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THE PRICE OF JUSTICE

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I. INTRODUCTION

My remit in this keynote address, at least as I have interpreted it, is to address broadly some basic economic dimensions of the administration of justice, including access to justice.

While I am often associated with the founding of the law and economics school of scholarship in Canada, dating back to the mid-1970s, and have until recently held the Chair in Law and Economics at the University of Toronto Faculty of Law, I do not approach my remit in a narrow or unidimensional way. Indeed, my engagement with issues pertaining to the regulation of the provision of legal services and access to justice has been multi-dimensional and interdisciplinary, dating back to my role as Research Director of the Professional Organizations Committee, a task force set up by the then Attorney-General for Ontario, Roy McMurtry, in the mid-1970s, to examine the regulation of several professions, including the legal profession, that reported to him.[1] This was followed by my role as Research Director of the McCamus Task Force set up in the mid-1990s to examine the future of legal aid in Ontario,[2] followed, in turn, by my role as Research Director several years later of the Houlden/Kaufman Task Force on Legal Aid Tariffs set up by Legal Aid Ontario.[3] This was followed by my appointment by the Attorney General of Ontario, Michael Bryant, in 2007, to undertake a one-person review (released the following year) of the state of legal aid and access to justice in Ontario, almost ten years after the reforms introduced following the report of the McCamus Task Force.[4] Subsequently, I and colleagues at the University of Toronto Faculty of Law organized an extensive consultation and

[1] Michael Trebilcock, Carolyn Tuohy and Alan Wolfson, *Professional Regulation* (Staff Study, Government of Ontario, 1979); Report of the Professional Organizations Committee (Government of Ontario, 1980).
[2] *A Blueprint for Publicly Funded Legal Services*, Report of the Ontario Legal Aid Review (Government of Ontario, 1997, 3 vols.).
[3] Holden-Kaufman Task Force Report on the Legal Aid Tariff (Legal Aid Ontario, 2000).
[4] Michael Trebilcock, Report of Legal Aid Review, 2008 (Ontario Ministry of the Attorney-General).

colloquium on middle income access to justice, which led to the publication of a volume of papers by Canadian and international experts related to this theme.[5]

A widely-quoted quip from Oscar Wilde motivates my presentation. He said that: "a cynic is a person who knows the prices of everything and the value of nothing." This quip has been widely amended subsequently as "an economist is a person who knows the prices of everything and the value of nothing". Is it true that an economic perspective on the administration of justice and access to justice sees prices everywhere but cannot appreciate the value of dimensions of the administration of justice that are not readily reducible to monetary terms? I begin this exploration in Part II with some brief comments on the centrality of the rule of law in our society in general and as a unifying lodestar of the legal profession in particular. I then move on in Part III to argue that prices of legal services simply cannot be ignored in any evaluation of strategies to improve access to justice in Canada. I then argue in Part IV that in turn the prices of legal services and proposals to reduce these cannot be usefully analyzed without squarely addressing the underlying cost structures that drive these prices and the potential for organizational and technological innovations to reduce these costs over time. Finally, in Part V, I offer some brief concluding thoughts on whether the self-regulatory model of professional regulation has the capacity to address potential innovations in the provision of legal services.

II. THE VALUE OF THE RULE OF LAW

As a scholar who for many years has both taught and written extensively about the role of law and institutions in developing countries, I have come to appreciate that what distinguishes

[5] Michael Trebilcock, Anthony Duggan, and Lorne Sossin (eds.), *Middle Income Access to Justice* (University of Toronto Press, 2012).

developing countries from developed countries most strikingly, in most cases, is the relative quality of their institutions: political, bureaucratic, and legal. Over the past 20 years or so, the mantra "institutions matter" or "governance matters" has moved to centre stage in much scholarly literature and policy thinking about development. Focusing on legal institutions and comparisons and contrasts between the quality of these institutions in developed and developing countries quickly leads to a focus on the role of the rule of law in development and both its meaning and challenges to its effective implementation. Sometimes one is only able to value what one has by observing countries or societies that lack institutional analogues. Failed states, or even minimally functional but chronically impoverished states, typically or often exemplify a state of lawlessness, massive incompetence or corruption in political, bureaucratic, and legal institutions, high levels of political and policy instability, and minimal levels of transparency and accountability.

