER REGULATION BY WHOM, TO WHAT END?

LAURA JANE SNYDER

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## ABSTRACT

While most people care about having access to legal services when they need them few are interested in how legal services are regulated. It is considered a technical subject best left to those who actually care, like lawyers themselves. That is what has happened in the United States—the regulation of legal services has been left to a small number of lawyers who make decisions for the entire country about how legal services can—and, especially, cannot—be delivered. They do this in the absence of public accountability or transparency and in the wake of near total abdication by state authorities who, on paper, actually have regulatory power. The result? As regards “accessible and affordable civil justice,” the World Justice Project Rule of Law Index ranks the US 96th of 113 countries. Countries like Afghanistan, Belarus, El Salvador, Russia and Uganda are ranked higher. Those countries provide better access to civil justice than the United States. The inability of many, if not most, people in the US to enforce their rights raises serious questions about the legitimacy of the country’s legal system as well as rule of law and democracy itself. In contrast, Australia ranks 40th, Canada 47th, the UK 60th. While not perfect, they are doing something right. By comparing them to the US, this research exposes the direct link between how legal services are regulated and how people are—and are not—able to access those services. This research demonstrates how the problems plaguing legal services in the United States can be addressed only by radical changes: to the rules that govern how legal services may be delivered, to who has the power to make those rules, and, ultimately, to the country’s entire regulatory environment. This research is based upon an extensive review of both primary and secondary materials and upon 65 in-depth interviews conducted with those who have created, are managing, are employees of, and/or have invested in alternative legal service providers in England & Wales, Australia, Canada, and the District of Columbia, and the people who regulate them.

## COMMENTARY

# Accessibility of Legal Services in the United States: Lawyer Regulation by Whom, to What End?

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## I. Importance of Topic

Many persons in the United States lack access to legal services: While large organizations, such as corporations, public sector bodies and high net worth individuals are generally able to obtain legal assistance,<sup>1</sup> most low and middle income individuals as well as small businesses are all but shut out. In particular, it is estimated that 80% of the legal needs of low income persons in the United States are not met.<sup>2</sup> This unmet need is so high and so acute, some argue that it constitutes a human rights crisis.<sup>3</sup> Indeed, on the question of affordable and accessible civil justice, the World Justice Project Rule of Law Index ranks the US 96<sup>th</sup> out of a total of 113 countries, behind places such as Afghanistan, Belarus, El Salvador, Kyrgyzstan, Russia, and Uganda.<sup>4</sup> This means that persons living in those countries have better access to civil justice than Americans do. In contrast, Australia ranks 40<sup>th</sup>, Canada ranks 47<sup>th</sup> and the UK ranks 60<sup>th</sup>.<sup>5</sup> Those from outside the legal profession who attempt to help to address the unmet need in the United States enter a dangerous space where they risk fines if not criminal penalties for the unauthorized practice of law.<sup>6</sup> Thus, at present, lawyers are the key to addressing the access to justice gap.

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<sup>1</sup> Interestingly, large corporations do face some challenges in obtaining legal services, as explained by Gillian Hadfield in “Legal Infrastructure and the New Economy,” *I/S: A Journal of Law and Policy for the Information Society* 8 (2012): 2-8, <http://ssrn.com/abstract=1567712>.

<sup>2</sup> William C. Hubbard, “Remarks of William C. Hubbard, President of the American Bar Association” (presentation to Meeting of American College of Trial Lawyers, Miami, Florida, February 28, 2015), [http://www.americanbar.org/groups/leadership/office\\_of\\_the\\_president/selected-speeches-of-aba-president-william-c--hubbard/american-college-of-trial-lawyers--february-2015-.html](http://www.americanbar.org/groups/leadership/office_of_the_president/selected-speeches-of-aba-president-william-c--hubbard/american-college-of-trial-lawyers--february-2015-.html). See also Ethan Bronner, “Right to Lawyer Can Be Empty Promise for Poor,” *New York Times*, March 15, 2013, [http://www.nytimes.com/2013/03/16/us/16gideon.html?pagewanted=all&\\_r=1](http://www.nytimes.com/2013/03/16/us/16gideon.html?pagewanted=all&_r=1). See generally Legal Services Corporation, “Documenting the Justice Gap in America—The Current Unmet Civil Legal Needs of Low-Income Americans: An Updated Report of the Legal Services Corporation,” September, 2009, [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

<sup>3</sup> Carrie Johnson, “Rights Advocates See ‘Access to Justice’ Gap in U.S.,” NPR, March 10, 2014, <http://www.npr.org/sections/thetwo-way/2014/03/10/288225649/rights-advocates-see-access-to-justice-gap-in-u-s>;

<sup>4</sup> The World Justice Project, *Rule of Law Index 2017-18*, <http://worldjusticeproject.org/historical-data>.

<sup>5</sup> Laura Snyder, “How Low Can You Go?” *Not Just for Lawyers*, Feb. 2, 2018, <http://notjustforlawyers.com/how-low/>.

<sup>6</sup> See, for example, Deborah L. Rhode and Lucy Buford Ricca, “Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement,” *Fordham Law Review* 82 (2014): 2587-2610, [http://fordhamlawreview.org/assets/pdfs/Vol\\_82/No\\_6/RhodeRicca\\_May.pdf](http://fordhamlawreview.org/assets/pdfs/Vol_82/No_6/RhodeRicca_May.pdf); Benjamin H. Barton, “The Lawyer’s Monopoly—What Goes and What Stays,” *Fordham Law Review* 82 (2014): 3067-90, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5008&context=flr>; Pierce G. Hunter, “Constitutional Law—Unauthorized Practice of Law: Driving Legal Business Without a License, LegalZoom, Inc., and Campbell v. Asbury Automotive, Inc., 2011 Ark. 157, 381 S.W.3d 21,” *University of Arkansas at Little Rock Law Review* 36 (2014): 201-28, <http://lawrepository.uarl.edu/lawreview/vol36/iss2/5>; Gerard J. Clark, “Internet Wars: The Bar

Why does it matter whether everyone who needs legal services is able to access them? Our legal systems are designed with lawyers as users, systems are highly complex and in many, if not most, instances they are impossible to negotiate, let alone negotiate successfully, without assistance of some kind.<sup>7</sup> Access to justice requires that everyone is able to use the legal system effectively; a person cannot have recourse to law and cannot have reasonable assurance of being able to enforce his/her rights unless that person can gain legal advice and assistance, and ultimately, if all else fails, seek recourse to the courts. Legal rights lose their meaning and our legal system loses its legitimacy when there are people who cannot seek relief. Without meaningful rights, without recourse to law, and without a legitimate legal system—that is, without the rule of law—then we must ask: can we have democracy?

## II. Definition of Topic and Scope of Inquiry

My study addresses the quality and opportunity of the advice and support of a legal nature that persons (as well as businesses and other organizations) receive in the United States and the importance of this issue to the broader question of access to justice. My enquiry focused on how the manner by which legal services are regulated

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Against the Websites,” *Journal of High Technology Law* XIII (2013): 247-96, [https://www.suffolk.edu/documents/jhtl\\_publications/CLARKMACRO-FINALFINAL.pdf](https://www.suffolk.edu/documents/jhtl_publications/CLARKMACRO-FINALFINAL.pdf); George Leef, “Why The Legal Profession Says LegalZoom Is Illegal,” *Forbes*, October 14, 2014, <http://www.forbes.com/sites/georgeleef/2014/10/14/why-the-legal-profession-says-legalzoom-is-illegal/#580de4037664>. These types of assertions date back a century if not more and significantly increased in intensity with the Great Depression. See, for example, James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown and Company, 1950), 319-322; Quintin Johnstone, “Unauthorized Practice Controversy: A Struggle among Power Groups,” *Kansas Law Review* 4 (1955): 1-57, [http://digitalcommons.law.yale.edu/fss\\_papers/1912](http://digitalcommons.law.yale.edu/fss_papers/1912). For a summary of each state’s approach to the unauthorized practice of law, see American Bar Association Standing Committee on Client Protection, “2015 Survey of Unlicensed Practice of Law Committees,” September, 2015, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2015\\_upl\\_report\\_final\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2015_upl_report_final_authcheckdam.pdf).

<sup>7</sup> See, for example, John M. Greacen, “Services for Self-Represented Litigants in Arkansas: A Report to the Arkansas Access to Justice Commission,” July 26, 2013, 2-3, <http://www.arkansasjustice.org/sites/default/files/file%20attachments/Arkansas%20Final%20Report%207-26-13.pdf>. In describing his research regarding the experiences of unrepresented litigants before Arkansas courts, Greacen writes:

The civil courts and the procedural rules that govern [Americans] in Arkansas and elsewhere in the United States have been designed with the expectation that all parties are represented by lawyers. The procedures are complicated, the rules are strict and often unforgiving, and the jargon used is often incomprehensible to a person without legal training. For persons representing themselves to have a fair opportunity to obtain the legal relief to which the facts and law of their case entitle them requires a significant amount of assistance—in understanding the law and the steps in a legal proceeding, in preparing appropriate legal documents, and in assembling and presenting evidence supporting their positions. *Ibid.*, 2.

operates to restrict access to legal services in the United States and how three other common law jurisdictions (England & Wales, Australia and Canada) either have changed or are in the process of changing their regulations, their regulatory bodies and their entire regulatory environments in order to make legal services more accessible to their populations.

My study is solution-focused. I propose solutions at three different levels:

**Solution Level N°1:** My study demonstrates that the rules in the United States regarding how legal services may be delivered must be radically overhauled. The lawyer monopoly on legal services must be ended. A primary but not exclusive objective in ending the monopoly must be to allow a wider variety of structures and organizations to provide legal services in addition to traditional law firms. More specifically, regulations must be changed in order to allow for lawyers to partner with non-lawyers and to allow for non-lawyers to own and manage organizations that provide legal services.<sup>8</sup> This is in-keeping with changes in some of the other jurisdictions that I examined in my study.

**Solution Level N° 2:** My study demonstrates that the rules in the United States regarding how legal services may be delivered cannot be radically overhauled without making equally radical changes to who exercises the power to make those rules. Today *de jure* regulatory power lies in most cases with the state's Supreme Court or other governmental authority to whom the Court has delegated its authority. However, for the most part those Supreme Courts and other authorities have abdicated their regulatory power such that the *de facto*—the actual—power lies with the American Bar Association (ABA), a voluntary, national association of lawyers and law students.<sup>9</sup> The ABA has repeatedly demonstrated that it is incapable of adopting any regulatory change that—rightly or wrongly—is perceived to threaten the interests of those lawyers who control the ABA and who control the local (state and other) bar associations to whom the ABA governing body—the House of

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<sup>8</sup> *Democratizing Legal Services: Obstacles and Opportunities* (hereinafter “*Democratizing*”), xv-xxi, 1-160, 217-26. Appendix A contains more information about *Democratizing*.

<sup>9</sup> Laurel S. Terry, “Globalization and the ABA Commission on Ethics 20/20: Reflections on Missed Opportunities and the Road Not Taken,” *Hofstra Law Review* 43 (2014): 117-23, [http://www.hofstralawreview.org/wp-content/uploads/2015/01/BB.3.Terry\\_final2\\_.pdf](http://www.hofstralawreview.org/wp-content/uploads/2015/01/BB.3.Terry_final2_.pdf). See also Barton, “The Lawyer’s Monopoly,” 3080-81; *Democratizing*, 21-22.

