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THE VALUE OF “THINKING LIKE A LAWYER”

MICHELLE M. HARNER*

“Your business as lawyers is to see the relation between your particular fact and the whole frame of the universe.”

—*Oliver Wendell Holmes, Jr.*¹

I. INTRODUCTION

What does it mean to “think like a lawyer”? Many commentators have debated this issue.² Some explain the concept as a narrow analytical task performed in the legal context.³ Others, such as Oliver

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* Associate Professor of Law, University of Maryland School of Law. I would like to thank Afra Afsharipour, Don Gifford, Nancy Rapoport, and Bill Reynolds for their comments on earlier drafts of this Essay. This Essay also benefitted from my discussions with Joan Heminway and Michael Kelly and from feedback from the participants in *University of Maryland School of Law’s Symposium on the Profession and the Academy: Addressing Major Changes in Law Practice*. In addition, I appreciate the research assistance of Alice Johnson. Nevertheless, all opinions, errors, omissions, and conclusions in this Essay are my own. Finally, I thank University of Maryland School of Law for financial support.

1. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* vii (1983) (internal quotation marks omitted).

2. See, e.g., KENNETH J. VANDELDE, *THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING* 1 (1996) (“The phrase ‘to think like a lawyer’ encapsulates a way of thinking that is characterized by both the goal pursued and the method used.”); Nancy B. Rapoport, *Is “Thinking Like a Lawyer” Really What We Want to Teach?*, 1 J. ASS’N LEGAL WRITING DIRECTORS 91, 93–94 (2002) (noting various interpretations of “thinking like a lawyer”); David A. Garvin, *Making the Case*, HARV. MAG., Sept.–Oct. 2003 at 56, 58–59 (discussing the historical development of the case method and “thinking like a lawyer”). For a particularly insightful discussion of thinking about “thinking like a lawyer,” see generally RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 2 (3d ed. 1997).

3. For example, “thinking like a lawyer” is often couched in terms of case synthesis or litigation. See generally, e.g., Jane Kent Gionfriddo, *Thinking Like a Lawyer: The Heuristics of Case Synthesis*, 40 TEX. TECH. L. REV. 1, 7 (2007) (“[T]o operate successfully in their many roles, lawyers must be able to synthesize groups of cases effectively.”); Peter T. Wendel, *Using Property to Teach Students How to “Think Like a Lawyer”: Whetting Their Appetites and Aptitudes*, 46 ST. LOUIS L.J. 733, 735–44 (2002) (claiming that *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805)—a classic property case involving possessory rights to a dead fox—is the perfect case for giving students a taste of what it means to ‘think like a lawyer,’” and recommending that first-year property courses compare student-prepared briefs with the court’s opinion and consider the case within the litigation context). This Essay uses the concept of “thinking like a lawyer” in a broader sense than the traditional case-method dialogue approach used in law school; I also intend the term to invoke the skill set utilized by lawyers in practice. See, e.g., John Lande, *Developing Better Lawyers and Lawyering Practices: Introduction to the Symposium on Innovative Models of Lawyering*, 2008 J. DISP. RESOL. 1, 2 (explaining the limitations of traditional case-method dialogue identified by the 2007 Car-

Wendell Holmes, Jr., suggest that the concept is something more universal: a skill set inculcated in lawyers but applicable well beyond the legal field.⁴ Perhaps this explains the value and application of the skill set in business, finance, and other professions.⁵

This Essay does not seek to resolve the debate, but it embraces the latter conception of “thinking like a lawyer” for purposes of considering what lies ahead for lawyers and the legal profession generally.

negie Report, which envisions lawyering as requiring a more complete analytical skill set that connects basic factual analysis “with the rich complexity of actual situations that involve full-dimensional people . . . [and considers] the social consequences or ethical aspects of the conclusions”).

4. See, e.g., ALDISERT, *supra* note 2, at 23 (“[The] case method is all-important because a law school education is designed to teach you how to solve complex problems. Even if you never practice law a day in your life, upon graduation you will be equipped for a galaxy of positions in both the private and public sectors for here there is a constant demand for skilled problem solvers.”); Stephen M. Bainbridge, *Reflections on Twenty Years of Law Teaching*, 56 UCLA L. REV. DISCOURSE 13, 15–16 (2008), available at <http://uclalawreview.org/pdf/discourse/56-2.pdf> (acknowledging that legal thinking “is a matter of learning how to reason and argue, in some ways that lawyers share with everyone else, and in other ways that are peculiar to lawyers (e.g., arguments from authority are not fallacious in the law).” (quoting Brian Leiter, *The “Socratic Method”: The Scandal of American Legal Education*, LEITER REPORTS: A PHIL. BLOG (Oct. 20, 2003, 12:15 PM), http://leiterreports.typepad.com/blog/2003/10/the_socratic_me.html)); Marc A. Loth, *Limits of Private Law: Enriching Legal Dogmatics*, 35 HOFSTRA L. REV. 1725, 1732–33 (2007) (urging a broader approach to thinking like a lawyer and observing that “[a] lawyer who understands law in its context will never restrict herself to the strictly legal domain, but will integrate sociological, economic, or psychological expertise”); cf. Karen H. Rothenberg, *Recalibrating the Moral Compass: Expanding “Thinking Like a Lawyer” into “Thinking Like a Leader,”* 40 U. TOL. L. REV. 411, 416 (2009) (“While ‘thinking like a lawyer’ mandates the intricate dissection and reconstruction of facts and case law, ‘thinking like a leader’ further requires a student to consider the impact of his or her decisions and actions on the community as a whole, especially when community considerations conflict with a client’s interests.”). But see Jeffrey M. Lipshaw, *Models and Games: The Difference Between Explanation and Understanding for Lawyers and Ethicists*, 56 CLEV. ST. L. REV. 613, 614–16 (2008) (exploring what it means to “think like a lawyer,” commenting that “‘thinking like a lawyer’ . . . is very much a cultural phenomenon of the last 150 years or so,” and suggesting the use of “games and models as one way of thinking about thinking”). For a general discussion of necessary lawyering skills and legal education, see also ABA, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 135–41 (1992) [hereinafter MACCRATE REPORT], available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html> (providing and explaining a “statement of fundamental lawyering skills and professional values”), and WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 1–20 (2007).

5. See, e.g., Eric Torbenson, *Law Degrees Increasingly Attractive for CEO Candidates*, DALLASNEWS.COM (Sept. 2, 2008, 7:22 AM), <http://www.dallasnews.com/sharedcontent/dws/bus/stories/090208dnbusceolaw.386bf5.html> (“Of *Fortune* magazine’s latest list of the 50 largest U.S. companies, nine CEOs have law degrees—the second-most common degree behind a master’s degree in business.”). One top executive explained that her law school training “‘taught [her] to identify issues and solve problems.’” *Id.* Another stated that his law degree aided in senior management, which requires an understanding of public policy, by forcing him to understand and argue all sides of an issue. *Id.*

I use the phrase “key analytical skills” to reference a particular set of abilities: spotting and dissecting issues, identifying applicable tools and potential barriers, embracing ambiguity, and thinking creatively to resolve issues.⁶ Admittedly, it takes more than thinking like a lawyer to be a good practicing lawyer.⁷ Nevertheless, the key analytical skills form a solid foundation from which a lawyer can excel and serve the interests of her clients.

Not surprisingly, commentators who evaluate the future of the legal profession are themselves lawyers, and they use their key analytical skills in developing and supporting their theses. For example, Larry Ribstein and Richard Susskind separately explore the future of lawyers and law firms in their written works.⁸ They identify and dissect

6. See, e.g., Barbara Bintliff, *From Creativity to Computerese: Thinking Like a Lawyer in the Computer Age*, 88 LAW LIBR. J. 338, 339 (1996) (explaining that thinking like a lawyer represents a “method of organizing and categorizing the parts of a legal problem that allows for its discussion and possible solution, using a logical reasoning process” and discussing the elements of this method); Judith Wegner, *Better Writing, Better Thinking: Thinking Like a Lawyer*, 10 LEGAL WRITING: J. LEGAL WRITING INST. 9, 12 (2004) (“[T]hinking like a lawyer’ involves dealing with uncertainty in a very profound way.”).

7. See generally MACCRATE REPORT, *supra* note 4, at 138–40 (enumerating “[f]undamental [l]awyering [s]kills,” which include counseling, communication, negotiation, and legal reasoning); Rapoport, *supra* note 2, at 93–94 (acknowledging that skills included in the concept of thinking like a lawyer, while “essential to the development of a lawyer,” place too much “focus on the ‘thinking’ part, rather than on the transition from ‘thinking’ to ‘doing’ to ‘being’”). Many commentators have criticized traditional legal education for not sufficiently recognizing this distinction. See, e.g., Afra Afsharipour, *Incorporating “Business” in Business Law Classes*, 8 U.C. DAVIS BUS. L.J. 1, 1–2 (2007) (arguing that the “traditional methods” by which legal education fosters analytical skills, such as “reading cases and creating a foundation in various legal theories[,] . . . may not be sufficient to train graduating law students who decide to pursue a transactional career”); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1233 (1991) (arguing that “[l]egal educators, with our increasing orientation away from law and the practice of law, are failing to adequately prepare students to practice law”); Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223, 223 (2004) (“Although the academy prides itself on teaching students to think like a lawyer, for the most part we teach students to think like litigators. To teach our students to be deal lawyers, we must teach them to think like deal lawyers.” (footnote omitted)); Joan Heminway, *Minding Our Own Business Forum: Yes to Skills Training, but Lawyering Skills First (or at Least Simultaneously)*, CONGLOMERATE (Apr. 19, 2010), <http://www.theconglomerate.org/2010/04/minding-our-business-forum-yes-to-skills-training-but-lawyering-skills-first-or-at-least-simultaneou.html> (advocating the teaching of legal skills that will enable students “to do meaningful work early on,” such as planning and drafting contracts and litigation documents).