Since the institutional perspective on development moved to centre stage in the early 1990s, attempts have been made both to define and measure the impact of the quality of the rule of law on development. Here, one should immediately acknowledge enormous ambiguity as to the meaning of the rule of law in both historical and contemporary discourse.[6] We have all been guilty, at one time or another, of casually throwing out the phrase as the lodestar of our profession (e.g., at law school orientation and convocation ceremonies and the like) without bothering much to define what we mean by it. In fact, in the scholarly literature relating to the rule of law, all kinds of understandings are manifest. Some understandings stress the non-instrumental nature of the rule of law as a kind of intrinsic universal human right inherent in our basic humanity and basic notions of human dignity and autonomy. Some, so-called "thin"

[6] See Michael Trebilcock and Mariana Prado, *Advanced Introduction to Law and Development* (Edward Elgar, 2014), chap. 4 and 5; Michael Trebilcock, "Between Universalism and Relativism: Reflections on the Evolution of Law and Development Studies," (2016) 66 *University of Toronto Law Journal*, 330.

conceptions of the rule of law emphasize essentially procedural values of due process or natural justice while much "thicker" conceptions of the rule of law emphasize the importance of a substantively just legal system, which in turn quickly becomes largely elided with substantive notions of a just society. More instrumental conceptions of the rule of law (often espoused by economists) tend to emphasize features of the legal system that plausibly generate desirable economic and social consequences for a society. In this respect, economists' conceptions of the rule of law tend to emphasize the importance of legal predictability and stability, along with strong legal protection of private property rights and enforcement of contracts, on the grounds that these are likely to increase levels of domestic and foreign investment and activity and hence economic growth.

Despite these ambiguities, the World Bank and other international bodies or agencies have attempted to measure the impact of the rule of law on development and reach extremely striking findings. For example, the World Bank in one of its early governance studies found that an improvement in the rule of law by one standard deviation from the current levels in the Ukraine to those middling levels prevailing in South Africa at the time would lead to a four-fold increase in per capita income in the longer run.[7] For purposes of the World Bank Governance Studies, the rule of law has been defined as capturing perceptions of the extent to which citizens have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence. A more recent study by Rodrik, Subramanian, and Trebbi estimate the respective contributions of institutions, geography and international trade in determining income levels around the world. The authors use a number of measures of institutional quality that capture the protection afforded to property rights as well as the strength of the rule of law (largely derived

[7] Daniel Kaufman, "Governance Redux: The Empirical Challenge," 14 (World Bank, 2004).

from World Bank data). The quality of institutions, the authors find, "trumps" everything else. For example, the authors conclude that an increase in institutional quality of one standard deviation, corresponding roughly to the difference between measured institutional quality in Bolivia and South Korea, produces a two log-points rise in per capita incomes, or a 6.4-fold different, which, not coincidentally, is also roughly the income difference between the two countries.[8]

The development of these and similar legal indicators has not gone without challenge on various methodological grounds, both pertaining to whether they are measuring the appropriate variables, and even if they are, whether their data derived from various investor and citizen surveys provide reliable measures of the variables in question.[9]

Relative to these earlier studies, the World Justice Project (a widely-respected international NGO, based in Washington, DC) now publishes annually much more detailed rule of law ratings for more than 100 countries, developed and developing around the world. The World Justice Project adopts a somewhat more capacious definition of the rule of law than the World Bank, comprising nine factors: constraints on government power; absence of corruption; open government; fundamental rights; order and security; regulatory enforcement; civil justice; criminal justice; and informal justice (each of which is defined by several sub-indicators). Canada rates well compared to all countries surveyed, but relative to European and North American countries, and other high income countries, is somewhere in the middle of the pack, with relatively low ratings on delays in the civil justice system and the cost of accessing legal

[8] Dani Rodrik, Arvind Subramanian, Francesco Trebbi, "Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development," (2004) 9 *Journal of Economic Growth* 131.
[9] See Kevin Davis, "Legal Indicators: The Power of Quantitative Measures of Law," (2014) 10 Annual *Review of Law and Social Sciences*, pg. 37.

representation[10] – a point that Chief Justice Beverley McLachlin made in the Forward to our book, *Middle Income Access to Justice*, in commenting on similar earlier findings by the World Justice Project, thus providing a salutary caution against excessive complacency on our part.

Even if one bridles at the notion of applying a general utilitarian or social welfare calculus to how the rule of law should be valued relative to other social goals (a perspective widely adopted by many economists on most resource allocation issues),[11] even an non-instrumental perspective on the rule of law must confront the disagreeable choice in the allocation of scarce social resources and thus might be willing to join forces with economists in asking whether alternative arrangements to the status quo have the potential to stretch scarce resources farther, both now and in the future through facilitating and incentivizing innovations in the provision of legal services, and that access to justice can be made more broadly available.