Delegates—is accountable.<sup>10</sup> New regulatory authority must be established and that authority must be accountable to the American public.<sup>11</sup> Such amendments to the locus of power for legal service rule-making would be similar to some of those seen in other jurisdictions that were examined in my study.

**Solution Level N° 3:** My study demonstrates that radical changes to who exercises the power to make the rules cannot be made—that is, new regulatory authority cannot be established—without a complete overhaul of the regulatory environment for legal services in the United States. In effecting this overhaul, the United States must embrace the OECD’s essential elements of effective regulatory policy and in particular these six elements: (i) independent regulators who are free from conflicts of interest (they must be independent from the legal profession as well as from state power),<sup>12</sup> (ii) accountability and transparency in regulatory decision making,<sup>13</sup> (iii) the placement of regulatory oversight bodies “at the center of government,”<sup>14</sup> (iv) making regulatory stakeholders, including businesses but also, notably, citizens and consumers, part of the regulatory process and paying attention to their voices,<sup>15</sup> (v) the use of evidence-based regulatory impact assessments,<sup>16</sup> and (vi) the use of a risk-based approach to regulation.<sup>17</sup> These appear to be conditions precedent to regulatory effectiveness that puts the legal service client at the heart of the system.

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<sup>10</sup> James E. Moliterno, *The American Legal Profession in Crisis: Resistance and Responses to Change* (New York: Oxford University Press, 2013).

<sup>11</sup> *Democratizing*, xxi-xxvi, 197-216; *Modernizing Legal Services in Common Law Countries: Will the US Be Left Behind?* Hereinafter, “*Modernizing*”), 171-224, 235-36. Appendix A contains more information about *Modernizing*.

<sup>12</sup> OECD, *Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest* (Paris: OECD Publishing, 2011), 9, <http://www.oecd.org/gov/regulatory-policy/regulatorypolicyandgovernancesupportingeconomicgrowthandservingthepublicinterest.htm>; David Parker and Colin Kirkpatrick, “Measuring Regulatory Performance -The Economic Impact of Regulatory Policy: A Literature Review of Quantitative Evidence,” OECD Expert Paper No.3, August, 2012, 11, [https://www.oecd.org/gov/regulatory-policy/3\\_Kirkpatrick%20Parker%20web.pdf](https://www.oecd.org/gov/regulatory-policy/3_Kirkpatrick%20Parker%20web.pdf).

<sup>13</sup> Parker and Kirkpatrick, “Measuring Regulatory Performance,” 11; OECD CleanGovBiz, “Regulatory Policy: Improving Governance,” July, 2012, 3-4, 6-7, <http://www.oecd.org/cleangovbiz/toolkit/49256979.pdf>.

<sup>14</sup> Parker and Kirkpatrick, “Measuring Regulatory Performance,” 11; OECD CleanGovBiz, “Regulatory Policy,” 6-7.

<sup>15</sup> Parker and Kirkpatrick, “Measuring Regulatory Performance,” 11; OECD CleanGovBiz, “Regulatory Policy,” 4,6; OECD, “Regulatory Policy and the Road to Sustainable Growth,” 2010, 39-40, <https://www.oecd.org/regreform/policyconference/46270065.pdf> (hereinafter “OECD Road to Sustainable Growth”).

<sup>16</sup> Parker and Kirkpatrick, “Measuring Regulatory Performance,” 11, 27-32; OECD CleanGovBiz, “Regulatory Policy,” 6; OECD Road to Sustainable Growth, 3, 8.

<sup>17</sup> Parker and Kirkpatrick, “Measuring Regulatory Performance,” 11; OECD CleanGovBiz, “Regulatory Policy,” 14; See generally OECD, *Risk and Regulatory Policy: Improving the Governance of Risk* (Paris: OECD Publishing, 2010), <http://dx.doi.org/10.1787/9789264082939-en>.

### III. Why This Scope

The solutions I propose are not a silver bullet. That is, their implementation, alone, will not solve the access to justice problem in the United States in its entirety. A number of other factors also require attention. A non-exhaustive list includes: (i) the complexity of laws and regulations such that they are often incomprehensible to the lay person (and even to many lawyers),<sup>18</sup> (ii) the complexity and expense of court and other judicial procedures,<sup>19</sup> (iii) the expense and the limitations of legal education in the United States (the average post-graduate three-year program can cost upwards of \$200,000 and more;<sup>20</sup> few if any law schools in the United States prepare law students to address the access to justice problem in the country<sup>21</sup> and if they don't learn it there, where will they learn it?), and (iv) an expanded use of open

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<sup>18</sup> See, for example, about the complexity of US immigration laws: “How the United States Immigration System Works,” American Immigration Council, August 2016, [https://www.americanimmigrationcouncil.org/sites/default/files/research/how\\_the\\_united\\_states\\_immigration\\_system\\_works.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/how_the_united_states_immigration_system_works.pdf); Mark E. Haranzo and Reaz H. Jafri, “Navigating Complex US Immigration Laws: US Visas & Taxation,” in *The International Comparative Legal Guide to: Private Client 2019*, edited by Jon Conder and Robin Vos, 23-27, 8th ed., London: Global Legal Group Ltd, 2019, <https://www.hklaw.com/files/Uploads/Documents/Articles/PC19Chapter5Haranzo.pdf>. With respect to the complexity of US employment laws, see Zach Stabenow, “Employment Law Compliance Complexity: Beyond Human Capacity,” GovDocs, May 15, 2018, <https://www.govdocs.com/employment-law-compliance-complexity-beyond-human-capacity/>. With respect to the complexity of the United States Tax Code and the measurement of the complexity of laws more generally, see J.B. Ruhl and Daniel Martin Katz, “Measuring, Monitoring, and Managing Legal Complexity,” *Iowa Law Review* 101 (2015): 191-244, <https://ilr.law.uiowa.edu/assets/issues/volume-101-issue-1/ILR-101-1-RuhlKatz.pdf>.

<sup>19</sup> See, for example, Robert W. Gordon, “Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History,” *Daedalus* 148 (2019): 177-89, [https://www.amacad.org/sites/default/files/publication/downloads/19\\_Winter\\_Daedalus\\_Gordon.pdf](https://www.amacad.org/sites/default/files/publication/downloads/19_Winter_Daedalus_Gordon.pdf); Ian Weinstein, “Coordinating Access to Justice For Low- And Moderate Income People,” *N.Y.U. Journal of Legislation and Public Policy* 20 (2017): 501-22, [https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1893&context=faculty\\_scholarship](https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1893&context=faculty_scholarship); but also see Colleen F. Shanahan and Anna E. Carpenter, “Simplified Courts Can’t Solve Inequality,” *Daedalus* 148 (2019): 128-35, [https://www.amacad.org/sites/default/files/publication/downloads/19\\_Winter\\_Daedalus\\_Shanahan\\_Carpenter.pdf](https://www.amacad.org/sites/default/files/publication/downloads/19_Winter_Daedalus_Shanahan_Carpenter.pdf).

<sup>20</sup> Ilana Kowarski, “See the Price, Payoff of Law School Before Enrolling,” *US News & World Report*, March 21, 2018, <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-03-21/understand-the-cost-payoff-of-law-school-before-getting-a-jd>; “What Are the Priciest Private Law Schools?” *US News & World Report*, 2018, <https://www.usnews.com/best-graduate-schools/top-law-schools/private-cost-rankings>; “What Are the Priciest Public Law Schools?” *US News & World Report*, 2018, <https://www.usnews.com/best-graduate-schools/top-law-schools/public-cost-rankings>.

<sup>21</sup> Andrew M. Perlman, “The Public’s Unmet Need for Legal Services & What Law Schools Can Do about It,” *Daedalus* 148 (2019): 75-81, [https://www.amacad.org/sites/default/files/publication/downloads/19\\_Winter\\_Daedalus\\_Perlman.pdf](https://www.amacad.org/sites/default/files/publication/downloads/19_Winter_Daedalus_Perlman.pdf); Kellye Testy, “You Say ‘Disruption,’ I Say ‘JUST Disruption,’” Law School Admission Council, Nov. 29, 2018, <https://www.lsac.org/blog/you-say-disruption-i-say-just-disruption>.

source as well as automation and other technology with respect to the dissemination of legal information, judicial processes and the delivery of legal services.<sup>22</sup>

As Rebecca Sandefur has observed, justice is not about legal services, it is about “just resolution.”<sup>23</sup> Sandefur rightfully points out that resolving what she terms a “justice problem” (as opposed to the more narrow term “legal need”) does not always require the assistance of a lawyer. Instead, there is a wider range of options and solutions require a new understanding of the problem: “It requires lawyers to work with problem solvers in other disciplines and with other members of the American public.”<sup>24</sup>

The solutions I propose fit squarely in this optic. My solutions start from the understanding that legal services are (or, at least, they can be) something much larger than just what lawyers do (or, at least, what lawyers do traditionally) and my solutions include the provision of those services by persons and by structures other than lawyers and law firms. And more than that, they call not only for lawyers to work with a wider variety of persons and expertise, but also—going further—for lawyers and especially lawyer representative bodies to be displaced from their position of power over the regulation of legal services in favour of regulating bodies that encompass a wider range of expertise and the public itself. Few professions have a monopoly on regulatory and educational rules; lawyers are relatively unusual in this regard, as discussed below. Sandefur’s call for a wider perspective on how “justice problems” can be addressed and, indeed, her call for justice by “just resolution” cannot be accomplished in the absence of these steps.

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<sup>22</sup> Robert Ambrogi, “The Innovation Gap (Part 2): How To Reboot The Justice System On Technology,” *Above the Law*, Jan. 29, 2018, <https://abovethelaw.com/2018/01/the-innovation-gap-part-2-how-to-reboot-the-justice-system-on-technology/>; Anjanette H. Raymond and Scott J. Shackelford, “Technology, Ethics, and Access to Justice: Should an Algorithm be Deciding Your Case?” *Michigan Journal of International Law* 35 (2014): 485-524, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1063&context=mjil>; Colin Lachance, “CanLII’s Future as a Canadian Primary Law Cooperative,” *Slaw*, Dec. 10, 2018, <http://www.slaw.ca/2018/12/10/canliis-future-as-a-canadian-primary-law-cooperative/>. But see also see Tanina Rostain, “Techno-Optimism & Access to the Legal System,” *Daedalus* 148 (2019): 93-97, [https://www.amacad.org/sites/default/files/publication/downloads/19\\_Winter\\_Daedalus\\_Rostain.pdf](https://www.amacad.org/sites/default/files/publication/downloads/19_Winter_Daedalus_Rostain.pdf).

<sup>23</sup> Rebecca L. Sandefur, “Access to What?” *Daedalus* 148 (2019): 49, [https://www.amacad.org/sites/default/files/publication/downloads/19\\_Winter\\_Daedalus\\_Sandefur.pdf](https://www.amacad.org/sites/default/files/publication/downloads/19_Winter_Daedalus_Sandefur.pdf)

<sup>24</sup> Ibid.

The United States cannot address its access to justice crisis in the absence of the solutions I propose. They are necessary steps even if, by themselves, they will not be sufficient.