8. See, e.g., RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES I* (2008) (“My aim is to explore the extent to which the role of the traditional lawyer can be sustained in coming years in the face of challenging trends in the legal marketplace and new techniques for the delivery of legal services.”); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 752 (“This Article focuses on the structure and function of large law firms. Its goal is to analyze big law firms as a type of business firm and

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issues that indicate instability in the profession and a need for change. These issues include inefficiencies in the practice,⁹ the emerging role of technology,¹⁰ hourly billing,¹¹ and the economic structure of law firms.¹² They then—to varying degrees—discuss the applicable law,¹³ industry standards,¹⁴ societal norms,¹⁵ and potential barriers¹⁶ necessary to analyze the issues. Ribstein and Susskind recognize the ambiguity inherent in this analysis and present their own predictions for resolution.¹⁷ Although they invoke the same analytical method, they emphasize different issues and reach slightly different conclusions.¹⁸

to question whether these firms are economically viable under modern business conditions.”).

9. *Cf.*, e.g., SUSSKIND, *supra* note 8, at 148–53 (“At worst, hourly billing can tempt lawyers to dishonesty. At best, it is an institutional disincentive to efficiency.”); Ribstein, *supra* note 8, at 768–71 (arguing that hourly billing “can exacerbate lawyer-client agency costs because it tempts law firms to spend unnecessary time and client money”). R

10. *See* SUSSKIND, *supra* note 8, at 99–145 (identifying and explaining “disruptive legal technologies” that are “significant for lawyers of today”); Ribstein, *supra* note 8, at 761, 780–82 (identifying technical advances and positing that “[t]echnology potentially could transform the delivery of legal services”). R

11. *See* SUSSKIND, *supra* note 8, at 148–53 (defining hourly billing as a barrier to the alignment of clients’ and law firms’ commercial interests); Ribstein, *supra* note 8, at 768–71 (outlining “the decline of hourly billing”). R

12. *See* SUSSKIND, *supra* note 8, at 28–36 (explaining that as a result of market pressures and emerging information technologies, the provision of legal services has moved away from “bespoke’ legal service . . . [or] traditional, hand-crafted, one-to-one consultative professional service” and toward commoditization); Ribstein, *supra* note 8, at 753–97 (introducing “the standard economic model of the law firm,” discussing “this model’s implications for the structure and governance of large firms,” and proposing “one kind of successor to the Big Law business model”). R

13. *See*, e.g., Ribstein, *supra* note 8, at 803–13 (highlighting “the regulatory roadblocks that are preventing alternative models of delivering legal services from taking center stage and the forces that might help penetrate these barriers”). R

14. *See*, e.g., *id.* at 760–68 (discussing traditional practices and business standards in the legal profession and the various client, business, and societal pressures that impact those standards).

15. *See*, e.g., SUSSKIND, *supra* note 8, at 19–23 (summarizing changes in various industries caused by technological developments and noting some societal expectations regarding the technology behind these changes—themes that carry importance throughout the book). R

16. *See id.* at 278–84 (addressing three implications that follow from his predictions about the future of law); Ribstein, *supra* note 8, at 810–13 (offering suggestions for overcoming regulatory impediments to change). R

17. *See* SUSSKIND, *supra* note 8, at 25 (acknowledging that speculation, personal prejudice, and preferences play into his predictions, aiming to provide “a collection of provisions hypothesis about the future of legal service,” and “leav[ing] it to [the] readers to select what they fancy and turn . . . ideas into action”); Ribstein, *supra* note 8, at 777–78 (outlining one specific successor model while also addressing “more radical departures . . . to illustrate the possible futures for legal services firms”). R

18. *See infra* Part III.

Ribstein and Susskind both foresee significant changes in the legal profession. They also both implore lawyers to embrace rather than resist these changes.¹⁹ Ribstein emphasizes the economic necessity of the changes;²⁰ Susskind suggests lawyers may “fade from society” without some marked change.²¹ Lawyers’ willingness to heed these warnings may turn largely on the framing of the issues and how lawyers contemplate their role in proposed solutions.

This Essay contributes to the dialogue by comparing and contrasting Ribstein’s and Susskind’s analyses of the profession and by assessing potential lessons for lawyers, clients, and legal educators. Part II reviews the current state of the legal profession and the various criticisms leveled against lawyers and law firms. Part III discusses certain key issues raised by Ribstein in *The Death of Big Law* and Susskind in *The End of Lawyers?*. I acknowledge their common themes and highlight their different approaches to framing and resolving the issues. Part IV considers their works and the future of the legal profession in the context of the practice of law and the lawyer-client relationship. This Essay concludes by encouraging professionals to remain open to changes that improve efficiency and client service. It also stresses the value of preserving and promoting the hallmark of being a lawyer—that is, thinking like a lawyer.

II. THE STATE OF THE LEGAL PROFESSION

The U.S. economic recession of 2008²² has and continues to affect millions of people in almost every industry, including the legal profession.²³ As of July 2010, the overall unemployment rate was 9.5%, and of those unemployed, “roughly 6.8 million people[] ha[d] been out of work for 27 weeks or more.”²⁴ Between June 2009 and

19. See Susskind, *supra* note 8, at 269 (“I predict that lawyers who are unwilling to change their working practices and extend their range of services will, in the coming decade, struggle to survive.”); Ribstein, *supra* note 8, at 803 (“[T]he structure of the legal services industry has to change.”).

20. Ribstein, *supra* note 8, at 752 (“Big Law’s problems now extend beyond unaccommodating professional rules and can be solved only by adopting significantly different business models . . .”).

21. Susskind, *supra* note 8, at 4 (emphasis omitted).

22. I use the phrase “economic recession of 2008” to reference the economic turmoil experienced in the United States and elsewhere that began in 2007.

23. See generally News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, The Employment Situation—December 2010 (Jan. 7, 2011), available at <http://www.bls.gov/news.release/pdf/empst.pdf> (outlining the current employment situation).

24. Tom Huddleston Jr., *Legal Sector Lost 3,900 Jobs in June*, LAW.COM (July 6, 2010), <http://www.law.com/jsp/article.jsp?id=1202463264613>.

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June 2010 alone, the legal profession lost 22,200 jobs.²⁵ And, law firm surveys suggest more workforce reductions in the future, including the de-equitization of partners.²⁶

The unemployment numbers across the board are troubling. Many commentators are asking whether the lost jobs will return, or whether the recession triggered a long overdue rightsizing of companies that may be the new status quo.²⁷ In the context of the legal profession, commentators are also asking whether these market forces, together with improved technologies, increased global competition, and increasing client dissatisfaction with law firm fee structures, will force significant changes in the ways lawyers conduct business and provide legal services.²⁸

Criticism of law firm economics and client service is not new. The dramatic growth of corporate law firms in the 1970s and 1980s, the growing pressure on lawyers to increase annual billable hours, and the dominance of the hourly fee structure have all raised concerns

25. *Id.*

26. See Zach Needles, *Law Firms Predict More Layoffs Among Non-Equity Partners, Support Staff*, LAW.COM (June 23, 2010), <http://www.law.com/jsp/article.jsp?id=1202462916505> (“The firms polled said they believe there are more layoffs on the horizon and that support staff and non-equity partners remain in the crosshairs for the bulk of them.”); see also Martha Neil, *Survey Warns of Pending Partner Bloodbath: Over 33% of Responding Law Firms May De-Equitize*, A.B.A. J. (June 23, 2010, 5:47 PM), http://www.abajournal.com/news/article/survey_warns_of_pending_partner_bloodbath_33_of_responding_law_firms_may_de/ (reporting that a recent Altman Weil survey indicates that “[m]ore than 33 percent of the respondents intend to or might de-equitize partners in 2010”).

27. See, e.g., Anthony Mirhaydari, *What If the Jobs Don't Come Back?*, MSN (Aug. 4, 2010, 8:00 PM), <http://articles.moneycentral.msn.com/Investing/MutualFunds/mirhaydari-what-if-the-jobs-do-not-come-back.aspx> (“But the cruel and simple truth is that lost jobs don't always come back. Look at the industrial Northeast and you might ask, is America going the way of Detroit?”). Although the auto industry added 55,000 jobs in the twelve months since General Motors and Chrysler exited bankruptcy, this figure represented “less than one-sixth the 334,000 industry jobs lost between mid-2008 and mid-2009.” Greg Gardner & Kathleen Gray, *Obama Cites Progress; Chrysler to Add Jobs*, FREEP.COM (July 31, 2010, 3:14 AM), <http://www.freep.com/article/20100731/BUSINESS01/7310351/Obama-cites-progress-Chrysler-to-add-jobs#ixzz0w76YdDjt>.

28. See, e.g., SUSSKIND, *supra* note 8, at 3 (“The market, in ways I discuss, will determine that the legal world is inefficiently resourced (under-resourced in the consumer sector and over-resourced at the high end); it will increasingly drive out excesses and unnecessary friction and, in turn, we will indeed witness the end of outdated legal practice and the end of outdated lawyers.”); Ribstein, *supra* note 8, at 753 (acknowledging that the breakdown of the traditional BigLaw model was caused by “its inherent weakness and the additional stresses imposed by the current economic environment of law practice” and noting “the [open] question of what might replace Big Law’s traditional reputational capital model”); see also THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 3 (2010) (“The premise of this book is that lawyers are facing fundamental changes in both what they will be asked to do and whether the work they once did will continue to be done by lawyers at all.”).

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about traditional law firm practices.²⁹ For example, in a 1987 address, Chief Justice William H. Rehnquist observed that “the number of lawyers in the United States has more than doubled, from fewer than 350,000 in 1970 to nearly 700,000 today.”³⁰ He then invited lawyers and especially legal scholars to consider the implications of these developments, including the impact on lawyer and client satisfaction, lawyer mobility, and lawyers’ ethical duties.³¹

Law firm billing practices are one of the primary targets for critics, who suggest that billable hours contribute to many of the profession’s ills.³² The phrase “billable hours” is shorthand for the practice of billing clients according to the amount of hours lawyers devote to each client’s matters.³³ Accordingly, each lawyer is assigned an hourly billable rate. The billable rate is then multiplied by the number of hours the lawyer works for the particular client, and the client’s fee is calculated by adding together the billable hours of all the lawyers assigned to the client’s matter.³⁴

In theory, billable hours are designed to increase the accountability of lawyers to clients and law firms.³⁵ The detailed accounting of

29. Cf. William H. Rehnquist, Dedicatory Address, *The Legal Profession Today*, 62 IND. L.J. 151, 156–57 (1987) (noting the trend in the second half of the twentieth century “to make the practice of law more like a business” and encouraging the legal academy to engage in “careful examination” of these changes).