III. THE PRICE OF THE RULE OF LAW

So far I have discussed the meaning and value of the rule of law, narrowly or broadly construed, and viewed either non-instrumentally or instrumentally. Whether one thinks that the rule of law is intrinsically valuable or instrumentally valuable, in both cases we must confront an obvious albeit painful reality: no society, including Canada, assigns infinite resources to the administration of justice or access to justice. To take, by way of example, the province of Ontario, with which I am most familiar. The provincial government assigns annual budgets for the administration of justice, including the courts, police, prosecutorial services, correctional services, and legal aid, but resources assigned to each of these components of the administration

[10] World Justice Project, *Rule of Law Index 2015* (Washington, DC).
[11] See e.g., Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press, 2002).

of justice are, by definition, limited and compete with demands by citizens for public expenditures on other functions of importance to them, including health care, education, infrastructure, social safety nets, etc. Politicians, like most of us, operate within a particular institutional incentive structure – in their case, to win election or re-election, which requires them to be responsive to the demands and concerns of their voters, who typically have a whole range of preoccupations that need to be addressed if their political representatives are to achieve electoral success and political survival. Thus, as I pointed out in my report of the Legal Aid Review (2008), it is almost certainly wishful thinking to assume that governments across the country are likely, in the foreseeable future, to allocate substantial additional resources, in the current fiscal environment, to any of these elements of the administration of justice. Legal aid is particularly vulnerable in this respect, given that, in public perceptions, it mostly caters to the poor and (inaccurately) mostly criminal defendants (given the substantial resources devoted to family law, refugee claimants, and the community legal services clinic system in Ontario). But otherwise, the middle class, who make up the bulk of voters and taxpayers, see themselves as having little stake in the legal aid system beyond their role as taxpayers, and certainly not as beneficiaries, in contrast to the stakes they widely perceive themselves as having in the public health care and education systems.[12] This said, I recognize that at least in the case of Ontario, the government in recent years, despite an uncongenial political economy environment, has been relatively generous in expanding significantly its funding of the legal aid system in Ontario, despite cuts to legal aid budgets in many other jurisdictions. However, even with these increases in the legal aid budget in Ontario, financial eligibility for legal aid remains stringent, and is available only for a limited range of civil matters. While many of us may espouse "equality

[12] See Report of CBA Access to Justice Committee, *Equal Justice: Balancing the Scales* (Canadian Bar Association, 2013) at p. 48, 49.

before the law" as a central element in our normative conception of the rule of law,[13] we are far from realizing this ideal.

However, there are other important institutional actors whose policies and conduct also significantly affect the price of justice. If access to civil justice is interpreted to mean primarily access to civil courts, then judges individually and collectively in the procedures they adopt and apply to civil litigation will significantly affect the price of justice. The more prolix and protracted civil proceedings are, the higher the monetary, temporal, and psychological costs experienced by many litigants, creating pressures on them to settle cases or to move disputes to less costly and more expeditious venues, such as private mediation or arbitration, or simply to "lump" their grievances, leading to the much-studied phenomenon of the "vanishing trial" in the US (and I suspect in Canada, although there is less systematic Canadian evidence on this issue).[14] Under classical conceptions of the adversarial system, judges were largely passive umpires between legally well-armed adversaries who would be accorded substantial latitude in how they presented their case to courts, e.g., in terms of number of witnesses, time for examination and cross-examination, scope of discovery, scheduling of hearings, adjournments, etc. – the "Full Court Press", as I have called it.[15] While in recent years, there has been significant movement away from the classical adversarial model of judges as relatively neutral umpires of proceedings largely controlled by the legal representatives of litigants to more active forms of judicial case management, in partial recognition of the fact that perfect justice for the few is a denial of justice for the many, controversy still persists as to what form case

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[13] See David Dyzenhaus, "Normative Justifications for the Provision of Legal Aid," background study for the Ontario Legal Aid Task Force Report, 1999; Michael Trebilcock, Report of Legal Aid Review, 2008 (Ontario Ministry of the Attorney-General, pp. 61-70.

[14] See Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," (2004) 1 *J. of Empirical Legal Studies* 459; Gillian Hadfield, "Where Have All the Trials Gone?" (2004) 1 *J. of Empirical Legal Studies* 713.

[15] Michael Trebilcock and Lisa Austin, "The Limits of the Full Court Press: Of Blood and Mergers," (1998) 48 *University of Toronto Law Journal* 1.

management should take, whether it should be mandatory or voluntary, and at what stage of proceedings it is most appropriate.[16] Proportionality-oriented civil justice reforms (recently endorsed by the Supreme Court of Canada[17]) in the form of an expanded role for Small Claims Court and summary judgment procedures reflect further movement away from the classical adversarial model. Pilot reform initiatives that are subject to rigorous evaluation and can be scaled up, if successful, may be a more reform prudent strategy than across-the-board systemic reforms.