#### IV. Critical Reflections

When I began my study, my intended scope was much smaller. Indeed, it was so small that I didn't realize that I was beginning a study. All I knew was that I had been introduced to how England & Wales had changed its rules to allow for a greater variety of persons and organisations to offer legal services and I was very intrigued.<sup>25</sup>

##### A. Overcoming Scepticism and Reluctance

At first I was highly sceptical that the changes in England & Wales described to me did, in fact occur—the change were so far from my realm of understanding of how legal services could be provided and so seemingly antithetical to everything I had been taught about how legal services should be regulated that it was very difficult for me to accept them on an intellectual level. But eventually I did accept them, and as soon as I did I was able to imagine an entirely new world for legal services. Whereas before I had only seen limitations, they disappeared to be replaced by seemingly infinite possibilities for how legal services could be delivered in ways that were new, different, better. As I explain in the Preface of *Democratizing*, if in my life I have ever had an epiphany moment, that was it.<sup>26</sup>

I set out to learn as much as I could about the new legal world in England & Wales: I read as much as I could and I made several trips from my home in France to London in order to attend classes to learn more. The classes I attended were designed as continuing legal education classes for solicitors; they offered a highly practical perspective on the functioning of the new legal world (COLPs and COFAs, material breaches, insurance, outcomes-focused regulation, qualified to supervise,...).<sup>27</sup>

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<sup>25</sup> I more fully explain the beginnings of my study in *Democratizing*, ix-xi.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid., ix-x.

At about this time I also journeyed to New York City in order to attend a Reinvent Law conference.<sup>28</sup> It was on that occasion that I met the Editor of the ABA Journal. After a lengthy discussion about the changes in England & Wales and in particular about alternative business structures he invited me to submit an article for the ABA Journal. I did so,<sup>29</sup> and this led to an invitation by ABA Publishing to submit a manuscript for a book on the adoption of alternative structures in England & Wales and on the implications of this change for the United States.<sup>30</sup>

The preliminary manuscript that I prepared was focused upon the rules themselves—upon the new rules adopted in England & Wales and how those new rules can be used to inspire comparable rule changes in the United States; that is, the manuscript was focused exclusively on Solution Level N° 1 described above. Notably, the manuscript did not address the regulatory role of the ABA in any meaningful way.

I solicited informal feedback on the preliminary manuscript from a number of persons. One challenged me on my failure to address the regulatory role of the ABA by referencing a then recently published article by Laurel Terry in which she describes the ABA as wearing two “hats,” one “trade group” or “representational” and the other “quasi-regulator.”<sup>31</sup> For this reviewer, my analysis was incomplete without referencing this article and more fully addressing the regulatory role played by the ABA.

This reviewer’s challenge set me on a journey that neither I nor, I have to presume, the reviewer, imagined.

As a first step, I had to learn more about the regulatory role played by the ABA. Until that point I had been reluctant to do that. This was in part out of laziness—I anticipated that it would require a significant amount of work—and in part out of a

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<sup>28</sup> “Reinvent Law NYC,” Feb. 7, 2014, <https://cooper.edu/events-and-exhibitions/events/reinvent-law-nyc>.

<sup>29</sup> Snyder, Laura, “Does the UK Know Something We Don’t About Alternative Business Structures?” *ABA Journal*, January 1, 2015, [http://www.abajournal.com/magazine/article/does\\_the\\_uk\\_know\\_something\\_we\\_dont\\_about\\_alternative\\_business\\_structures](http://www.abajournal.com/magazine/article/does_the_uk_know_something_we_dont_about_alternative_business_structures).

<sup>30</sup> *Democratizing*, x-xi.

<sup>31</sup> Terry, “Globalization and the ABA Commission on Ethics 20/20,” 117-23.

belief that it was not sufficiently relevant to my principal focus on substantive rule changes.

Motivated by the reviewer's challenge, I overcame that reluctance in order to examine in detail the ABA's governing bodies and how they function internally<sup>32</sup> as well as in relation to local bar associations and the state regulators.<sup>33</sup> I examined in even greater detail—going back to 1982—the four ABA commissions that have considered the issue of alternative structures.<sup>34</sup>

Those examinations turned out to be a big eye-opener for me. They forced me to confront the depth of the corruption in the regulation of legal services in the United States. With the word “corruption” I do not mean something as formulaic and obvious as the payment of bribes. I mean something more harmful and obscure that subverts the purpose of the regulation<sup>35</sup> by operating to protect the legal profession at the expense of those who need legal services and the public at large. Indeed, it operates to protect not all members of the legal profession but those who are served by the continuation of the status quo—that is, those whose own interests and/or those of their powerful clients are protected by the many restrictions in place today both on who may provide legal services as well as on the conditions under which they may do so.<sup>36</sup>

The problematic nature of the ABA's regulatory role also became apparent by comparing it to the regulatory roles of comparable bodies in the other countries: I saw that England & Wales and Australia were able to adopt revolutionary regulatory changes in large part because the regulatory roles of their respective law societies

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<sup>32</sup> *Democratizing*, xxii, 20-21, 212-13; *Modernizing*, 159.

<sup>33</sup> *Democratizing*, 19-21, 28-30, 199-206, 212-13; *Modernizing*, 208-11.

<sup>34</sup> *Democratizing*, xxii-xxiv, 21-25, 205-206; *Modernizing*, 171-234 .

<sup>35</sup> Chapter 2 of *Modernizing* addresses the purpose of the regulation of legal services. *Modernizing*, 17-18.

<sup>36</sup> My interview with John Ray provides fascinating insight in this regard. “John Ray, Senior Consultant, Law Firm Consulting Group,” <http://notjustforlawyers.com/john-ray/>. See also *Democratizing*, 31. See also Deborah L. Rhode and Alice Woolley, “Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada,” *Fordham Law Review* 80 (2012): 2761-2790, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4808&context=flr>, discussing how disciplinary sanctions brought by bar authorities tend to disproportionately target lawyers who, as sole practitioners or members of small firms, are “at the margins of the profession in power and status.” *Ibid.*, 2775.

were restricted.<sup>37</sup> In contrast, while Canada’s semi-professionalized regulatory bodies have succeeded in adopting some meaningful changes their progress has been limited because the bar maintains significant self-regulatory powers.<sup>38</sup>

### B. An Initially Narrow Focus, Progressively (and Perilously) Enlarged

It became clear to me that I was wrong to think that the regulatory role played by the ABA was not relevant to my work. I realized that, to the contrary, it is directly and highly relevant because the rule changes for which I advocate are impossible without also changing who has the power to make those rules—that is, without also changing the regulatory role played by the ABA.

This analysis created a dilemma for me. My publisher wasn’t just any publisher: it was *ABA Publishing*. If I did incorporate this analysis—if I criticized the ABA’s regulatory role and advocated for limiting it in a manner akin to England & Wales and Australia—then I ran the risk that *ABA Publishing* would reject the manuscript for publication. But if I failed to incorporate this analysis then my manuscript not only would be incomplete but also, in my eyes, would lack integrity.

For better or for worse, I chose the former, submitting a manuscript that addressed Solution Level N° 1 as well as Solution Level N° 2 described above. And *ABA Publishing* did, indeed, reject that manuscript for publication.<sup>39</sup>

This rejection did more than just oblige me to find a different publisher; it also held two important lessons for me. Most obviously, it validated my observation that the rules cannot be changed without also changing who has the power to make the rules. The rejection of my manuscript taught me first-hand that for the ABA certain discussions are off-limits. But in that case, how can the best regulatory solutions be found?

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<sup>37</sup> *Democratizing*, 19, 30-31; *Modernizing*, 43-44, 46-47, 51-55, 77-79, 97-102.

<sup>38</sup> *Democratizing*, 12-13, 145-47, 152-53, 155; *Modernizing*, 115-58.

<sup>39</sup> Letter from Bryan L. Kay to Laura Snyder dated May 15, 2015, on file with author. The letter explained that my manuscript had a number of errors that suggested the need “for a very detailed fact checking of all the statements in the manuscript.” Errors that the letter noted included: (1) incorrect references to “the UK” when the references should have been to only England & Wales, (2) stating that a certain event occurred in 2001 when in fact it occurred in 2011, and (3) while I had “the absolute right” to express my opinion, that what I saw as the state supreme courts’ deference to the ABA as de facto regulator was “troubling” and “not an accurate characterization.”

My second lesson from this experience was less obvious but arguably even more important. The experience taught me that there is an additional question that must be asked: how do you change who has the power to make the rules, in order to finally be able to change the rules themselves? In order to answer this question I took an additional step back to examine: what is it about the entire regulatory environment of a country that either enables it to make or prevents it from making needed regulatory changes, be those changes to the rules themselves and/or changes to who has the power to make the rules? More specifically, why were England & Wales and Australia able to make sweeping changes while Canada is only able to make limited changes and the United States is stopped dead in its tracks?

It was in answering these questions that I added Solution Level N° 3 (described above) to my again revised and expanded manuscripts—one book had grown into two—that were ultimately published by Lexington Books.

In sum, *Democratizing* and *Modernizing* are the products of a mostly unplanned and unexpectedly perilous journey. I started with what I now realize was an overly narrow focus on rules themselves. I was at first reluctant to enlarge that focus but eventually I did so—progressively and ultimately enthusiastically—as I grew to understand the fundamental connection between the quality of a country’s rules, the quality of its regulators, and the quality of its overall regulatory environment. I learned that good rules and good regulators are possible only in the context of a good regulatory environment.

### C. Paradigm of Neoliberalism

My entire study was performed squarely within the paradigm of neoliberalism in that it does not question in any manner the use of market-based solutions (the purchase of legal services) to address social problems (access to justice and rule of law).<sup>40</sup>

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<sup>40</sup> See, for example, Janine Brodie, “Reforming Social Justice in Neoliberal Times,” *Studies in Social Justice* 1 (2007): 100-01, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.916.2411&rep=rep1&type=pdf>; Jason J. Czarnecki and Katherine Fiedler, “The Neoliberal Turn in Environmental Regulation,” *Utah Law Review* 1 (2016): 1-3, <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1019&context=ulr>; Valentin Quintus Nicolescu and Diana Elena Neaga, “Bringing the Market In, Letting the Science Out. Neoliberal Educational Reform in Romania,” *Social and Behavioral Sciences* 142 (2014): 105-06, <https://ac.els-cdn.com/S1877042814045236/1-s2.0-S1877042814045236->

However, it is not at all clear that market-based solutions are the best solutions for addressing access to justice and rule of law issues.<sup>41</sup> And certainly they are not the only solutions. Conducting my study helped me to better understand the potential value of a program akin to the UK’s National Health Service, but for legal services—or, in the American parlance of “Medicare for All,” the potential value of a program of “legal services for all.” To apply the same justification as for a program of socialized medicine: everyone should have access to the legal services they need, when and where they need them, without suffering financial hardship.<sup>42</sup> No one should be denied access to legal services because they are poor, and nor should anyone be poor because they are denied access to legal services.<sup>43</sup> My study has prepared me, as a next step, to shed the neoliberal paradigm<sup>44</sup> and to explore socialized legal services (and any other non-market-based solutions) in greater depth.

## V. Significance and Limitations of Study

While my study is (A) significant for a number of reasons, it nevertheless (B) has some limitations.

### A. Significance of Study

*Democratizing* argues that the problems that plague legal services in the United States cannot be addressed in the absence of a radical overhaul of the rules that

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<sup>41</sup> See, for example: Jeanne Charn, “Legal Services for All: Is the Profession Ready?” *Loyola of Los Angeles Law Review* 42 (2009): 1021-63, <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2674&context=llr>; Noam Scheiber, “The Case for Socialized Law,” *The New Republic*, Feb. 4, 2014, <https://newrepublic.com/article/116424/socialized-law-radical-solution-inequality>. But see also Eric A. Posner, “Socialized Law Would Be a Massive, Unworkable Nightmare,” *The New Republic*, Feb. 5, 2014, <https://newrepublic.com/article/116473/socialized-law-would-not-work>.