30. *Id.* at 151. Chief Justice Rehnquist also noted that “[t]his increase is out of all proportion to the increase in the nation’s population: in 1960 there was one lawyer for every 627 people in the country, whereas today there is one lawyer for every 354 people.” *Id.*

31. *Id.* at 152–57.

32. See, e.g., Stephen W. Jones & Melissa Beard Glover, *The Attack on Traditional Billing Practices*, 20 U. ARK. LITTLE ROCK L.J. 293, 295 (1998) (“Although simple to implement, the use of the hourly rate, unfortunately, rewards inefficiency.”); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 705–20 (1990) (detailing numerous ways in which attorneys deceive their clients through billing practices); William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 5 (1991) (exploring “the ethical aspects of time-based billing” and briefly offering suggestions for alternative billing practices).

33. See WILLIAM G. ROSS, *THE HONEST HOUR* 19–22 (1996) (explaining the historical development of the billable hour); D. W. Darby, Jr., *It’s About Time: A Survey of Lawyers’ Timekeeping Practices*, LEGAL ECON., Fall 1978, at 39, 39 (noting that “[t]he predominant basis used by successful attorneys to value their non-contingent services is time—time spent to perform the particular service”); Dennis Curtis & Judith Resnik, *Teaching Billing: Metrics of Value in Law Firms and Law Schools*, 54 STAN. L. REV. 1409, 1411 (2002) (reviewing DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000)) (stating that “most large law firms today bill their clients on the basis of hours worked by lawyers and paralegals, multiplied by their standard billing rates”).

34. See, e.g., YALE LAW SCH. CAREER DEV. OFF., *THE TRUTH ABOUT THE BILLABLE HOUR* (2010), available at http://www.law.yale.edu/documents/pdf/CDO_Public/cdo-billable_hour.pdf (providing sample billable hour calculations).

35. Cf. Jones & Glover, *supra* note 32, at 294 (noting that billable hours are “an objective way to measure the amount a client should owe”).

what a lawyer does for a client—broken down in small time increments—should allow clients and law firms to understand exactly what the lawyer did for the client and in turn justify the fee charged to the client.³⁶ Nevertheless, in practice, billable hours are subject to abuses, such as overworking a client's matter, padding hours, and multitasking, and clients often lack the tools (while firms may lack the incentive) to accurately monitor a particular lawyer's billable hours.³⁷

The potential issues with billable hours are frequently linked to perceived flaws in the leveraged business model (otherwise known as the pyramid model) adopted by many law firms. Under the pyramid model, law firms employ several nonequity lawyers for each equity partner.³⁸ Law firms then compensate equity partners in part through revenue generated by the billable hours of nonequity lawyers (who are paid on a fixed salary basis). Essentially, law firm profits are generated through nonequity lawyers' billable hours. For instance, if a nonequity lawyer bills 2,000 hours at \$200 per hour (for a total of \$400,000) and is paid an annual salary of only \$200,000, the law firm nets \$200,000 above and beyond the lawyer's salary to allocate to overhead, partner compensation, and other expenses.³⁹

The pyramid model can place pressure on nonequity lawyers to produce excessive billable hours while allowing partners to receive compensation that might not align with their contributions to clients or the firm.⁴⁰ Moreover, beginning in the late 1980s, law firms started to retain junior lawyers who were not promoted to equity partners, thereby increasing the number of nonequity lawyers available to support law firm profits.⁴¹ Yet, no notable methods emerged to ensure

36. See Curtis & Resnik, *supra* note 33, at 1412–13 (“Sophisticated clients now scrutinize legal bills to ferret out exorbitant charges and to prevent ‘padding’ through charges for unnecessary work or exaggerated hourly totals.”).

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37. See, e.g., Lerman, *supra* note 32, at 705–20 (providing examples of billing abuse); Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 208–10 (2000) (suggesting that partners, as well as associates, may be tempted to engage in unethical billing practices).

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38. For information on changing trends in this model, see MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 59 (1991), and Janet Ellen Raasch, *Making Partner—or Not: Is It In, Up or Over in the 21st Century?*, LAW PRAC., June 2007, at 32, 35.

39. This is a very basic explanation for purposes of illustration only. The economics in practice are complicated by, among other things, the amount of time billed versus the amount of invoiced fees collected.

40. See Raasch, *supra* note 38, at 34 (explaining that associates, under a heightened leverage structure, are pressured to bill increasingly more hours “as partners pile on the assignments in a never-ending effort to boost [profits per partner]”).

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41. *Cf. id.* at 33 (explaining that part of the significant trend away from the Cravath “up and out” model is decreased opportunity for associates to obtain equity partnership).

the necessity or quality of the work being performed for clients or lawyers' compliance with their ethical obligations.⁴²

One possible response to these developments "is that so long as the clients are willing to pay the bills, and the insurance company is willing to insure, no outsider need question what is going on."⁴³ Chief Justice Rehnquist found this response unavailing.⁴⁴ Likewise, clients, academics, and others have found it lacking and have increasingly scrutinized law firm practices.⁴⁵

The economic stress of the 2008 recession and its negative effect on law firms appear to validate many of the concerns expressed by clients and commentators through the years. Several large law firms have collapsed, and many more have downsized significantly.⁴⁶ As clients have become more cost-conscious, large law firms have encountered difficulty in sustaining their traditional business models.⁴⁷ Ribstein suggests that a good economy "masked" the problems of large law firms, noting that "Big Law's problems are long-term The real problem with Big Law is the non-viability of its particular model of delivering legal services."⁴⁸

Most agree that large law firms must change to survive in the current economic environment.⁴⁹ Law firms have responded by offering

42. Cf. Lerman, *supra* note 32, at 663–64 (noting that the "client's relative ignorance" and the lack of official or public scrutiny of an attorney's work are two factors that contribute to "opportunities for undetected deception").

43. Rehnquist, *supra* note 29, at 156.

44. *See id.*

45. *See, e.g.*, Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1907 (2008) ("Although this system is remarkably effective at maximizing the financial return on (at least some) human capital, it simultaneously undermines or hinders other values cherished by the profession.").

46. *See, e.g.*, Jason Fagone, *Wrongful Death*, PHILA. MAG. (May 26, 2009), http://www.phillymag.com/articles/wrongful_death/ (discussing the dissolution of Wolf Block, "one of the first Jewish law firms in Philadelphia, an iconic city institution"); Katerina Milenkovski, *What to Do When Your Firm Implodes*, ABA LITIG. NEWS (Jan. 16, 2009), http://www.abanet.org/litigation/litigationnews/top_stories/firm-implode.html (acknowledging the dissolutions of Heller Ehrman LLP and Thelen LLP, two former Am Law 100 firms).

47. *See* LEXISNEXIS, STATE OF THE LEGAL INDUSTRY SURVEY: COMPLETE SURVEY FINDINGS 6 (2009) [hereinafter LEGAL INDUSTRY SURVEY], available at http://www.lexisnexis.com/document/state_of_the_legal_industry_survey_findings.pdf (revealing a conflict between corporate counsel, who "say law firms are not doing enough to respond to the economic downturn," and private practice attorneys, who "say clients are too focused on costs, at the expense of quality and results").

48. Ribstein, *supra* note 8, at 751–52.

49. *See, e.g.*, Needles, *supra* note 26 (discussing recent changes in firms that are likely to continue in light of the recession, including an increased emphasis on generating business and the implementation of alternative billing arrangements); Dan Slater, *At Law Firms, Reconsidering the Model for Associates' Pay*, N.Y. TIMES DEALBOOK (Andrew Ross Sorkin ed.,

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alternative fee structures, outsourcing services, and reducing their workforces.⁵⁰ But are those changes enough?⁵¹ Commentators debate not only this question, but also the long-term outlook for the legal profession.⁵² Many (including most private lawyers) believe that the long-term impact of the recession will be nominal or nonexistent.⁵³ Others (including academics and clients) believe that the profession is experiencing a true paradigm shift.⁵⁴ The truth most likely lies somewhere between these views and is likely to depend largely on how the profession itself responds.

Ribstein and Susskind both predict significant and fundamental changes for the legal profession. Whether or not critics and commentators agree with their predictions, their works are thought-provoking and worthwhile reads. As Winston Churchill observed, “‘Criticism may not be agreeable, but it is necessary; it fulfills the same function

Apr. 1, 2010, 1:17 AM), <http://dealbook.blogs.nytimes.com/2010/04/01/at-law-firms-re-considering-the-model-for-associates-pay/> (reporting that firms are “experimenting with new ways to hire, train, promote and compensate associates”); Rachel M. Zahorsky, *Warnings Toll for BigLaw Firms Resistant to Change*, A.B.A. J. (Mar. 23, 2010, 11:59 AM), http://www.abajournal.com/news/article/warnings_toll_for_biglaw_firms_resistant_to_change/ (reporting on the “Law Firm Evolution: Brave New World or Business as Usual?” Conference hosted by the Georgetown Center for the Study of the Legal Profession, where questions such as “[w]hether firms will embrace . . . opportunities [for change], if change will be incremental or across-the-board, and who owns the onus to lead change were all hotly debated topics”); *see also supra* text accompanying notes 19–21 (noting Susskind’s and Ribstein’s predictions of future change).

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50. *See, e.g.*, LEGAL INDUSTRY SURVEY, *supra* note 47, at 6 (“[P]rivate practice attorneys say their firms have taken a number of steps in 2009 to respond to the changed economic climate,” including layoffs, alternate fee arrangements, hiring freezes, deferred start dates, and reduced salaries). This survey polled 300 private practice lawyers, 150 corporate counsel, and 100 law students. *Id.* at 4. It was conducted from October 26, 2009 through November 6, 2009. *Id.*

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51. *See id.* at 6 (“71% of corporate counsel responded that law firms today are not doing enough to the current financial pressures on their business model.”).

52. *See, e.g.*, Zahorsky, *supra* note 49 (discussing alternative views on the future of law firms offered by consultants, lawyers, academics, and service providers at the Georgetown Conference).