<sup>42</sup> Tedros Adhanom Ghebreyesus, “Health is a Fundamental Human Right,” World Health Organization, Dec. 10, 2017, <https://www.who.int/mediacentre/news/statements/fundamental-human-right/en/>.

<sup>43</sup> Stef Benstead, “Why We Need the NHS,” *Huffpost*, Aug. 24, 2013, [https://www.huffingtonpost.co.uk/stef-benstead/why-we-need-the-nhs\\_b\\_3492642.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAAB-5bbRdPdkPC5NpVLPbJDF\\_22LLSa\\_v3i4\\_5eUSv0BCXcKCST1LdA6hstnBg0tg-M0ie7aZKT3fZJMfiACtTpk3rKYt6pGCiWsbzaAUR\\_W\\_KnRTbR5qrWawoJ4Rt\\_9bCzibFotFNV1i anf6Shoa4dHHTWbivCZlh-IbGfcYctsB](https://www.huffingtonpost.co.uk/stef-benstead/why-we-need-the-nhs_b_3492642.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAB-5bbRdPdkPC5NpVLPbJDF_22LLSa_v3i4_5eUSv0BCXcKCST1LdA6hstnBg0tg-M0ie7aZKT3fZJMfiACtTpk3rKYt6pGCiWsbzaAUR_W_KnRTbR5qrWawoJ4Rt_9bCzibFotFNV1i anf6Shoa4dHHTWbivCZlh-IbGfcYctsB).

<sup>44</sup> Arguably I began this evolution in the last chapter of *Modernizing*, where I emphatically reject a proposal by Gillian Hadfield to introduce private markets for the purposes of regulation itself. *Modernizing*, 253-73; Gillian Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It For a Complex Global Economy*, New York: Oxford University Press, 2016.

govern how legal services may be provided, and the book prepares the reader for a difficult journey by exposing the formidable obstacles that exist along the path to changing those rules. *Modernizing* explores the regulation of legal services in greater depth, in England & Wales, Australia, Canada and the US. In comparing the four jurisdictions, *Modernizing* exposes how the paralysis of the regulatory environment of the US prevents the country from closing its huge access to justice gap. Taken as a whole, these two books explain to the reader why the regulatory environment for legal services in the United States is moribund and the severe consequences this has for people who need legal services and who, in Sandefur's parlance, need "just resolution." At the same time, the books offer the reader a blueprint for how the United States can breathe new life into its regulatory environment for legal services and, in doing so, take a vital step towards restoring access to justice and, indeed, the rule of law and democracy itself.

## B. Limitations of Study

While my study has a number of limitations I consider these three to be among the most significant:

### 1. Almost No Interviews of People Who Need or Use Legal Services

For the most part, I did not interview people who need or use legal services. The only exception to this is my discussion with Elizabeth Davies, who spoke with me in her capacity as Chair of the Legal Services Consumer Panel. In that position, her role is to represent "consumers" of legal services. In addition, while I did not interview him, Tom Gordon of Responsive Law reviewed an early draft manuscript and provided valuable feedback on it.

I did not interview people who need or use legal services because I believed that, acting alone, I did not have the skills or resources required to do so effectively. Speaking with industry "players"—persons who have created and/or are managing alternative structures and regulators of legal services—is relatively easy in that for the most part they are well-versed in the underlying issues and are used to discussing them. Further, it was easy to identify the industry players who were relevant to my study and easy to contact them to ask them to participate: as industry players,

information about them and their activities is widely available on the internet. In most cases their contact details were also easily available. None of this is true with persons who need or use legal services: With the exception of, perhaps, some in-house counsel, their familiarity with the issues and ease in discussing them could not be assumed. Further, acting alone, I did not know how I could identify or reach out to appropriate interview subjects as persons who need or use legal services. Finally, even if I were to identify appropriate interview subjects and know how to contact them, I did not feel that I had the skills necessary to interview them: I did not have confidence in my abilities to acquire their trust or to know how to frame my questions in order to elicit relevant responses. Indeed, it was in recognizing these limitations in myself that I was able to better understand the value of organizations like the Legal Services Consumer Panel in England and Responsive Law in the United States: they are among the few organizations that are fully conversant in the underlying issues and can discuss them not from the perspective of a legal services provider or a regulator but of those who need and use legal services.<sup>45</sup> That informed perspective is precious and, as I've discovered in my research, highly undervalued.

The fact that I did not, for the most part, interview persons who need or use legal services meant that I made certain assumptions about them and notably about the struggles they face. I did not make these assumptions entirely in the dark however; they were at least partially informed in that I myself have been a recipient of legal services both as an individual and in my roles as in-house counsel, I have assisted family members and friends as recipients of legal services and, as a legal services provider myself, I have observed first-hand how my clients have obtained and used legal services. I was also informed and inspired by a wealth of others' research into how people access legal services.<sup>46</sup>

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<sup>45</sup> This is why in my study I recommend Responsive Law as an obvious candidate to participation in a citizen engagement process. *Modernizing*, 249.

<sup>46</sup> Examples include: Rebecca L. Sandefur, "What We Know and Need to Know about the Legal Needs of the Public," *South Carolina Law Review* 67 (2016): 443-460, <https://ssrn.com/abstract=2949010>, as well as a variety of presentations and reports issued by the Solicitors Regulation Authority (<https://www.sra.org.uk/sra/how-we-work/consumer-research/consumer-research.page>) and the Legal Services Consumer Panel ([http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/)).

## 2. Did Not Examine the Countries at the Top of the World Justice Project Rule of Law Index

In my study I rely heavily upon the World Justice Project Rule of Law Index and in particular upon its Factor 7.1 (“People can access and afford civil justice”) to demonstrate that lack of access to civil justice is a very serious problem in the United States. I draw attention not only to the shockingly low rank of the United States for this Factor (96<sup>th</sup> out of 113 countries) but also to how the United States compares unfavourably to fellow common law countries the United Kingdom (ranked 60<sup>th</sup>) Canada (ranked 47<sup>th</sup>) and Australia (ranked 40<sup>th</sup>).<sup>47</sup> And of course I go even further—I engage in a detailed examination of the differences among the four countries with respect to the regulation of legal services.

My study ignores the countries that rank the highest with respect to Factor 7.1; that is, my study ignores the countries in the world where citizens can best access and afford civil justice. The 12 countries that rank the highest in the 2017-18 Index are the Netherlands, Uruguay, Denmark, Antigua and Barbuda, Germany, Dominica, Barbados, Spain, New Zealand, Argentina, Norway, and Bulgaria.<sup>48</sup> While some of these countries (Antigua and Barbuda, Barbados, Dominica and New Zealand) share a common law tradition with the United States, most do not. Common law or not, what are the secrets of those countries? Why do their populations have better access to civil justice not only as compared to the United States but also to the UK, Australia and Canada? How are legal services in those countries regulated and, in particular, are they regulated in the manner that, in *Modernizing*, I argue that they should be? I felt that without some familiarity with the legal systems of at least some of these countries and also some familiarity with at least some of their languages (Dutch, Danish, Spanish, German, Norwegian, Bulgarian,...), I was not in a position to be able to do the research necessary to respond to those questions.

## 3. Lack of Data Demonstrating that the Changes in England & Wales and Australia Have Had (or Not) a Positive Effect on Access to Legal Services

While, in contrast to the two limitations described above, I do not see this as reflection of any personal failing or lack of skill on my part, I do think it is

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<sup>47</sup> Snyder, “How Low Can You Go?”

<sup>48</sup> Ibid.

unfortunate that in my study I was not able to present any data demonstrating whether (or not) the regulatory changes in England & Wales and Australia have actually (or not) resulted in better access to legal services by the populations of those countries. While I can imagine that it would be quite difficult to devise much less carry out an appropriate and sufficiently comprehensive study<sup>49</sup> I am nevertheless surprised as well as disappointed that, for England & Wales in particular, no such study exists (not that I am aware of, anyway) or has even been seriously attempted.

It is important to stress, however, that even in spite of this absence of data I believe there exists proof that the changes have been beneficial.<sup>50</sup> I believe this proof exists in the mere existence of the alternative structures I've profiled in my study: examined on a case-by-case basis, it is clear that they offer legal services in ways that were previously unavailable and to the extent these structures remain in business it is clear that there are people benefitting from their services. Further, and I believe that this is one of the most fundamental arguments reflected in the study, to the extent lawyers are provided by law with a monopoly on something as vital as legal services then they should be required to meet all needs for those services. If they are unable or unwilling to do so then they should not be allowed to maintain their monopoly. While certainly it is reasonable to require the others who would like to attempt to meet them comply with certain requirements intended to protect clients from poor or incompetent service, it is entirely unreasonable to require proof that they will succeed in significantly reducing unmet need. Of course this cannot be proven in advance and any requirement for such proof is a ruse for maintaining the monopoly, all while never requiring lawyers themselves—the monopoly holders—to do anything themselves to significantly reduce unmet need.<sup>51</sup>

## VI. Relation of Findings to Existing Scholarship

Scholarship in this area typically has one of two focuses: either (A) the concept of professionalism and its relationship to self-regulation, or (B) the regulatory changes that have taken or are in the process of taking place in England & Wales and Australia and their implications for regulation in the United States. In this next

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<sup>49</sup> I discuss those difficulties in *Democratizing*, 169-172.

<sup>50</sup> *Democratizing*, 172-84.

<sup>51</sup> *Ibid.*, 221-22.

section, I shall consider how the literature has approached these two concepts in a legal context, and then explain how my findings either advance or expand upon this scholarship.

### A. Professionalism and Self-Regulation

The first area of focus relates to the concept of professionalism and its relationship to self-regulation. This existing scholarship centres on how a 19<sup>th</sup> century concept of professionalism has collided with a 20<sup>th</sup> century concept of capitalism. Under the little-changed concept of professionalism, the legal profession is perceived as a public good. In this context, protecting and strengthening the legal profession is perceived to bring benefit to the public. Protection—and thus also professionalism—involves, most notably, self-regulation as well as broad unauthorized practice of law rules, strictly applied, to assure that anyone providing legal services falls under the control of that self-regulation.<sup>52</sup> However, this concept of professionalism—and thus also protectionism—has proven difficult to reconcile with the requirements of modern capitalism, which compels lawyers to act as service providers, and thus to operate in a business paradigm.<sup>53</sup>

#### 1. Existing Scholarship

A number of scholars have examined this quandary in-depth. Notable examples include:

Alan Paterson describes self-regulation as an element of a professionalism “contract.”<sup>54</sup> More specifically, Paterson explains, the nature of professionalism, at least in its “traditional model,”<sup>55</sup> is that it carries certain obligations for the profession in exchange for which it also provides to them certain benefits. The

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<sup>52</sup> See, for example, Gaye T. Lansdell, “Reflections on ‘Professionalism’ and Legal Practice—An Outmoded Ideology or an Analytically Useful Category?” *Legal Ethics* 19 (2016): 297-98, <https://www.tandfonline.com/doi/full/10.1080/1460728x.2016.1249641>. See also Richard L. Abel, “Lawyer Self-Regulation and the Public Interest: A Reflection,” *Legal Ethics* 20 (2017): 115-16, <https://doi.org/10.1080/1460728x.2017.1334742>.

<sup>53</sup> Christopher J. Whelan, “The Paradox of Professionalism: Global Law Practice Means Business,” *Penn State International Law Review* 27 (2008): 465-93, <http://elibrary.law.psu.edu/psilr/vol27/iss2/10>.

<sup>54</sup> Alan Paterson, *Lawyers and the Public Good: Democracy in Action?* (New York: Cambridge University Press, 2012), 16.

<sup>55</sup> Alan A. Paterson, “Professionalism and the Legal Services Market,” *International Journal of the Legal Profession* 3 (1996): 140.

obligations that it carries include competence (or expertise), a service ethic, public protection, and access. In counterpart, the profession is accorded status, “reasonable rewards,” restricted competition and autonomy (or self-regulation).<sup>56</sup> Seen from this perspective, self-regulation is an integral if not essential element of what it means to exercise a profession. Put another way, for Paterson, without autonomy (or self-regulation), there is no profession.

Richard Abel takes a cynical, if not mercenary, twist on Paterson’s concept of the professionalism “contract.” For Abel, controlling the market is an essential element of professionalism and self-regulation is a key means of that control. More specifically, self-regulation allows the legal profession “to control the production *of* and *by* the producers.”<sup>57</sup> This control includes both the supply side (who offers legal services and how they do so) as well as the demand side (how legal services may be advertised or solicited, and the extent to which pro bono work is encouraged).<sup>58</sup> In the words of Abel, “from a structural perspective, a profession *must* seek to control its market or else commit collective suicide.”<sup>59</sup> In sum, for Abel, even if self-regulation does not enable the profession to achieve a perfect or total control over the market,<sup>60</sup> it nevertheless enables it to achieve some, and for that reason self-regulation is essential to the survival of the legal profession.

Noel Semple rejects the theory of professionalism as a social contract, stating that its “elitism” is unsupportable.<sup>61</sup> Further, it courts regulatory failure (the inability both to accomplish the goals of regulation and to prioritize client interests over lawyer interests),<sup>62</sup> and it has deleterious effects upon access to justice (by increasing the

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<sup>56</sup>Paterson, *Lawyers and the Public Good*, 16; Paterson, “Professionalism and the Legal Services Market,” 140; Alan Paterson, Lindsay Farmer, Frank Stephen and James Love, “Competition and the Market for Legal Services,” *Journal of Law and Society* 15 (1988): 361.

<sup>57</sup> Richard L. Abel, “Why Does the ABA Promulgate Ethical Rules?” *Texas Law Review* 59 (1981): 653; see also Richard L. Abel, *American Lawyers* (New York: Oxford University Press, 1989), 40-73, 112-57; Richard L. Abel, “United States: The Contradictions of Professionalism,” in *Lawyers in Society: The Common Law World*, ed. Richard L. Abel and Philip S.C. Lewis (Washington DC: Beard Books, 2005), 205-22.

<sup>58</sup> Abel, “Why Does the ABA Promulgate Ethical Rules?” 657-60.

<sup>59</sup> *Ibid.*, 654.

<sup>60</sup> Abel says that the profession’s struggle for market control is “waged,” not that it is necessarily “won.” *Ibid.*

<sup>61</sup> Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar Publishing, 2015), 6-7, 216-17.

<sup>62</sup> *Ibid.*, 6, 93-132.

price and suppressing intra-professional collaboration).<sup>63</sup> However, Semple argues, as problematic as professionalism is, it should not be abandoned. Rather, it should be reformed and renewed in order to retain its positive aspects of service orientation, efficiency and independence, while at the same time becoming more client-centric.<sup>64</sup>

Laurel Rigertas writes that a key justification for regulating legal services is to protect consumers.<sup>65</sup> But, she asks, how much are we really protecting them when our regulations make it impossible for them to access legal services and thus force them to go without?<sup>66</sup> For Rigertas, it is the responsibility of state courts, as “the main regulators of the legal profession,” to take on more of a leadership role. In particular, she calls upon state courts to “revisit the scope” of the legal profession’s monopoly on legal services.<sup>67</sup>

Gillian Hadfield and Deborah Rhode observe that the US bar’s standard response to the crisis in access to justice is to promote increased funding for legal aid, increased pro bono by attorneys, and the creation of a government-funded right to counsel in some civil matters.<sup>68</sup> But, the authors point out, these responses are nowhere near adequate.<sup>69</sup> They argue that a larger number of people could be reached through the development of new business models, and notably through the “corporate practice of law,” but that such development is impossible in large part due to the protectionism of the bar. More specifically, they state, lawyers use their “special access to the regulatory levers” to protect themselves from competition by nonlawyers and alternative business models.<sup>70</sup> In order to improve access, reduce costs, promote innovation and improve quality of legal services, Hadfield and Rhode recommend that regulation be changed in these ways: (1) to develop a licensing scheme under which entities (namely corporations) in addition to lawyer-only law firms are

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<sup>63</sup> Ibid., 6, 133-82.

<sup>64</sup> Ibid., 7-8, 243-308.

<sup>65</sup> Laurel A. Rigertas, “The Legal Profession’s Monopoly: Failing to Protect Consumers,” *Fordham Law Review* 82 (2014): 2690-91, [http://fordhamlawreview.org/assets/pdfs/Vol\\_82/No\\_6/Rigertas\\_May.pdf](http://fordhamlawreview.org/assets/pdfs/Vol_82/No_6/Rigertas_May.pdf)

<sup>66</sup> Ibid., 2683-84.

<sup>67</sup> Ibid., 2684, 2701-02.

<sup>68</sup> Gillian K. Hadfield and Deborah L. Rhode, “How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering,” *Hastings Law Journal* 67 (2016): 1193, [http://www.hastingslawjournal.org/wp-content/uploads/Hadfield\\_Rhode-67.5.pdf](http://www.hastingslawjournal.org/wp-content/uploads/Hadfield_Rhode-67.5.pdf).

<sup>69</sup> Ibid., 1193-94, [http://www.hastingslawjournal.org/wp-content/uploads/Hadfield\\_Rhode-67.5.pdf](http://www.hastingslawjournal.org/wp-content/uploads/Hadfield_Rhode-67.5.pdf).

<sup>70</sup> Ibid., 1194-95.

authorized to provide legal services, (2) to allow lawyers to share revenue and profits with nonlawyers, (3) to expand the number and diversity of licensed legal professions, and (4) to allow some legal services to be provided by licensed nonlawyer experts.<sup>71</sup>

James Moliterno argues that, in the United States, the legal profession's inward focus, of which self-regulation is an integral part, causes the profession to resist change.<sup>72</sup> Moliterno shows through a succession of examples how the profession changes only in the midst of a crisis and only when change is forced upon it from outside.<sup>73</sup> As a result, the profession is unable to "grow with society" and is not attuned to the needs of the society that the profession claims to serve.<sup>74</sup>

## 2. My Findings in Relation to Existing Scholarship

What is missing from the scholarship described above is an examination of the extent to which the entire regulatory framework for legal services in the United States may be limiting the profession's ability to deliver on its obligations of professionalism. And more than that, the extent to which the regulatory framework may be holding back not just the legal profession but all of us, as a society, from assuring that those who need legal services receive them, be it from a lawyer or other competent source. These questions are particularly pertinent with respect to the United States, as that country has sat on the sidelines while other common law jurisdictions, and notably England & Wales and Australia, have made substantial if not revolutionary changes to their frameworks.

How did those changes come about, to what extent have the changes resulted in better outcomes for those who need legal services, and what can the United States learn from those countries? My study responds to these as yet unanswered questions:

### a. How Did the Changes Come About?

The changes came about by ignoring if not outright rejecting any conversation about professionalism and its focus on the legal profession in order to focus on the needs of

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<sup>71</sup> Ibid., 1215.

<sup>72</sup> Moliterno, *The American Legal Profession in Crisis*, 1-17.

<sup>73</sup> Ibid., 18-214.

<sup>74</sup> Ibid., 1.

clients and of the public as a whole. Further, they were only possible once the spectre of self-regulation was overcome—and again its focus on the legal profession—so as to permit a focus on what is good regulation—regulation that would benefit the public.<sup>75</sup> My interview data provided a rich vein of evidence in this regard, for example:

*“What matters is not what the impact of change will be on the ‘legal profession,’ but whether those changes will make it easier, in an inequitable world, for people to find access to the legal system.”—Andrew Grech, Group Managing Director, Slater and Gordon Lawyers.<sup>76</sup>*

*“When lawyers are self-regulating, their focus is rarely on access to justice or other consumer outcomes. Their focus is on whether services are being provided at a high enough standard...It is a professional conceit to believe that only lawyers can own and operate law firms.”—David Clementi, author of The Clementi Report.<sup>77</sup>*

*“The main focus of the Panel is to ensure that the reforms in the legal services market are producing better outcomes for consumers and to ensure that regulators are taking into account the use of legal services from the perspective of the consumers. We are trying to put the needs of consumers of legal services into the heart of the regulations.”—Elisabeth Davies, Chair, Legal Services Consumer Panel.<sup>78</sup>*

*“We are focused on what is in the public interest. We do not think about what we are doing in terms of what is good for the legal profession—we do not want to harm the legal profession because it plays a key role in our society, but our focus is on change for the benefit of the public.”—Darrel Pink, Executive Director, Nova Scotia Barristers’ Society.<sup>79</sup>*

*“Lawyers today struggle with the concepts of self-governance and the public interest. Since the 19th century, lawyers have taken for granted that self-governance is in the public interest. I think we need to challenge that. We need to make sure that regulation is done through the lens of the public interest.”—James Coyle, Attorney Regulation Counsel, Colorado Supreme Court.<sup>80</sup>*

These quotes demonstrate that in these jurisdictions the focus was much broader than professionalism as a product of self-regulation, but instead as a function of

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<sup>75</sup> For evidence on this point, and a developed analysis, see: *Democratizing*, 19-35, 209-32.

<sup>76</sup> “Andrew Grech, Group Managing Director, Slater and Gordon Lawyers,” Not Just For Lawyers, <http://notjustforlawyers.com/andrew-grech/>.

<sup>77</sup> “Sir David Clementi, Author, The Clementi Report,” Not Just For Lawyers, <http://notjustforlawyers.com/sir-david-clementi/>.

<sup>78</sup> “Elisabeth Davies, Chair, Legal Services Consumer Panel,” Not Just For Lawyers, <http://notjustforlawyers.com/elisabeth-davies/>.

<sup>79</sup> “Darrel Pink, Executive Director, Nova Scotia Barristers’ Society.”

<sup>80</sup> “James Coyle, Attorney Regulation Counsel, Colorado Supreme Court,” Not Just For Lawyers, <http://notjustforlawyers.com/james-coyle-attorney-regulation-counsel-colorado-supreme-court/>.

addressing client needs and how better to achieve this through a regulatory environment that sought to increase access to legal services and to Sandefur’s “just resolutions.”<sup>81</sup>

b. To What Extent Have the Changes Resulted in Better Outcomes for Those Who Need Legal Services?