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53. *Compare id.* (“‘If you talk to most law firm leaders, they would dismiss these discussions [about law firm change] and say it’s really going to be business as usual again.’” (quoting William Perlstein, co-managing partner at WilmerHale)), *with* LEGAL INDUSTRY SURVEY, *supra* note 47, at 7 (“53% of corporate counsel and 52% of private practice attorneys believe the recession will permanently change the way business is done in the legal industry.”).

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54. *See supra* notes 27–28 and accompanying text; *see also* Rachel M. Zahorsky, *Majority Say Law Practice Is Undergoing a Sweeping Evolution, Survey Says*, A.B.A. J. (Mar. 26, 2010, 11:45 AM), http://www.abajournal.com/news/article/majority_say_law_practice_is_undergoing_a_sweeping_evolution_survey_says (reporting on one survey that reveals that “[w]hile not all lawyers agree the deep impressions of the economic downturn will last, the majority is preparing for a new paradigm with significant changes to practice—whether it be BigLaw or solo practice—and legal education”).

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as pain in the human body, it calls attention to an unhealthy state of things.’”⁵⁵

The next part of this Essay reviews the key issues raised by Ribstein and Susskind in the spirit of Churchill’s observation. It highlights similarities and differences in their perspectives and analyzes the potential implications of their predictions. It also considers alternative outcomes that may result from their spotlighting of these very important issues affecting the legal profession.

III. *THE DEATH OF BIG LAW? THE END OF LAWYERS?*

The titles of Ribstein’s and Susskind’s respective works are jarring to many in the legal profession. Both authors predict somewhat dire consequences for lawyers, particularly those lawyers who refuse to embrace and adapt to changing economic and technological environments.⁵⁶ Notably, their theses and predictions are not identical and may provoke different reactions among lawyers.

Ribstein finds that “[t]he real problem with Big Law is the non-viability of its particular model of delivering legal services.”⁵⁷ *The Death of Big Law* builds on Ribstein’s prior works that discuss the structure of law firms and the role of reputational capital in the traditional law firm model.⁵⁸ He identifies several challenges to that model, including decreased demand for legal services, reduced “information asymmetry” between lawyers and clients, declining reputation and quality in large law firm services, and increasing competition from legal and nonlegal professionals.⁵⁹ Ribstein does not necessarily question the value of or need for quality legal services; rather, he suggests

55. WILLIAM MANCHESTER, *THE LAST LION: WINSTON SPENCER CHURCHILL, VISIONS OF GLORY 1874–1932*, 348 (1983) (quoting one of Churchill’s speeches in the House of Commons).

56. For the most part, Ribstein and Susskind both focus on law firms and sophisticated clientele. See SUSSKIND, *supra* note 8, at 1 (“My aim is to explore the extent to which the role of the traditional lawyer can be sustained in coming years in the face of challenging trends in the legal marketplace and new techniques for the delivery of legal services.”); Ribstein, *supra* note 8, at 752 (“The Article is not primarily concerned with the future of law practice or of the legal profession generally, except to the extent that these broader developments offer alternatives to Big Law.”). Accordingly, in assessing their respective claims, this Essay adopts the same, somewhat narrow focus on a specific segment of the legal profession.

57. Ribstein, *supra* note 8, at 752.

58. See *id.* (explaining that *The Death of Big Law* “presents a much more pessimistic view of the future of Big Law” than an earlier work, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998)).

59. *Id.* at 760–71.

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lawyers need to explore innovative methods and structures for delivering those services.⁶⁰

Susskind presents a slightly different version of the impending changes in the legal profession. He suggests the potential for dramatic change not only in the model for delivering legal services but also in the nature of legal services themselves.⁶¹ Although he envisions some roles for lawyers, they are of less importance in his paradigm.⁶² He implies that many of the services provided by lawyers are generic in nature and can be performed by nonlawyers or even computerized.⁶³ He reserves only a small role for traditional legal expertise, which he suggests will be needed by only a handful of clients.⁶⁴

Both Ribstein and Susskind find inefficiencies in a model that caters solely to individualized client services.⁶⁵ They both urge lawyers to diversify their approaches to providing legal services.⁶⁶ Nevertheless, Ribstein appears to perceive greater value in lawyer participation in that diversification than Susskind. He encourages lawyers to develop proprietary legal products⁶⁷ and suggests ways for lawyers to diversify while maintaining the integrity of the profession, such as

60. See Ribstein, *supra* note 8, at 777–97 (suggesting “other ways of delivering legal knowledge and law-related products that could provide better value to clients”).

61. See SUSSKIND, *supra* note 8, at 1 (suggesting that in the future “conventional legal advisers will be much less prominent in society and, in some walks of life, will have no visibility at all” as “[c]ommoditization and IT will shape and characterize twenty-first century legal service”). *The End of Lawyers?* builds on Susskind’s prior works, including *The Future of Law*. *Id.* at 17–19. See generally RICHARD SUSSKIND, *THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY 2* (1998) (explaining that “modern information technologies can and should provide the basis of, and even the catalyst for, the emergence of a quite different kind of legal service”).

62. See SUSSKIND, *supra* note 8, at 36–39 (proposing that legal services move toward systematization, prepackaged knowledge services, and commoditization and limit one-on-one lawyer-client interaction).

63. See *id.* at 28–33 (introducing a model to explain the five stages of evolution for legal services and commenting that such services are becoming increasingly commoditized with the help of existing and new information technologies).

64. *Id.* at 39.

65. See *id.* at 35 (asserting that efficiencies will increase as legal services become standardized and systematized); Ribstein, *supra* note 8, at 797 (“[I]t may be more efficient for firms to combine legal services with other activities under common ownership, where control may or may not be exercised by lawyers.”).

66. See, e.g., SUSSKIND, *supra* note 8, at 29–32 (asserting that “high quality service, charged at a reasonable price and subject to regular update and maintenance, can be delivered in standardized, systematized, and packaged form”); Ribstein, *supra* note 8, at 797 (suggesting that law firms “may move beyond customized legal advice to other ways to profit from legal expertise”).

67. Ribstein, *supra* note 8, at 778–82 (acknowledging that although “[l]egal knowledge can be packaged and sold as standardized products,” one significant barrier to such development is “the lack of formal intellectual property protection for legal products”).

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through control shares in multidisciplinary firms.⁶⁸ Susskind, however, perhaps to underscore his primary thesis, posits certain instances in which actual lawyers provide little or no value and suggests the potential for the commoditization of legal products.⁶⁹

The intricacies of these various arguments are explored below through Ribstein's and Susskind's comments on types of legal services, the impact of technology on legal services, the delivery of legal services, and the regulation of the legal profession. This Essay's discussion of these four categories does not cover all arguments and issues raised in Ribstein's and Susskind's works, but it highlights some of the more challenging assertions to help crystallize the ongoing debate.

A. *Types of Legal Services*

The phrase "legal services" covers a wide spectrum of activities performed by lawyers. Legal services may involve, among other things, client counseling, negotiations, research, and litigation.⁷⁰ Traditionally, a specific client's identity and legal needs determine the type of legal services the lawyer renders during the engagement. In most instances, a single lawyer or law firm provides all legal services necessary in a particular matter. Nevertheless, the Model Rules of Professional Conduct allows lawyers and clients to limit the scope of legal services to identified tasks or to aspects of the engagement.⁷¹

1. *Ribstein's Perspective*

Ribstein observes that law firm profitability under this traditional approach to legal services depends largely on the relationship between the client and the lawyer and the reputational capital of the law firm.⁷² The relationship component of this profit calculation presents significant risks for the law firm: if a lawyer leaves the law firm and the client follows that lawyer, then the law firm is left with no profit-producing product.⁷³ Moreover, to the extent lawyers can and do move

68. *See id.* at 792, 798–99.

69. SUSSKIND, *supra* note 8, at 28–33.

70. *See, e.g.,* Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59 MD. L. REV. 595, 602 n.38 (2000) (pointing out that states have taken different approaches to defining "the practice of law" and offering a list of services that create "a presumption of rendering legal services" as defined by the D.C. Court of Appeals (citing D.C. CT. APP. R. 49(b)(2))).

71. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) cmt. 6 (1983).

72. *See* Ribstein, *supra* note 8, at 753–54 (explaining the "basic reputational bonding model" as follows: "A law firm in effect 'rents' its reputation to its lawyers just as a roadside franchise restaurant uses the franchisor's reputation to draw customers.").

73. *Id.* at 759–60 (noting the risk that partners may "'grab' clients and leave," a possibility which "threaten[s] law firm stability").

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freely among law firms, individual lawyers have little incentive to contribute to firm-specific reputational capital.⁷⁴

Ribstein suggests law firms need to develop legal products—that is, “[l]egal knowledge . . . packaged and sold as standardized products.”⁷⁵ He posits that these legal products could take a variety of forms, including law-related forms and publications, legal ideas (for example, takeover defenses or risk-management tools), and software.⁷⁶

Alternatively, Ribstein explores the potential value in law firm research and development efforts.⁷⁷ Law firms could devote teams of lawyers to creating novel approaches to client problems, exceptional standard forms that would better suit client needs than those currently in existence, and processes for anticipating and mitigating potential legal problems before they develop.⁷⁸ All of these efforts would better serve law firm clients, but Ribstein suggests the traditional law firm model “does not readily lend itself to profiting from research and development that benefits classes of cases and clients.”⁷⁹

2. *Susskind's Perspective*

Susskind foresees an “evolution of legal services” in which bespoke legal services—that is, “traditional, hand-crafted, one-to-one consultative professional service”⁸⁰—become less prominent as legal services evolve along a spectrum that includes standardized, systematized, and packaged legal products.⁸¹ At the end of the spectrum are commoditized legal products, which Susskind defines as “an [information technology]-based offering that is undifferentiated in the marketplace.”⁸² He asserts that legal services are being pulled along this spectrum toward commoditization by market forces and information technology advances and away from bespoke legal services.⁸³

74. *See id.* at 759 (“[T]he firm’s reputation lasts only as long as lawyers gain more from investing in it than they do from building their own clientele.”); *see also* William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 *GEO. J. LEGAL ETHICS* 1395, 1399–1403 (2009) (summarizing data on lateral lawyer movement).

75. Ribstein, *supra* note 8, at 778.

76. *Id.* at 778–82.