In making the changes it made, England & Wales and Australia now allow for a much wider range of persons and structures to provide legal services using a much wider variety of business models.<sup>82</sup> That wide variety and how it makes it easier for different kinds of people to access legal services. I set out below a range of the types of legal service organisations that have flourished as a result of these regulatory changes, and how they are able to address access to justice through new and innovative means:

Proelium Law is a two-partner multidisciplinary practice that offers legal and business advice to companies, individuals and governmental agencies that seek to operate in complex, high-risk and hostile environments such as Syria, Afghanistan and Iraq.<sup>83</sup> As Adrian Powell, a founding partner of Proelium Law explained to me:

*For clients that operate in complex environments, it is easier for them to come to us rather than to a law firm that does not have any particular knowledge or understanding of complex environments or the client’s particular industry... There are very few firms in the world that do what we do... The fact that we can offer clients a one-stop-shop is comforting for them. Much more so than clients needing to go to two, three or four places for the same mix of work.*<sup>84</sup>

This multi-disciplinary perspective was obvious in other legal service entities too. Salvos Legal is a not-for-profit law firm with eight “partners” that provides commercial and property services to corporations, government agencies and not-for-profits. The fees collected by Salvos Legal, less expenses, are used to fund Salvos Legal Humanitarian. Salvos Legal Humanitarian is a full-service law firm that provides services to the “disadvantaged and marginalized” in family law, housing,

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<sup>81</sup> Sandefur, “Access to What ?” 49.

<sup>82</sup> *Democratizing*, 177-84.

<sup>83</sup> “Adrian Powell, Partner, Proelium Law,” Not Just For Lawyers, <http://notjustforlawyers.com/adrian-powell/>; and “Richard Stephens, Partner, Proelium Law,” Not Just For Lawyers, <http://notjustforlawyers.com/richard-stephens/>.

<sup>84</sup> “Adrian Powell, Partner, Proelium Law.”

social security, migration and refugee matters, debt, criminal law and other areas. The services of Salvos Legal Humanitarian are offered free of charge; the firm has a staff of lawyers whose salaries are paid from the funding of Salvos.<sup>85</sup> As Luke Geary, the Managing Partner of both Salvos Legal and Salvos Legal Humanitarian, explained to me:

*Salvos Legal Humanitarian, to date, has provided free legal assistance on [18,856]<sup>86</sup> matters, at no cost either to the government or to The Salvation Army. That's [18,856] cases of access to justice that otherwise would not exist. And that number goes up with each passing day.<sup>87</sup>*

BPIF Legal offers legal support and advice to members of The British Printing Industries Federation (BPIF), a trade association representing the UK's print, printed packaging and graphic communications industry. Their services are offered holistically with the other services that BPIF also offers to its members, in the areas of human resources, health, safety and environment, quality, marketing, sales and finance.<sup>88</sup> As Anne Copley, Head of Legal, BPIF Legal, explained to me:

*Our members come to us because of our expertise in the industry. They do not have to explain to us how the industry works... We know what our members are and we can ask questions that other lawyers might not know to ask because we know frontwards and backwards what goes on in a printing company. In addition, the relationship we have with our members is different than the one a traditional law firm would have with them. For lack of a better word, the relationship is more intimate. Since they are members, they consider that they have some ownership of us, rather than coming to us cap in hand. And since we liaise with the other services in our organization, we have a much more rounded view of their businesses.<sup>89</sup>*

Yet more evidence of multi-disciplinary practice is found in Counterculture Partnership that offers to cultural and creative not-for-profit organizations holistic services in the areas of strategic planning, funding, financial and project management, legal and governance advice, capital projects, training and advocacy.

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<sup>85</sup> "Luke Geary, Managing Partner, Salvos Legal and Salvos Legal Humanitarian," Not Just For Lawyers, <http://notjustforlawyers.com/luke-geary/>.

<sup>86</sup> Salvos Legal maintains an online counter of the number of matters for which it has provided free legal assistance since 2010: <https://slh.salvoslegal.com.au/counter>. 18,856 is the number reflected on the counter on 10 March 2019.

<sup>87</sup> "Luke Geary, Managing Partner, Salvos Legal and Salvos Legal Humanitarian."

<sup>88</sup> "Anne Copley, Head of Legal, BPIF Legal," Not Just For Lawyers, <http://notjustforlawyers.com/anne-copley/>.

<sup>89</sup> Ibid.

Counterculture has ten partners of which one is a lawyer.<sup>90</sup> As Keith Arrowsmith, Partner, Counterculture Partnership LLP, explained to me:

*There are clients who talk to me now because I am sitting with them wearing a Counterculture badge that wouldn't dream of walking through the door of what they see as a law firm. There is something about the perception of being in this more comprehensive structure that allows them to be more comfortable in engaging with me. Some of it might be related to concerns about cost, but I think that the real reason is that because I am wearing a Counterculture badge, I can begin conversations that otherwise I never would have been able to have. Many people in the arts start with the premise that their world and the legal world are so far apart, a lawyer could never understand them. With Counterculture, I am able to communicate with clients in a much more open way because they don't see us as a traditional law firm. We've had real success in that way, and it has been helpful for the arts sector.<sup>91</sup>*

But it is not just multi-disciplinary practice that is possible under these alternative regulatory models. New forms of business investment and firm ownership are also permitted, allowing firms to harness a range of people with a diversity of talents. For example, Stephens Scown provides legal services to companies and high net worth individuals. The firm specializes in areas important to the South West region of England, such as mining & minerals, renewable energy and tourism. Inspired by the share ownership scheme of John Lewis, Stephens Scown is one of the first large law firms in the UK to implement a limited employee share ownership scheme in which not just lawyers but all eligible employees may participate.<sup>92</sup> As Robert Camp, Managing Partner, Stephens Scown LLP, explained to me:

*For the past five years, we've been focused on client service, and we've won several awards for client service. We've recognized that client service is dependent upon staff engagement, and we want our staff to feel part of our firm, and not just a cog in a bigger wheel. This is the context in which we decided to become an ABS [alternative business structure] — in order to increase staff engagement. Research shows that if you can engage your entire staff so that they are all working for the same common goal and not just for rewards for those at the top, then the quality of service will go up. So you get happy clients who recommend you to others, and you get a virtuous circle.<sup>93</sup>*

In short, changes to the regulatory environment have allowed the development of alternative business structures that provide a more extensive and also specialised set

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<sup>90</sup> “Keith Arrowsmith, Partner, Counterculture Partnership LLP,” Not Just For Lawyers, <http://notjustforlawyers.com/keith-arrowsmith/>.

<sup>91</sup> Ibid.

<sup>92</sup> “Robert Camp, Managing Partner, Stephens Scown LLP, Not Just For Lawyers, <http://notjustforlawyers.com/robert-camp/>.

<sup>93</sup> Ibid.

of services at more competitive prices to individuals and to small and medium sized businesses. And the fact that non-lawyers are able to become legal business owners has brought new thinking into the legal services market and challenged some of the orthodoxies about how to practice law. The results have been very positive for clients.

c. What Can the United States Learn?

The list of what the United States can learn from England & Wales and Australia as well as from Canada is long. Without any pretence of this list being comprehensive, the United States can learn (1) that allowing for a wider range of persons and structures to provide legal services need not and has not resulted in unethical or sub-standard legal services nor has it resulted in the end of the legal profession,<sup>94</sup> (2) that while of course members of the legal profession should be involved in discussions of whether and how to change the rules they should not control those discussions and many more different kinds of persons—representatives of the public as well as those who have expertise in areas other than the legal profession—need to be involved in the discussions,<sup>95</sup> and (3) that it will not be enough to make small changes to one or a handful of rules: it is necessary to change the entire regulatory environment for legal services in the United States.<sup>96</sup>

A number of the persons I interviewed echoed these lessons:

*“[Lord Falconer selected me in part because] I was not a lawyer...In approaching the task, the first thing I did was to ask what questions needed to be answered. I concluded that [one question was]: What would be a better regulatory system than the confusion we have now?”—David Clementi, Author, The Clementi Report.<sup>97</sup>*

*“As we watched what was happening [in England & Wales and Australia] we realized that the sky hasn’t fallen, and that it likely won’t fall. We also realized that what they were doing made a lot of sense. And we realized that the practice of law has changed substantially...All this led us ... to ask the question: What is the right regulatory model for the 21st century?”—Darrel Pink, Executive Director, Nova Scotia Barristers’ Society.<sup>98</sup>*

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<sup>94</sup> *Democratizing*, 3-8, 143-56; *Modernizing*, 51-62, 107-10, 285-94.

<sup>95</sup> *Democratizing*, 211-14; *Modernizing*, 7-9, 40, 52, 56, 98, 140-42, 214-18, 247-49.

<sup>96</sup> *Democratizing*, xxv-xxvi, 5-17, 143-56; *Modernizing*, 206-08, 239-51.

<sup>97</sup> “Sir David Clementi, Author, The Clementi Report.”

<sup>98</sup> “Darrel Pink, Executive Director, Nova Scotia Barristers’ Society.”

*“A body that is essentially a membership body will always find it difficult if not impossible to take regulatory action which its members perceive to be a threat to their livelihoods, no matter how great the benefit to the public may be. This is why we need independent regulators, as they are able to regulate in the interest of the public without any conflict of interest with a duty to represent members. And with independent regulation, I am not saying that the perspective of the public or of the consumer must or even should prevail—I am simply saying that it needs to be in the mix. It’s essential for instilling public confidence in lawyers as well as in the regulation of legal services, and for that matter in our system of justice and the rule of law.”—John Briton, former Legal Services Commissioner Queensland.<sup>99</sup>*

*“When I look at the work of the Solicitors Regulation Authority (SRA) in England & Wales, I see that they spend a lot of time assessing risks and identifying ways to reduce those risks and to improve client services. Here in Colorado we do not have the resources of the SRA, but I think there is still a lot we can do. This is especially the case if we use the English and Australian models to guide us.”—James Coyle, Attorney Regulation Counsel, Colorado Supreme Court.<sup>100</sup>*

In short, regulatory change can be creative, effective and liberating for legal professions and for the public, assuming it is done in the right way.

## B. Regulatory Changes in England & Wales, Australia, and Canada

The second area of focus relates to the regulatory changes that have taken or are in the process of taking place in England & Wales, Australia, and Canada, and their implications for regulation in the United States. The existing scholarship in this area centres heavily upon England & Wales, and, in particular, upon the adoption of the 2007 Legal Services Act (“Legal Services Act”),<sup>101</sup> as well as upon Australia. This scholarship describes in greater or lesser detail the events leading up to the adoption of new regulations in those countries, the content of the new regulations, and the manner by which the new regulations have been interpreted and applied. In most cases this scholarship does not address the regulatory changes from a wide context but instead from a narrow one, notably by focusing on one element in particular, such as self-regulation, alternative structures, entity regulation, (with or without) compliance-based regulation, or regulatory objectives.

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<sup>99</sup> “John Briton, Legal Services Commissioner Queensland, 2004 – 2014.”

<sup>100</sup> “James Coyle, Attorney Regulation Counsel, Colorado Supreme Court.”

<sup>101</sup> Legal Services Act 2007, available at: <http://www.legislation.gov.uk/ukpga/2007/29/contents>.

## 1. Existing Scholarship

The literature provides a lens through which we are able to view legal service regulatory change and the drivers for change in the jurisdictions that I compared with the United States' context.

Paul Paton describes the changes in England & Wales and Australia as having been motivated in large part by widely publicized scandals resulting from the failure of the bar in each country to effectively regulate its members.<sup>102</sup> These scandals, together with concerns regarding competition and consumer welfare, led to changes in the regulatory system of each country whereby the profession lost regulatory power. In England & Wales, under the Legal Services Act and its creation of the Legal Services Board, this loss was nearly complete.<sup>103</sup> In Australia, however, it was merely partial as in most states the profession now acts as a co-regulator alongside that state's Legal Services Commissioner (or comparable body).<sup>104</sup> For Paton, the experiences of England & Wales and Australia are warning signs to the Canadian and American bars which, Paton assumes, would like to maintain their self-regulatory powers. He warns, however, that if the bar of either country fails to protect the public interest or confuses the public interest with the self-interest of the profession, then it deserves to have those powers reconsidered.<sup>105</sup>

Richard Devlin and Ora Morison describe in considerable detail the events that led to the adoption of incorporated legal practices in Australia and ABSs in England & Wales.<sup>106</sup> They also examine the events that led to the failure of the adoption of

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<sup>102</sup> Paul D. Paton, "Between a Rock and a Hard Place: The Future of Self-Regulation—Canada between the United States and the English /Australian Experience," *Journal of the Professional Lawyer* (2008): 91-92, <https://ssrn.com/abstract=1226802>. Paton also describes the processes leading to the adoption of the Legal Services Act in his article "Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America," *Fordham Law Review* 78 (2010): 2232-40. In this article, Paton holds up the examples of England & Wales and Australia as examples for the ABA Commission on Ethics 20/20 to follow in its own consideration of the adoption of multidisciplinary practices, arguing that their examples demonstrate that "thinking about the profession as a business does not have to mean the abandonment of 'core values' as the profession evolves." *Ibid.*, 2242.

<sup>103</sup> Paton, "Between a Rock and a Hard Place," 96-104.

<sup>104</sup> *Ibid.*, 104-07.

<sup>105</sup> *Ibid.*, 116.

<sup>106</sup> Richard Devlin and Ora Morison, "Access to Justice and the Ethics and Politics of Alternative Business Structures," *The Canadian Bar Review* 91 (2012): 499-526, <http://ssrn.com/abstract=2437035>.

alternative structures in the United States.<sup>107</sup> Their descriptions centre upon the respective roles of four “constituencies” in the debate on whether ABSs are desirable: governments, the organized legal professions, corporations, and consumer groups.<sup>108</sup> Observing that government played an important role in England & Wales and in Australia but virtually no role in the United States, they conclude that “the most assured route” to the introduction of ABSs in Canada will require government support. In its absence, the initiative will fall upon the law societies of the provinces and the Canadian Bar Association.<sup>109</sup>

Adam Dodek argues that Canada should regulate law firms in addition to lawyers as individuals. Dodek supports this argumentation in part by looking to England & Wales and Australia as examples. For this purpose, he describes the adoption of entity-based regulation in England & Wales (with limited detail)<sup>110</sup> together with the adoption of compliance-based regulation in Australia (with significant detail).<sup>111</sup> Dodek concludes that the regulation of law firms is necessary in order to ensure public confidence in self-regulation and out of respect for the rule of law. For him, the proper question is not whether law firms should be regulated, but instead why do they largely escape regulation?<sup>112</sup>

Ted Schneyer and Susan Fortney, respectively, recount the events leading to Australia’s adoption of compliance-based regulation (which they refer to as proactive, management-based regulation, or PMBR).<sup>113</sup> Both Schneyer and Fortney cite 2010 research by Christine Parker, Tahlia Gordon and Steve Mark demonstrating that the adoption of PMBR led to a two-thirds drop in the number of

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<sup>107</sup> Ibid., 526-37.

<sup>108</sup> Ibid., 485.

<sup>109</sup> Ibid.

<sup>110</sup> Adam M. Dodek, “Regulating Law Firms in Canada,” *Canadian Bar Review* 90 (2012): 406, 420-27, <http://dx.doi.org/10.2139/ssrn.1984635>.

<sup>111</sup> Ibid., 427-33.

<sup>112</sup> Ibid., 387.

<sup>113</sup> Ted Schneyer, “The Case for Proactive Management-Based Self-Regulation to Improve Professional Self-Regulation for US Lawyers,” *Hofstra Law Review* 42 (2013): 238-44, [http://www.hofstralawreview.org/wp-content/uploads/2014/02/BB.7.Schneyer.final2\\_.pdf](http://www.hofstralawreview.org/wp-content/uploads/2014/02/BB.7.Schneyer.final2_.pdf); Susan Saab Fortney, “Promoting Public Protection through an ‘Attorney Integrity’ System: Lessons from the Australian Experience with Proactive Regulation of Lawyers,” *The Professional Lawyer* 23 (2015): 1-3, <https://ssrn.com/abstract=2906525>. See also Susan Fortney and Tahlia Gordon, “Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation,” *University of St. Thomas Law Journal* 10 (2013): 156-65, <http://ir.stthomas.edu/ustlj/vol10/iss1/4/>.

complaints against law firms in Australia.<sup>114</sup> On the basis of this research, both Schneyer and Fortney argue that the United States should adopt PMBR because it will improve the quality of legal services and the operation of law firms and will increase client satisfaction.<sup>115</sup> In making this recommendation, Schneyer and Forney, respectively, focus in particular upon the self-assessment requirement adopted in Australia. In their opinions, the simple process of completing the self-assessment results in law firms making “learning and infrastructural adaptations”<sup>116</sup> which address in a proactive manner the types of concerns that typically lead to complaints.<sup>117</sup> This, in turn, leads to fewer complaints and better quality client service.

Laurel Terry, Steve Mark and Tahlia Gordon argue that “regulatory objectives are a necessity and jurisdictions that have not adopted regulatory objectives should seriously consider doing so.”<sup>118</sup> They offer England & Wales as an example of a jurisdiction that has adopted regulatory objectives, and, in doing so, they provide a history of the adoption of the Legal Services Act with a specific focus upon the topic of regulatory objectives.<sup>119</sup> Terry, Mark and Gordon argue that regulatory objectives serve important purposes, not the least of which are informing the public, consumers of legal services, and the profession of the purpose of legal services regulation, and underscoring the need to ensure access to justice and promote the rule of law.<sup>120</sup>

## 2. My Findings in Relation to Existing Scholarship

What is missing from this scholarship is a comprehensive examination of the regulatory changes in England & Wales and Australia. More specifically, what is missing is an exposure of the interplay among each of the different changes that, in the scholarship described above, are considered mostly in isolation from each other. In fact, neither England & Wales nor Australia adopted any of those changes in

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<sup>114</sup> Christine Parker, Tahlia Ruth Gordon, and Steve A. Mark, “Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW,” *Journal of Law and Society*, 2010, 485, <http://dx.doi.org/10.2139/ssrn.1527315>; cited by Schneyer, “The Case For,” 244-47; cited by Fortney, “Promoting Public Protection,” 3.

<sup>115</sup> Schneyer, “The Case For,” 235; Fortney, “Promoting Public Protection,” 7-8.

<sup>116</sup> Schneyer, “The Case For,” 247.

<sup>117</sup> Fortney, “Promoting Public Protection,” 3.

<sup>118</sup> Laurel S. Terry, Steve Mark, and Tahlia Gordon, “Adopting Regulatory Objectives for the Legal Profession,” *Fordham Law Review* 80 (2012): 2687, <http://ssrn.com/abstract=2085003>.

<sup>119</sup> *Ibid.*, 2697-2701.

<sup>120</sup> *Ibid.*, 2701, 2727-42.

isolation from the others. To the contrary, each change was highly dependent upon the other changes and each was adopted in the context of an overhaul of the respective country's entire regulatory framework. These facts are highly pertinent with respect to the United States because its attempts to adopt alternative structures—in isolation of other changes—have failed. My study demonstrates why this is the case.<sup>121</sup> My study also further completes existing scholarship with updated information both as regards the adoption of the Legal Profession Uniform Law in Australia<sup>122</sup> and as regards Canada's recent attempts to make its own regulatory changes.<sup>123</sup>

a. Why Attempts in the United States to Adopt Alternative Structures Have Failed

In the United States, the objections raised in relation to the adoption of alternative structures have often included “There is no way to regulate them.”<sup>124</sup> Indeed, there currently is no way to regulate them because today in the United States legal services are not regulated directly: they are regulated only indirectly, through the regulation of lawyers as individuals. Law firms (which can only be made up of lawyers) are regulated only in very limited ways,<sup>125</sup> and any person that is not a lawyer is not regulated at all, except through the lawyer monopoly on legal services, which for the most part restricts anyone who is not a lawyer from providing legal services.<sup>126</sup> Thus, indeed, it simply would not be sufficient to amend ABA Model Rule 5.4 to allow for alternative structures: the entire regulatory framework for legal services will also need to be revised in order to allow for the regulation not just of lawyers but of all legal services, regardless of the person or the structure that provides them.

As noted above, nothing in the existing scholarship acknowledges or addresses the necessity of this preliminary (or at least simultaneous) step. But for the regulators in the other countries I studied—who started from more or less the same position as the United States in that they also only regulated lawyers as individuals—this necessity

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<sup>121</sup> *Democratizing*, 143-60 ; *Modernizing*, 51-61, 86-88, 137-48, 206-8; “Steve Mark and Tahlia Gordon, Directors, Creative Consequences,” Not Just For Lawyers, <http://notjustforlawyers.com/steve-mark-and-tahlia-gordon/>.

<sup>122</sup> *Modernizing*, 91-106.

<sup>123</sup> *Modernizing*, 115-58.

<sup>124</sup> *Democratizing*, 11-18.

<sup>125</sup> *Ibid.*, 147-50.

<sup>126</sup> *Ibid.*, 222-24.

was obvious and easily recognized. Neither Clementi’s role nor his objectives were limited to allowing for alternative structures. Instead, his role was to identify “a better regulatory system,” and a primary objective was to “remove barriers to competition.”<sup>127</sup> Allowing for alternative structures was a by-product among many other by-products of that process. Similarly, even if as Legal Services Commissioner for New South Wales Steve Mark initially resisted,<sup>128</sup> he eventually embraced his role, commenting with Tahlia Gordon:

*The 2001 legislation permitting law firms to incorporate not only changed law firm structure. It also changed the method of regulation...The introduction of entity regulation today means that we have shifted from regulating “lawyers” to regulating “legal work”...At the beginning we faced a lot of criticism. But we didn’t let that stop us.*<sup>129</sup>

In a jointly written paper, the Law Societies of the Prairie Provinces of Manitoba, Alberta and Saskatchewan explained that while their initial focus was on alternative structures, they realized over the course of their discussions that “it was impractical to look at ABS alone” because of uncertainty over how they could be regulated. This led them to the inevitable conclusion that entity regulation, compliance-based regulation and alternative structures “are all intimately connected.” Entity regulation, together with compliance-based regulation, are the answer to the question “how would we regulate ABS?”<sup>130</sup> In stark contrast, when Ontario tried to change its rules only in order to allow for alternative structures of some kind—in isolation from any other regulatory change—my study explains how this resulted in a spectacular failure.<sup>131</sup> Given the importance of that province for the country as a whole, Ontario’s failure has set the work in Canada back for a number of years at least.<sup>132</sup>

#### b. Completion of Existing Scholarship

As explained above, while fragmented, existing scholarship describes in greater or lesser detail the changes that took place in England & Wales in connection with the

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<sup>127</sup> “Sir David Clementi, Author, The Clementi Report.”

<sup>128</sup> *Modernizing*, 78.

<sup>129</sup> “Steve Mark and Tahlia Gordon, Directors, Creative Consequences.”

<sup>130</sup> *Modernizing*, 126-7.

<sup>131</sup> *Modernizing*, 137-148.

<sup>132</sup> You can see evidence of this, for example, in the fear that regulators in British Columbia have in even mentioning alternative structures and their insistence that their work in relation to entity regulation and compliance-based regulation has nothing to do with alternative structures. *Modernizing*, 131-35; “Herman Van Ommen, Law Firm Regulation Task Force, Law Society of British Columbia,” Not Just For Lawyers, <http://notjustforlawyers.com/herman-van-ommen/>.