77. *Id.* at 782–87.

78. *Id.* at 782–83.

79. *Id.* at 783.

80. SUSSKIND, *supra* note 8, at 29.

81. *Id.* at 28–33.

82. *Id.* at 32.

83. *Id.* at 28.

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Susskind sees significant opportunity for lawyers in this changed environment, but not in the traditional sense.⁸⁴ He believes that innovative lawyers can profit by systematizing and packaging legal services, particularly online legal services:

[I]f a chargeable online legal service is developed and is of such value and use to clients that they are prepared to pay serious fees for its use and there are no competitor products, then once the initial investment in the system has been made, all later sales yield funds that are unrelated to the expenditure of time and effort by lawyers.⁸⁵

He acknowledges, however, that the profit opportunity could be lost if the product becomes commoditized.⁸⁶

3. *Analyzing the Perspectives*

Ribstein and Susskind appear to agree on the value of standardized and packaged legal services, but with certain variations. For example, Ribstein suggests developing these products in tangible, as well as intangible, forms and as a means to enhance client value and law firm sustainability.⁸⁷ Well-developed legal products offer a way for firms to differentiate themselves to clients and attract investment and financing opportunities.⁸⁸ Together with investments in research and development, legal products deepen the expertise of the law firm.⁸⁹

For Susskind, packaged and, to a greater extent, commoditized legal services are primarily online products accessible to clients with or without lawyer intervention. He describes these products as a potential do-it-yourself legal service available as “raw material that can be sourced from one of various [electronic or online] suppliers.”⁹⁰ Ribstein also hints at the possibility of using artificial intelligence to de-

84. Susskind suggests that legal services can be most efficiently provided by decomposing the services into identifiable tasks that are then outsourced to a variety of service providers—some lawyers and some not. *Id.* at 42–52. In this regard, his focus “is on the outsourcing of legal and quasi-legal work rather than the outsourcing of back-office functions.” *Id.* at 48.

85. *Id.* at 36–37.

86. *See, e.g., id.* at 55–56 (noting that Deloitte’s commoditization of a software product, while beneficial to its reputation, left the firm in need of new sources of income).

87. *See* Ribstein, *supra* note 8, at 777–82.

88. *Id.* at 777–78.

89. *See id.* at 778, 782 (arguing that law firms might “leverage their expertise by publishing legal analyses, contracts, standard forms, software, codes, and other law-related materials” and “by providing research and development on specific types of business transactions.”).

90. SUSSKIND, *supra* note 8, at 30–32.

velop smart legal products,⁹¹ but he does not appear to champion automation and commoditization to the extent proposed by Susskind.⁹² Both commentators, to varying degrees, undervalue the personal component of legal services and the fact-intensive nature of many legal matters.⁹³

Some clients may have similar legal issues, and clients within the same industry may invoke similar contract forms and compliance advice. But, no two clients are really the same.⁹⁴ Most clients have individualized needs and objectives. While you can squeeze a client into someone else's form document, the fit is rarely perfect. Thus, clients who want legal services that address their particular potential or actual legal problems need more than an automated response. They need a sophisticated lawyer who can use technology to provide the right legal advice in a more efficient and cost-effective manner. As discussed below, technology certainly has potential in the legal context, but using it as a substitute for trained legal judgment is problematic and ill-advised.

B. *The Impact of Technology on Legal Services*

Technology undeniably is changing the way people live, interact, and transact business. Approximately fifty-five percent of Americans

91. Ribstein, *supra* note 8, at 808 (suggesting that if regulations are relaxed, “firms would have incentives to invest in, for example, software and data that could automate contract drafting or aspects of litigation, or guide businesses on likely legal outcomes of particular decisions or contract provisions”).

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92. Ribstein discusses commodity legal practices, but his definition of “commodity” is different than Susskind’s definition. *Compare id.* at 766 (stating that “the commodity end of legal work[] includ[es] risk management, contract review, and patent searches”), with Susskind, *supra* note 8, at 32 (“[A] commoditized legal service is an IT-based offering that is undifferentiated in the marketplace (undifferentiated in the minds of the recipients and not the providers of the service).”).

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93. I recognize that Susskind anticipates this critique from lawyers. *See* Susskind, *supra* note 8, at 42–43, 274–75 (explaining that a common response to his position is the notion that “computers cannot replace legal work”). Notably, I am not suggesting that his observations are completely flawed in this respect. Nevertheless, having practiced in a large law firm for many years and counseled numerous clients in and out of crisis situations, I think individualized legal services offer more value to clients than Susskind acknowledges.

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94. Admittedly, different lawyers serve different clienteles. For some types of practices—for example, those referred to as commodity practices by Ribstein—online or automated services may satisfy some of the clients’ legal needs. For the majority of sophisticated business clients with complex legal matters, however, even “smart” technology most likely falls short. *See infra* Part IV. Consider, as just one minor example, a standardized or form agreement for a business acquisition that includes specific performance as a remedy for breach of that agreement. Even a sophisticated business client most likely needs a lawyer’s assistance in assessing the potential enforceability of that provision in a variety of circumstances and then factoring that risk into the value of the overall deal.

use the Internet on a daily basis, with most of those individuals using e-mail and search engines.⁹⁵ Computers and online databases have altered practices at law schools and law firms alike.⁹⁶ But just how far will technology push the legal profession?⁹⁷ Will the virtual law firm become the new norm?⁹⁸

1. *Ribstein's Perspective*

Technology itself is not the focus of Ribstein's work. Nevertheless, he acknowledges its advancements and its role in reshaping aspects of the legal profession.⁹⁹ For example, Ribstein implies that technology has the potential to reduce information asymmetry between lawyers and clients through, among other things, the standardization of legal documents and the hiring of legal counsel.¹⁰⁰ Technology may further weaken clients' reliance on the traditional law firm model to insure, identify, and purchase legal services.¹⁰¹ Ribstein observes that "[t]he prospect of standardization therefore may be more a threat than an opportunity to Big Law, since it could squeeze some of the profit from transactional work and litigation without letting law firms profit from the new tools."¹⁰²

95. Catharine Smith, *Internet Usage Statistics: How We Spend Our Time Online*, HUFFINGTON POST (June 22, 2010, 12:34 PM), http://www.huffingtonpost.com/2010/06/22/internet-usage-statistics_n_620946.html.

96. See Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 N.W. U. L. REV. 1827, 1830–35 (2008) (illustrating various impacts of computers on law schools and law office operations).

97. *Id.* at 1864–67 (concluding with intentional ambiguity that “the revolution may be upon us, but we cannot be sure”).

98. See, e.g., Joe Kashi, *Building a Virtual Law Firm: Changes and Opportunities*, LAW PRAC. TODAY (Jan. 2004), <http://www.abanet.org/lpm/lpt/articles/ptr01042.html> (speculating about the operations and services that will be provided by virtual law firms in the future). For examples of virtual law firm models, see ANYWHERE LEGAL, <http://www.anywherelegal.com/> (last visited Dec. 12, 2011); RIMON LAW GROUP, <http://www.rimonlaw.com/> (last visited Dec. 12, 2011); and VIRTUAL LAW PARTNERS, <http://www.virtuallawpartners.com/> (last visited Dec. 12, 2011).

99. See Ribstein, *supra* note 8, at 780–82 (“Technology potentially could transform the delivery of legal services.”).

100. See *id.* at 757–59, 781 (explaining the demand for BigLaw legal service in terms of information asymmetry between clients and their attorneys and suggesting that technology may ease clients' reliance on traditional law firms and the services they provide).

101. See, e.g., *id.* at 760–61, 766–67 (describing the rise of legal services obtained from in-house counsel and outsourced legal experts as two factors threatening to destabilize BigLaw and noting that the transformation to a “horizontal” rather than “vertical” firm structure and, in some cases, the elimination of “brick-and-mortar offices” are enabled in part by technology).

102. See *id.* at 782 (referencing challenges for law firms in protecting proprietary interests in technology developed by the firm for clients' use).

Ribstein also views technology as an important tool in lawyer innovation. Technology facilitates the timely and efficient provision of legal services and can also form the basis of the legal product itself, such as with online or software-based training, forms, and legal guidance.¹⁰³ Ribstein's perspective that technology will form an integral part of the legal profession's future is evident in his predictions for legal education: "[T]he development of legal products and the increasing use of technology in law practice require technical training that enables lawyers to do more than just litigate and give individualized advice."¹⁰⁴

2. *Susskind's Perspective*

Technology itself is very much the focus of Susskind's work. He views technology as a primary driver of change in the legal profession.¹⁰⁵ Susskind believes technology, beyond complementing the work of lawyers, will radically change the way people give and receive legal information.¹⁰⁶ As noted above, his concept of commoditization involves technology-based products that require little, if any, lawyer participation.¹⁰⁷

Susskind identifies several trends in technology that indicate its inevitable dominance in the legal profession.¹⁰⁸ Nevertheless, the more intriguing aspects of his technology discussion focus on what he calls "disruptive legal technologies."¹⁰⁹ According to Susskind, these are "technologies (or systems, techniques, or applications) that do not simply support or sustain the way a business or sector operates; but instead fundamentally challenge or overhaul such a business or sector."¹¹⁰

Susskind discusses ten "disruptive legal technologies": (1) "automated document assembly"; (2) "relentless connectivity"; (3) "elec-

103. *See id.* at 778–79 (pointing out that one drawback of such legal products is a lack of intellectual property protections, which means that "[l]aw firms . . . might not get much payoff apart from reputational or branding effects from the kinds of publications they could produce").

104. *Id.* at 814 (noting Susskind's suggestion that "law students will need to be able to engineer legal knowledge").

105. SUSSKIND, *supra* note 8, at 27 (describing "widespread uptake of *information technology*" as one of two forces that "will fundamentally transform legal service in the coming decade and beyond").

106. *Id.* at 99 (introducing the concept of "disruptive legal technologies").

107. *See supra* note 62; *see also* SUSSKIND, *supra* note 8, at 31–33 (discussing his definition of commoditization).

108. *See* SUSSKIND, *supra* note 8, at 59–93 (describing trends in technology).

109. *Id.* at 99.