2007 Legal Services Act and in Australia in connection with the progressive changes that took place in New South Wales in the 1990s and early 2000s and were adopted across most of Australia with the Model Laws Project. My study adds to this scholarship not only by collecting the fragments in order to understand it as a whole,<sup>133</sup> but also by explaining in a comprehensive manner the adoption, content and significance of the 2015 Legal Profession Uniform Law in Australia<sup>134</sup> and the numerous changes and events that are taking place across the various provinces of Canada.<sup>135</sup>

It is with this information that we can have as complete an understanding as possible of what happened and is happening in England & Wales, Australia and Canada. In this manner, the United States may fully learn from what those countries have done right as well as from what they have done wrong. This learning is vital if the United States is to overcome the formidable obstacles it faces on its path to reform of legal services regulation. And, as explained above, such reform is vital if the United States is to assure wider access to legal services and, in doing so, better assure access to justice and the rule of law.

## VII. Original Contribution to Knowledge

Taking the material as a whole (*Democratizing, Modernizing* and the online data), the most important contribution is its very different perspective on the regulation of legal services. Most analyses of lawyer regulation are made from the perspective of lawyers and the legal profession. In contrast, the material analyses lawyer regulation from the perspective of prospective users of legal services and the public as a whole. This different perspective changes the discourse: The conversation is no longer about the nature of professionalism or whether law is a profession or a business. Instead, it is about the problems that people have in accessing legal services and about what stands in their way. The conversation is no longer about whether the legal profession has or should have a monopoly on legal services, but instead on how should legal services be regulated so as to permit unmet need to be fulfilled effectively.

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<sup>133</sup> With respect to England & Wales, see *Modernizing* 35-74; with respect to Australia, see *Modernizing*, 75-90.

<sup>134</sup> *Ibid.*, 91-106.

<sup>135</sup> *Ibid.*, 115-56.

Changing the discourse in this manner has profound consequences. It enables us to understand that what have typically been thought of as separate and distinct issues are in fact closely linked and highly dependent upon each other: the rule of law, access to justice and equal protection of the law, innovation in legal services, and the regulation of legal services. It enables us to understand that innovation in legal services should not be an end in itself or a means to maximize profits, but a means to maximize access to justice and rule of law. It enables us to understand that the focus of regulation needs to be on how to increase access to justice and the rule of law, even if this may be perceived, rightly or wrongly, as detrimental to the legal profession. While we should not seek to harm the profession, our focus should be elsewhere: on how to best benefit and protect the public.<sup>136</sup>

The second original contribution is its comparison of the common law jurisdictions of England & Wales, Australia, Canada and the United States. The material offers a comprehensive and in-depth comparison of the manner by which each jurisdiction has addressed or is addressing the topic of alternative structures. This comparison exposes not only the fundamental differences in the way each jurisdiction has addressed this specific topic, but also the fundamental differences in each jurisdiction's overall regulatory environments. This dual exposure enables us to understand why England & Wales and Australia have succeeded whereas Canada is struggling and the United States has to date outright failed in adopting alternative structures. And, most importantly, it allows us to understand how the United States can learn from the experiences of its common law sisters in order to improve (indeed, bring back to life) its today moribund regulatory environment for legal services.

The interviews offer two original contributions of their own: Firstly, they provide direct, first-hand perspectives on the variety of issues that are raised in the books. They move the discussion of alternative structures as well as a new regulatory environment from the realm of the theoretical and abstract to the realm of the concrete and entirely real.

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<sup>136</sup> This observation was inspired by Darrel Pink, who said in his interview with me: “we do not want to harm the legal profession because it plays a key role in our society, but our focus is on change for the benefit of the public.” *Modernizing*, 291 and <http://notjustforlawyers.com/darrel-pink/>.

Secondly, the interviews demonstrate the full range of alternative structures that have been created in England & Wales and Australia. Many people think that alternative structures are only about large corporations establishing “law factories,” in the manner of Slater & Gordon. Certainly they are about that, but they are also about much more. There is huge variety in these structures, as regards both size and substance that many people overlook. Part VI.A.2.b above provides five examples drawn from the interviews: Proelium Law, Salvos Legal and Salvos Legal Humanitarian, BPIF Legal, Counterculture Partnership, and Stephens Scown. These five structures, as well as the others that are profiled in the interviews, demonstrate just some of the large variety of ways that legal services are provided under the new regulatory frameworks of England & Wales and of Australia. They demonstrate just some of the large variety of ways that, regulatory framework permitting, individuals as well as organizations that need legal services can be reached and served. None of these structures is permitted under the regulatory frameworks currently in place in the United States or Canada.

## Appendix A

### Portfolio of Publications

Discipline: Law

Publications: Two books: (1) *Democratizing Legal Services: Obstacles and Opportunities* (2016<sup>137</sup>), and (2) *Modernizing Legal Services in Common Law Countries: Will the US Be Left Behind?* (2017<sup>138</sup>). The publisher for both is Lexington Books, an imprint of Rowman & Littlefield. A hard copy of each book is submitted together with this Commentary. An electronic version of each book has been uploaded to VRE. The books are supplemented by additional online data that is available in open access via a website at [this link](#). Additionally, a 275-page pdf document containing all of the supplemental materials is available at [this link](#).

Demonstration of appropriate quality: Both books were prepared on the basis of extensive research of both primary and secondary materials. In conducting the study I consulted with and incorporated the input of a number of scholars based in the US, UK, Canada and Australia. Both books were the subject of anonymous peer review. The supplemental online data is the work-product of 65 oral interviews that I conducted over a 27-month period. The methodology used to conduct the interviews and prepare the supplemental data is described below in Appendix B.

The full bibliography for *Democratizing* is available at [this link](#) and the full bibliography for *Modernizing* is available at [this link](#). The full bibliography for *Democratizing* is also available with Zotero at [this link](#).

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<sup>137</sup> ISBN: 9781498529792 (hardback); 9781498529815 (paperback); 9781498529808 (electronic).

<sup>138</sup> ISBN: 978-1-4985-3006-4 (hardback); 978-1-4985-3007-1 (electronic).

## Appendix B

### Methodology for the Interviews

I conducted the interviews either by phone or skype, with one exception (Sir David Clementi, with whom I met in person). Most interviews lasted about one hour. A small number were shorter—about 30 minutes—and some were much longer—up to two hours, with some of those taking place over more than one call. When I conducted the first interviews in early 2014, I had no idea what I was doing: I was not sure what questions to ask, I was not sure in what order to ask them, and I was not adept at formulating follow-up questions. After the first few interviews, I got the hang of it. The interviews became semi-structured, with the support of a topic guide.

More specifically, I developed a core set of questions. Before each interview, I studied the publicly available information about the relevant organization and the interviewee, and tailored the core set of questions to reflect the specificities of both. As I listened to each interviewee, I got into the habit of noting follow-up questions and I got better at identifying the right moments to ask them. Because I was never sure that I asked all the right questions, my last question became “What should I have asked, but didn’t?” Often it was this question that elicited the most interesting comments.

I consulted with Professor Lisa Webley, now my Director of Studies, in order to verify that my approach conformed to university research ethics requirements. She was able to confirm that it did.

In most instances, the interviews were recorded with the permission of the interviewee, and I also took handwritten notes as needed. After each interview, I prepared a write-up. I quickly recognized that a simple transcript of the interview wouldn’t work: hearing the spoken word is one thing—reading the spoken word is something entirely different. Run-on sentences, sentence fragments and the repetition of words and ideas are tolerated and even expected in speech, but not in writing. So, what I did was take the words and ideas that the interviewee expressed orally, and organized them on paper (or, more precisely, on a screen) in way that

they could be easily accessed by a reader rather than a listener. Because I wanted the focus of the reader to be on the interviewee and not on the interviewer (me), I excluded from the write-up the questions that I posed and any other limited commentary I occasionally made during the interviews. An unfortunate by-product of this is that sometimes in reading the stories the transitions can be abrupt.

I sent each write-up back to the interviewee. In doing so, I invited him/her to make comments and corrections. At first, I was not sure how “warmly” I should extend this invitation. Naturally I wanted any factual errors to be corrected. More than that, I wanted the interviewee to be comfortable with the write-up. At the same time, however, I didn’t want the write-up to be transformed into something that no longer reflected the interview. In progressing with the first few write-ups, I discovered that those fears were mostly unfounded—most interviewees made very few if any substantive changes. And when substantive changes were made, in most cases I felt that they improved the write-up. So, after those first few write-ups, I became comfortable extending what I intended to be a warm invitation to make comments and corrections, saying “please don’t feel wedded to what I have typed” and “it is important that you are comfortable.” And when I received a write-up back, usually in the form of a mark-up, I did not question or quibble with the changes—instead, in nearly all cases I accepted all of them, and then went back through the revised document simply to correct any spelling or grammatical errors.

As noted above, the interviews were conducted between March 2014 and May 2016. In August 2015 I contacted everyone I had interviewed up to that time, and I invited them to work with me to update their write-ups—most of them did so, if not immediately, then over the course of the following months.

Finally, because of spacing concerns, it was impossible to include all of the interviews in the books. The interviews that are included are excerpts. As previously noted, full versions of all the interviews can be accessed at <http://notjustforlawyers.com/stories/> and at [this link](#).

## Appendix C

### Terminology

A variety of terms are used to refer to organizations that are owned and/or managed by one or more nonlawyers and/or that are multidisciplinary practices (in other words, to refer to legal service providers that are not the traditional structures of either sole practitioner or law firm partnership). In Australia as well as in England & Wales, where there exist formal regulatory frameworks for such organizations, the terminology is fixed and easy to identify: in Australia they are referred to as “incorporated legal practices” or “ILPs” (as well as “multi-disciplinary partnerships,” or “MDPs” and the recently coined “unincorporated legal practices,” or “ULPs”). In England & Wales, they are referred to in common speech as “alternative business structures” or “ABSs,” and in the formal legal texts as “licensed bodies.” In the Canadian provinces, which are moving towards formal regulatory frameworks for such organizations but have not yet established them, the English/Welsh reference of “alternative business structures” or “ABSs” is often used, but by no means is it the only one used. Others include “new business models,” “new business structures,” “alternative business models,” and “liberalized structures.” In the US, “alternative business structures” and “ABSs” are also often used, but so are expressions like “alternative law practice structures,” (an expression occasionally used by the ABA Commission on Ethics 20/20), and “alternative law firm structures.”

In the books, I have chosen to use the term “alternative structures” as a general, all-purpose term of reference. I have done this for these reasons:

— In order to reserve the terms ILP and ABS for reference to the Australian and the English/Welsh entities specifically,

— In order to distance the general concept of these kinds of organizations from the specifically Australian and the specifically English/Welsh manifestations of them (manifestations which, as compared to each other, have significant differences). In doing so, I seek to underline that while the United States can and should be informed

by Australian ILPs and English/Welsh ABSs, in creating its own versions of them, there is no need that to identically copy their terminology, much less create identical copies of the structures themselves. In other words, Australian ILPs and English/Welsh ABSs are only two of the many possible manifestations of these kinds of organizations—the term “alternative structures” is used to encompass all possible manifestations,

— Because the term “business” is too limiting, and, for that reason, misleading. These structures are about much more than “business.” They are about new ways of developing and delivering legal services.

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