110. *Id.*

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tronic legal marketplace”; (4) “e-learning”; (5) “online legal guidance”; (6) “legal open-sourcing”; (7) “closed legal communities”; (8) “workflow and project management”; (9) “embedded legal knowledge”; and (10) “online dispute resolution.”¹¹¹ His discussion of each technology explains the characteristics that will enhance legal services yet potentially threaten the traditional role of lawyers.¹¹² He states that “these disruptive legal technologies will present fundamental, unavoidable, and pressing challenges for most legal businesses.”¹¹³ Although he sees opportunities in these developments for innovative lawyers,¹¹⁴ he challenges the sustainability of “the traditional, one-to-one consultative, advisory service that has characterized the legal profession for centuries.”¹¹⁵

3. *Analysis of Perspectives*

Both Ribstein and Susskind acknowledge the growing importance of technology in the legal profession. They see opportunity in technology, including the development of more responsive and efficient legal products. In many respects, however, Susskind builds a new legal paradigm around information technology. In that paradigm, technology—not lawyers—is the primary source of legal services.¹¹⁶ Lawyers are almost an afterthought.¹¹⁷

The use of technology by clients directly and without lawyer input (whether live or in real-time online) raises several potential issues, particularly for clients without in-house lawyers. These issues include

111. *Id.* at 99–145, 217–24.

112. For example, e-learning can be a valuable training and marketing tool for lawyers. Internally, law firms can use e-learning or the development of e-learning programs to train junior lawyers. *Id.* at 118–19. Externally, law firms can make these products available to clients and use the technology for online client briefings. *Id.* at 120. The risk, of course, is that e-learning and online client briefings reduce lawyers’ direct involvement and related fees. *Id.* Similar issues exist with respect to online legal guidance. Susskind explains that “[t]he disruption and threat here is that clients (whether citizens or multinationals) can obtain legal guidance online, which looks rather threatening for the traditional legal professional which used to have something of a monopoly over the provision of legal help.” *Id.* at 121–22.

113. *Id.* at 145.

114. *See, e.g., id.* at 226 (“There is an unparalleled opportunity here for innovative law firms to extend their range of services beyond traditional reactive work to a fundamentally different, proactive suite of services.”).

115. *Id.* at 144.

116. *See id.* at 273 (“In some areas of law, lawyers will be less dominant, while in others (where there are, for example, online legal services or there is legal open-sourcing), they will no longer have a role.”).

117. *See id.* (admitting that he does not foresee “that there will be no lawyers,” but predicting that the traditional role of lawyers will be significantly and increasingly circumscribed).

misapplication of legal information and incomplete (or incorrect) legal advice based on the client's failure to disclose—or the technology's failure to tease out—facts relevant to the analysis. Therefore, use of this type of technology may actually increase the need for, and cost of, lawyers on the back end of transactions.¹¹⁸ It also runs counter to the potentially valuable, yet underutilized, role for lawyers in the business context—risk management.¹¹⁹ To provide effective legal and risk management advice, lawyers need to talk to their clients *before* the client buys a competitor, distributes its employee handbook, enters into a contract, or the like.

Accordingly, lawyers and clients need to understand the role and limits of online and other similar technology-based legal products. As suggested above, lawyers need to develop a business model that passes on the efficiencies of these technologies to clients and in turn encourages clients to collaborate with lawyers to customize those products—and the resulting advice—to the client's particular needs. Ribstein's and Susskind's thoughts on delivery models are discussed below.

C. *The Delivery of Legal Services*

Some of the oldest law firms in the United States trace their origins to the 1800s.¹²⁰ Early law firms generally were small partnerships of two or more lawyers.¹²¹ In the 1920s, the firm now known as

118. See *id.* at 227 (analogizing to “the tale of the chief fire officer” and noting that in a business prone to factory fires, it may be worthwhile to pay to keep a chief fire officer on staff instead of spending a great deal every time a destructive factory fire occurs).

119. Both Ribstein and Susskind see opportunities for lawyers in the risk management context. SUSSKIND, *supra* note 8, at 224–28; *cf.* Ribstein, *supra* note 8, at 783 (suggesting that lawyers could “engag[e] economists and other analysts to help anticipate future litigation and structure transactions to minimize litigation costs”). For Susskind, risk management advice would not involve traditional one-to-one type legal services, which seems at odds with the client-specific, law firm approach of most risk management programs. SUSSKIND, *supra* note 8, at 226. Lawyers certainly can invoke different techniques to provide such services (that is, face-to-face meetings are not always required or the most effective technique), and they should collaborate with the client and the client's other professionals in that endeavor. This Essay does not suggest otherwise. Nevertheless, lawyers still need to understand and interact with the client to provide meaningful risk management advice; the service must be individualized on some very important levels.

120. See, e.g., *Firm History*, JONES DAY, <http://www.jonesday.com/aboutus/firmhistory> (last visited Jan. 5, 2011) (explaining that the firm, originally Blandin & Rice, was formed in 1893); *Our Firm: History*, SIDLEY AUSTIN LLP, <http://www.sidley.com/ourfirm/history> (last visited Jan. 5, 2011) (noting that Sidley Austin LLP was founded in 1866).

121. GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* 39 (2004). Law firms initially charged clients based on fee schedules, task billing, or “eyeballing” the matter; lawyers did not routinely record the time they devoted to client matters until the second half of the twentieth century. See ROSS, *supra* note 33, at 12–16 (providing the historical background of fee schedules, task billing, and the “eyeball procedure”).

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Cravath, Swain & Moore LLP introduced a novel concept to the legal profession: not every lawyer the firm hired would make partner.¹²² As discussed above, this structure of “up or out”—commonly called a pyramid structure—prevailed for most of the twentieth century.¹²³ Eventually this structure gave way to an elastic pyramid approach.¹²⁴ The dramatic growth of law firms and the increasing reliance on billable hours during the last few decades have garnered criticism and raised questions about the value of legal services.¹²⁵

1. *Ribstein’s Perspective*

Whereas Susskind targets the impact of technology on the legal profession, Ribstein devotes much of his analysis to the business model through which legal products are delivered. He suggests the existing large law firm model is fragile and breaking down under pressure from clients, technology, and global competition.¹²⁶ Nevertheless, he sees opportunities for law firms to restructure and implies that these changes are necessary for law firms to remain viable business entities.¹²⁷

Ribstein posits that law firms can create value by, among other things, deepening their knowledge base and expertise or by broadening their services beyond traditional legal services.¹²⁸ In discussing innovation and the creation of new legal products, Ribstein suggests greater specialization by larger law firms. Ribstein observes opportunities for firms that have the resources to invest in developing in-depth and novel approaches to issues that commonly arise in certain types of transactions or litigation matters.¹²⁹ Ribstein acknowledges

122. Raasch, *supra* note 38, at 33.

123. *See supra* text accompanying notes 38–42.

124. *See Galanter & Henderson, supra* note 45, at 1871 (acknowledging that “the well-known ‘promotion-to-partner tournament’ remains a core feature of large U.S. law firms,” but also suggesting that a new model—the ‘elastic tournament,’ [which] involves a different set of ground rules and ultimately includes a much larger (and mostly older) set of players in more roles”—has emerged).

125. *See, e.g., The Billable Hour Debate Is Not About the Billable Hour*, ADAM SMITH, ESQ. (Dec. 13, 2011), <http://www.adamsmithesq.com/archives/2009/08/the-billable-hour-debate-is-not-about-the-billable-hour.html> (discussing fundamental problems with the billable hour and offering reasons for the transition away from that scheme).

126. *See Ribstein, supra* note 8, at 760–77 (discussing the pressures on BigLaw and its unraveling).

127. *Id.* at 777–97.

128. *See id.* at 778–87 (discussing potential lines of business for BigLaw to explore, including legal products and research and development).

129. *See id.* at 782 (explaining that firms specializing in certain kinds of transactions or litigation can “capitalize on investments in issues that the firm expects to crop up repeatedly in its practice because it is both specialized and has a large share of the market for this

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that seizing this opportunity would require law firms to deviate from the traditional all-purpose law firm model focused on “client-specific work and billing.”¹³⁰

In addition, Ribstein sees value in multidisciplinary and nonlaw firms.¹³¹ Lawyers are prohibited, however, from practicing law in firms owned in whole or in part by nonlawyers.¹³² This restriction limits law firms’ financing options and relegates lawyers to hiring batteries of nonlaw experts to address a client’s tax, accounting, and other nonlegal needs.¹³³ Ribstein suggests these alternative business models would allow lawyers to join with other professionals to offer clients “one-stop” shopping and more complete legal products.¹³⁴ As discussed below, he also believes that the perceived ethical concerns with these alternative models can be addressed in a satisfactory manner.¹³⁵

2. *Susskind’s Perspective*

Susskind only briefly addresses the impact of his predictions on the law firm business model. He notes that his predictions of outsourcing and computerizing will mean that work currently performed by junior lawyers at the base of the law firm pyramid structure will be replaced, which will reduce law firms’ leverage and profits.¹³⁶ He also suggests the pull toward commoditization and technological advancements may encourage large law firms to specialize and focus more on attracting experienced, senior lawyers rather than junior lawyers, as in the traditional pyramid model.¹³⁷ According to Susskind, “the future

type of advice”); *see also supra* text accompanying notes 77–79 (discussing Ribstein’s perspective on transforming the provision of legal services through research and development).

130. *See id.* at 783. Ribstein also urges law firms to consider financing and ownership structures other than the traditional leverage model. *See id.* at 788–97.

131. *Id.* at 798–800.

132. *Id.* at 799.

133. *See, e.g., id.* at 798–99 (considering how a shift to multidisciplinary firms would affect traditional firm structure and observing that “the facts that multiple types of expertise can be required for the same transactions and litigation and that clients’ needs for the services can arise unpredictably and for short time periods may make hiring a multidisciplinary firm less costly than hiring the experts separately”).

134. *Id.* (suggesting that adding “legal advice” to large publicly traded firms could create a “one-stop deal-making service,” which offers clients coordination and information-sharing advantages).

135. *See, e.g., id.* at 803–04 (arguing that the ethical rule that prevents nonlawyers from owning law firms “is unnecessary”).

136. SUSSKIND, *supra* note 8, at 278.

137. *Id.* at 278–79. Similar to Susskind’s description of “medium-sized firms merging to achieve a critical mass of experts,” *id.* at 279, Ribstein discusses the devolution of law firms into an “all-partner,” or “horizontal,” law firm model. *See* Ribstein, *supra* note 8, at 777.

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of very small firms whose work in [sic] not highly specialized” is the most uncertain component in his legal paradigm.¹³⁸

3. *Analysis of Perspectives*

Both Ribstein and Susskind predict the breakdown of the current large law firm pyramid model. They also observe significant value in lawyer specialization and less focus on individualized client service. Nevertheless, they approach the necessity for these changes in a slightly different manner.

For Ribstein, the law firm model itself is an impediment to client service and innovation; it does not promote efficiency or provide incentives for developing legal products.¹³⁹ For Susskind, changes in the large law firm model are simply inevitable consequences of his predicted changes in legal services.¹⁴⁰ Susskind suggests lawyers themselves could be the authors of this new legal paradigm.¹⁴¹ He is skeptical, however, of lawyers seizing this opportunity in part because of their general resistance to change and their inability to innovate.¹⁴²

Although lawyers typically are not characterized as entrepreneurs, the practice of law has not remained stagnant over time.¹⁴³ For example, law firms have increasingly adopted new methods and technologies, and both courts and lawyers are integrating technology into the judicial process.¹⁴⁴ There is no indication that these advancements will stop or that law firms are resisting change altogether. Fundamental change, however, typically comes slowly, particularly at large institutions. Boutique law firms and “maverick” lawyers—both touted as innovators by Ribstein and Susskind—likely are more nimble in

138. See SUSSKIND, *supra* note 8, at 279.

139. See generally Ribstein, *supra* note 8, at 752–77 (examining “Big Law’s inherent structural flaws and the forces that are destabilizing it”).

140. See SUSSKIND, *supra* note 8, at 278–79 (asserting that changes such as outsourced legal work “will necessitate major structural change in the long run”).

141. See *id.* (describing the role for expert and experienced lawyers in the new legal paradigm).

142. *Id.* at 279–81 (noting that “lawyers do not find it easy to innovate, especially in the way in which they deliver their services”).

143. For an interesting discussion of lawyers as entrepreneurs and the perceived weaknesses of legal education in this context, see the posts at the *Minding Our Own Business Forum*, CONGLOMERATE (Apr. 2010), <http://www.theconglomerate.org/masters-minding/>.

144. The American Bar Association tracks technological developments in the legal profession, including in law firms and in the courts. See ABA, LEGAL TECHNOLOGY SURVEY REPORT (2010). Like firms, lawyers often find creative ways to achieve client objectives—both in the administrative and substantive aspects of the representation. See, e.g., Karen Sloan, *The Apprentice: Three Firms Claim Success with a New Model for Training and Mentoring Legal Associates*, NAT’L L.J., June 14, 2010, at 19, 22–24 (describing Howrey LLP’s new apprenticeship program).

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their governance structures and client protocols and can adapt more quickly.¹⁴⁵ As such, larger law firms may, at times, lag behind smaller players, but they may still have the ability to change *as* and *when* necessary to meet client demands.¹⁴⁶

To that end, Ribstein suggests lawyer regulation may in fact inhibit core structural changes in the law firm model that would more readily facilitate innovation.¹⁴⁷ His perspective on regulation is the last point of comparison in this Essay.

D. *The Regulation of the Legal Profession*

The practice of law is, for the most part, regulated at the state level.¹⁴⁸ Lawyers' conduct in representing clients and practicing law must comply with the ethical rules and other standards established in the state in which they practice.¹⁴⁹ These regulations include stringent fiduciary duties imposed on lawyers with respect to their clients and licensing requirements for any person engaging in the practice of law.¹⁵⁰ The regulations are designed primarily to protect clients and the public generally.¹⁵¹ Some commentators argue that they also insu-

145. See SUSSKIND, *supra* note 8, at 280 ("Mavericks are the research and development departments of many law firms."); Ribstein, *supra* note 8, at 786 (noting the professional success an attorney described as "'sui generis,' a 'maverick [who] works outside the firm's traditional structures'" (alteration in original) (quoting Mitu Gulati & Robert Scott, *Sticky Contracts (or Why Don't Law Firms Have R&D Departments?)* (Feb. 16, 2009) (unpublished manuscript))).

146. Lawyers typically are motivated to meet or even exceed clients' expectations. Most lawyers appreciate the competitive nature of the legal profession, which existed even prior to the recent recession, and work to satisfy clients' demands on billing, staffing, and other matters. Consequently, as discussed in Part III, law firms are likely to adapt to changes mandated by their particular clientele. See, e.g., Ed Flitton & Karen MacKay, *Managing Change: How Law Firms Are Answering the Wake-Up Call*, LAW PRAC., July–Aug. 2009, at 32, 32–40 (summarizing a roundtable discussion conducted by five law firm leaders on the challenges and opportunities accompanying changes in the legal profession).

147. See *infra* Part III.D.1.

148. See, e.g., Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1315 n.34 (1995) (noting that in 1887 Alabama was the first state to codify a set of professional standards). For a historical analysis of the power of courts to control the legal profession, see generally Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525 (1983).

149. See, e.g., MD. LAWYERS' RULES OF PROF'L CONDUCT R. 8.5(a)(1) ("A lawyer admitted by the Court of Appeals to practice in this State is subject to the disciplinary authority of this State, regardless of where the lawyer's conduct occurs.").

150. See, e.g., MD. LAWYERS' RULES OF PROF'L CONDUCT R. 1.1–1.18 (client-lawyer relationship); MD. LAWYERS' RULES OF PROF'L CONDUCT R. 8.1 (bar admission and disciplinary matters).

151. See, e.g., Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3 (1981) ("Variations abound on the theme that it is consumers, not attorneys, who suffer from unautho-

late the legal profession from outside competition, thereby enabling arguably excessive fees and making legal assistance inaccessible to many.¹⁵²

1. *Ribstein's Perspective*

Ribstein ascribes to an enabling theory of lawyer regulation. Although he acknowledges the original objectives of regulation in protecting clients, lawyers, and society, he suggests it is time to revisit those goals.¹⁵³ Specifically, he sees a productive role for market competition in the legal profession—both in firm ownership structures and the provision of legal services.¹⁵⁴

Ribstein argues that allowing nonlawyers to own law firms would provide financing flexibility and ease firms' reliance on the unsustainable pyramid model.¹⁵⁵ He also believes that outside ownership would bring discipline to law firms, but not necessarily conflict with the firm's obligations to clients.¹⁵⁶ He notes a variety of management structures that firms could use to maintain compliance with legal standards.¹⁵⁷

Although Ribstein favors outside competition, he views prohibitions on noncompetition agreements among lawyers and law firms as a barrier to law firm value.¹⁵⁸ A lawyer's ability to leave a law firm without any restrictions or penalties encourages her to invest in and develop only self-serving legal products that will follow her upon her

rized practice and that, in the words of [former ABA President] John Satterfield, 'the fight to stop it is the public's fight.'").

152. *Cf., e.g.*, DEBORAH L. RHODE, ACCESS TO JUSTICE 3–23 (2004) (discussing the societal and ethical consequences of "prohibit[ing] individuals who are not members of the state bar from providing personalized legal advice").

153. Ribstein, *supra* note 8, at 803 (acknowledging that the "regulation is to a significant extent responsible for the success of Big Law," but arguing that such "regulation is now hurting the legal services industry by impeding its move to a more sustainable business model").

154. *See generally id.* at 803–13 (discussing the benefits of allowing competition to penetrate "regulatory roadblocks that are preventing alternative models of delivering legal services").

155. *Id.* at 788–94 (outlining "potential business rationales for and some governance logistics of outside financing of law firms").

156. *See id.* at 793, 804 (proposing that law firms could be organized as unincorporated business entities, which would have the disciplinary advantage of "substitut[ing] distributions and high-powered partner-type incentive compensation for corporate-type monitoring devices like fiduciary duties, shareholder voting, and independent directors").

157. *Id.* at 791–97 (describing various law firm governance options, such as manager-managed limited liability companies and partial integration in the form of franchises, holding companies, or joint ventures).

158. *See id.* at 804–06 (discussing the "potentially perverse effects" that restrictions on noncompetition agreements may have on law firm structure).

departure.¹⁵⁹ The policy inhibits a law firm's ability to create valuable legal products outside of its human capital.¹⁶⁰ Accordingly, Ribstein urges regulators to investigate the continued viability of existing licensing, ownership, and noncompetition regulations in the developing legal marketplace.¹⁶¹

2. *Susskind's Perspective*

Susskind does not devote much attention to regulation, but this appears to be more a result of his focus rather than his indifference to regulation itself. Susskind targets the future role of lawyers generally, regardless of where they practice or what laws govern their conduct.¹⁶² His premise is that market forces and technology will overhaul the legal profession.¹⁶³ Thus, he may view regulatory changes as an inevitable consequence of these driving forces, in a way that is similar to his perspective on potential changes to the large law firm model.¹⁶⁴

Susskind does occasionally reference applicable lawyer regulation in the United Kingdom and the United States, and he raises potential issues with those regulations in light of his predictions. For example, he discusses his attendance at a seminar discussing England's Legal Services Bill, which proposed authorizing alternative business structures for law firms.¹⁶⁵ At the end of that seminar, Susskind concluded that "the delivery of legal services will be a very different business when financed and managed by non-lawyers."¹⁶⁶

159. *Id.* at 805 (explaining that "[s]tandardized legal advice and law firm research and development may not be protected by trade secret or copyright law and therefore might walk out the door with departing lawyers").

160. *Id.*

161. *See id.* at 803 (reasoning that, because BigLaw's "traditional reputational bonding model" has become "untenable," changes to "the structure of the legal services industry" are necessary, and commenting that "[w]hether and how it changes depends importantly on regulation of the legal profession"). Alternately, Ribstein also proposes a number of different ways in which firms and lawyers can work around the regulations until they have been reconsidered and amended. *Id.* at 810 (observing that the regulations are not "an implacable barrier" and suggesting that "[p]otential profits from eliminating the restrictions give competitors and consumers a strong incentive to surmount the barriers").

162. *See* SUSSKIND, *supra* note 8, at 1 (casting the work as one about the role of the "traditional lawyer").

163. *See id.* (asserting that the conventional role of lawyers will decrease as two forces—"a market pull towards *commoditization*" and "pervasive development and uptake of *information technology*"—together change the nature of twenty-first century legal service).

164. *See id.* at 270–77 (predicting that the large law firm model must change as "new methods, systems, and processes" emerge to influence the way in which legal work is done).

165. *Id.* at 9–11.

166. *Id.* at 10 (emphasis omitted).

3. *Analysis of Perspectives*

To realize the full extent of either Ribstein's or Susskind's predictions, the regulations governing lawyers will need to change. Ribstein takes a more direct approach to this issue, urging regulatory changes that will allow law firms to operate under what he believes are more sustainable models.¹⁶⁷ He also suggests regulation is a more efficient way to implement change, rather than requiring parties to achieve particular objectives on a one-off basis through creative contracting and client consents.¹⁶⁸ Susskind is less direct in his discussion of regulation, but an implicit call for regulatory change follows naturally from his predictions for the legal profession.¹⁶⁹

It is difficult to discuss regulatory change without first assessing what really needs to be fixed. Ribstein and Susskind articulate thoughtful justifications for proposed or predicted changes in the legal profession. But, in many respects, their works are a call to action for the legal profession. If—and to what extent—that call is answered may determine the need for and extent of any regulatory changes. Accordingly, the final part of this Essay considers the takeaway points from *The Death of Big Law* and *The End of Lawyers?* and the potential responses from the legal profession.

IV. DO LAWYERS HAVE A FUTURE?

Lawyers and the legal profession have a future. Neither Ribstein nor Susskind suggests otherwise. They do each highlight, however, different challenges to the traditional role of, and legal services provided by, lawyers.¹⁷⁰ Moreover, they predict significant consequences for lawyers who ignore these red flags.¹⁷¹

Anecdotal evidence lends some validity to the allegations of client dissatisfaction with billable hours and the large law firm model, but these criticisms are not new.¹⁷² The Internet provides numerous instances of technological advances in legal services—from electronic

167. See *supra* note 161 and accompanying text.

168. Ribstein, *supra* note 8, at 810–13 (discussing possibilities for overcoming regulatory impediments).

169. See *supra* Part III.D.2.

170. See *supra* Part III.A–D.

171. See *supra* Part III.A–D.

172. See *supra* note 32 and accompanying text; see also G. Wynn Smith, Jr., *Toward Value Billing—An Artificial Intelligence Approach*, LEGAL ECON., Nov.–Dec. 1989, at 22, 24, 27 (stating that “the Golden Age [for the legal profession] has produced certain excesses” and concluding that “[i]n the view of many lawyers . . . the time is fast approaching when abandonment of the 100 percent hourly billing standard not only will be desirable but also will become inevitable”).

client alerts to virtual law firms—but law firms have traditionally integrated technologies into their processes (eventually).¹⁷³ So, is there really reason to be concerned? It depends.

This typical lawyerly answer leads the inquiry back to thinking like a lawyer. Lawyers do not just dispense rote legal advice. Not every client has the same legal issues, and even those with similar issues often require individualized advice. The relevant questions and the smoking gun documents often are identified only after a lawyer probes and obtains a feel for the matter. Standard questions and search terms may suffice in some, but certainly not in all, cases.

A lawyer adds value to a client matter because she thinks like a lawyer. She possesses those key analytical skills that allow her to sit down with a client or a set of documents and consider not only the obvious but also the obscure details that might resolve the issue at hand. For example, in the transactional context, a lawyer's key analytical skills allow her to identify, among other things, arbitrage opportunities to increase a deal's value for the client's benefit.¹⁷⁴ As Professor Stephen Bainbridge explains:

For the most part, lawyers increase [value] by reducing transaction costs. One way of lowering transaction cost is through regulatory arbitrage. The law frequently provides multiple ways of effecting a given transaction, all of which will have various advantages and disadvantages. By selecting the most advantageous structure for a given transaction, and ensuring that courts and regulators will respect that choice, the transactional lawyer reduces the cost of complying with the law and allows the parties to keep more of their gains.¹⁷⁵

Admittedly, one perhaps could design a software or similar online program to ask the client questions and then provide alternative transaction forms for the client based on its responses.¹⁷⁶ For some

173. See Alan Cohen, *Cutting a Winning Edge in Law Firm Blogs*, LAW TECH. NEWS (May 2, 2008), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005634624> (finding that roughly twenty-six percent of Am Law 200 firms were blogging in some capacity); Kenneth Jones, *Developing a Portal to Share Firm Content*, LAW TECH. NEWS (Apr. 24, 2009), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202430150908> (describing a system of “data sharing among office locations” within a single firm).

174. See Stephen M. Bainbridge, *The Function of Transactional Lawyers*, PROFESSORBAINBRIDGE.COM (June 8, 2009, 6:55 AM), <http://www.professorbainbridge.com/professorbainbridge.com/2009/06/first-kill-all-the-transactional-lawyers.html> (explaining the value added by transactional lawyers).

175. *Id.*

176. See SUSSKIND, *supra* note 8, at 121–25 (discussing online legal guidance, “[o]ne of the most obviously disruptive legal technologies”); Ribstein, *supra* note 8, at 780–82 (discussing the potential market for legal service technologies).

clients and some transactions this may work. But, for many transactions—which today are global in scope, subject to numerous and often competing laws, and involve multiple and often changing parties—that software likely would not be the best or even most efficient option. Saving a few thousand dollars on legal fees pales in comparison to the costs of litigation and potential liability from an ill-structured deal.

This example is intended to highlight two points: First, one of a lawyer's most valuable legal products is her ability to think like a lawyer; and second, broad prescriptions for the legal profession likely are unworkable. As lawyers and clients consider Ribstein's and Susskind's works, they should reflect on these points. Specifically, they should weigh heavily Susskind's suggestion that there will be less need for traditional bespoke legal services in the future.¹⁷⁷ Individualized client service need not be face-to-face and certainly can be streamlined by technology, but lawyers and clients need to appreciate the inherent value in that service.¹⁷⁸

Recognizing the potentially ongoing value of individualized client service does not necessitate a complete disregard for the issues raised by Ribstein and Susskind. Rather, it frames the challenge facing lawyers in a more familiar context—the lawyer-client relationship. How can lawyers continue to provide meaningful legal solutions for clients in a changing economic and technological environment? Ribstein and Susskind both offer hints as to how lawyers might answer this challenge.¹⁷⁹

Accordingly, as Ribstein proposed, law firms need to re-evaluate internal economic incentives and external fee structures.¹⁸⁰ Does this mean abandoning the large law firm pyramid model? Perhaps. For many firms it likely means continued right-sizing, reallocating resources, and finding alternative billing structures that pass on the value of technological efficiencies to clients.¹⁸¹ For some law firms, however, their fire power in “bet the company” litigation and transactions may enable them to sustain the status quo.¹⁸²

177. See *supra* notes 80–83 and accompanying text.

178. See *supra* note 93 and accompanying text.

179. See *supra* Part III.D.1–2.

180. See *supra* notes 155–57.

181. See *supra* note 50; see also Smith, *supra* note 172, at 24, 27 (describing a computerized billing system developed by one firm to implement “value billing”).

182. See Henderson & Bierman, *supra* note 74, at 1398–99 (noting that “a large number of law firms appear to be ‘betting the firm’ on attracting sufficient quantities of ‘bet the company’ lawsuits”).

Likewise, regulators should consider Ribstein's invitation to investigate and better understand whether lawyer regulations correspond to the realities of the marketplace. The key question here is whether regulatory changes to restrictions on competition better protect clients and the public generally or expose them to increased manipulation and abuse.¹⁸³ In many respects, this is a cost-benefit analysis that could benefit from empirical studies, which may be feasible as different countries revamp their regulatory regimes for the legal profession.¹⁸⁴ It also is not an all or nothing proposition. For example, as Ribstein suggests in the nonlawyer ownership context, multidisciplinary firms may be a possible compromise solution that facilitates outside investment—but only by other professionals presumably held to reasonable professional standards of conduct.¹⁸⁵

Overall, Ribstein and Susskind give lawyers, clients, and legal educators much to ponder. Some change is inevitable, but not all of the changes predicted in the works discussed here are likely or desirable. As suggested above, clients with a short-term perspective may favor more outsourcing, nonlawyering, and computerizing, but those developments might not be in the long-term best interests of clients. The use of technology and alternative business forms, as well as any regulatory changes, should be guided by the goal of improving both the efficiency *and* the quality of legal services. One without the other does a disservice to clients. And, the hallmark of being a lawyer—thinking like a lawyer—is the perfect tool for assessing and adopting new means to achieve that goal.

183. See, e.g., Ribstein, *supra* note 8, at 803–04 (noting in relation to ethical rules restricting nonlawyer ownership of law firms that “clients might fare better from capitalist-owned than from lawyer-owned firms, since capitalists would be focused on serving client needs rather than in maximizing lawyers’ role in providing these services”).

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184. See, e.g., News Release, Ministry of Justice of the U.K., Law Firms to Allow Non-Lawyer Partners (Mar. 31, 2009), <http://www.justice.gov.uk/news/newsrelease310309b.htm> (announcing that in the United Kingdom “[f]or the first time, by forming Legal Disciplinary Practices (LDPs), law firms can be owned by different types of lawyers, and a proportion of non-lawyers”); cf. Gina Passarella, *Will U.K. Management Trends Influence U.S. Law Firms?*, LAWJOBS.COM (Nov. 3, 2010), http://www.lawjobs.com/newsandviews/LawArticle.jsp?hubtype=News&id=1202474333189&Will_UK_Management_Trends_Influence_US_Law_Firms&slreturn=1&hbxlogin=1 (reporting on new models used by British firms that decrease client costs by outsourcing legal work to small regional firms and by creating firm subsidies that offer less expensive services by top lawyers, and wondering whether American firms will similarly embrace the managerial or “quarterback” role in providing legal services).

185. See Ribstein, *supra* note 8, at 798 (“Many types of experts other than lawyers can contribute to litigation and transactional work, including economists, accountants, financial analysts, business consultants, psychologists, medical doctors, and actuaries.”).

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