Another recent and controversial body of predominantly law and economics scholarship seeks to explore the incentive structure and utility functions of judges (both trial judges and appellate court judges), seeking to understand what motivates them as they go about the discharge of their judicial duties (in Richard Posner terms, what do judges maximize?).[18] This literature explores, *inter alia*, how judges make the work-leisure trade-off that all or most of us face; the role of ideology and political partisanship in judicial decision-making; the role of collegiality in motivating consensus in appellate courts, etc. Most of this literature is focused on the US judicial system, where federal judicial appointments are subject to a formal political confirmation process, and most state court judges are popularly elected, so that findings from this literature should be extrapolated with extreme caution to other legal systems (as Posner himself readily acknowledges).[19] Notwithstanding this important caveat, it is true that the factors that motivate judicial decision-making in Canada (and probably elsewhere) remain something of a

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[16] See Judge David Price, "A New Model for Civil Case Management: Efficacy Through Intrinsic Engagement," (2015) 50 *Court Review* 174.
[17] *Hryniak v. Mauldin* (2014) SCC 7.
[18] See Richard A. Posner, "What Do Judges Maximize? (The Same Thing Everybody Does)" (1993) 3 *Supreme Court Economic Review*, pg. 1; Richard A. Posner, *How Judges Think* (Harvard University Press, 2010), especially chapter 1 for an overview of various theories of judicial behaviour; Richard A. Posner, *Reflections on Judging* (Harvard University Press, 2013); Lee Epstein (ed.), *The Economics of Judicial Behavior* (Edward Elgar, 2013).
[19] See Richard Posner, "Judicial Behavior and Performance: An Economic Approach," (2005) 32 *Florida State University Law Review* 1259.

"black box", unlike much more developed bodies of literature on what motivates politicians and bureaucrats.[20]

Courts, of course, are not the only institutions that perform adjudicative functions in our society. A plethora of administrative tribunals, bodies, and program administrators within government perform adjudicative or quasi-adjudicative roles in resolving claims or disputes, and many of the same questions that one might pose of courts can, with appropriate adaptations, be applied to these quasi-adjudicative bodies.

Beyond courts and quasi-adjudicative bodies, the policies adopted by university-based law schools obviously influence the price of justice: the number of students they admit; the length and nature of course requirements; and tuition fees (which in recent years have been increasing substantially, reflecting in part reductions in real levels of government support for professional education and increasingly intense international competition for academic talent, both faculty and student).[21] In contrast to the US, where the number of students taking the LSAT and applications and enrolments at many second-tier law schools have sharply declined, there is little evidence to date of similar trends in Canada and indeed calls to the Ontario bar in recent years have been increasing.[22]

Provincial law societies as self-regulators of the legal profession also significantly influence the price of justice in terms of a wide range of policies that they do or might adopt with respect to entry requirements and post-entry regulation of conduct of lawyers and the permissible

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[20] But see Ben Alarie and Andrew Green, "Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada" (2009) 47 *Supreme Court Law Review* 475.

[21] For a 2014 survey of the impact of rising tuition fees on law students in Ontario, see Law Students' Society of Ontario, *Just or Bust?*.

[22] From 2011 to 2015, new lawyer licenses in Ontario have increased from 1707 to 2201 per year – about a 28% increase (LSUC data), although applications to Ontario law schools have dipped by 15 percent over the past two years (see Precedent, Summer 2016, p. 18), perhaps suggesting both a lag effect on calls to the bar and foreign-trained lawyers gaining Canadian certification and bar admission; see also Noel Semple, "Personal Plight Legal Practice and Tomorrow's Lawyers," (2014) 39 *J. of the Legal Profession* 25 at 27, 28.

scope of activities of para-legals, cognate professionals, and non-lawyer relationships with lawyers in the provision of legal services.

Courts, university law schools, and law societies, for many good reasons, are all fiercely protective of their institutional autonomy. These contending autonomies, however, along with the political decisions, both federal and provincial, that bear on the administration of justice, carry the offsetting risk of disarticulation of any coherent approach to enhancing access to justice (including the development of any systematic data base on the administration of justice).[23]

Moving from the systemic or institutional perspective on the allocation of resources to the administration of justice, it is useful to undertake a reality check on the incentives facing lawyers in private practice and private citizens with respect to their needs or concerns that could potentially benefit from legal assistance or representation. First, from the perspective of lawyers in private practice, despite periodic proposals to mandate some level of pro bono services, it seems to me unrealistic to expect them to devote substantial proportions of their time to pro bono services or to dramatically reduce fees for large classes of cases to impecunious clients below those they would normally charge for these services and hence the opportunity costs of their time. These lawyers are presumably constrained by the need to maintain a business model that ensures the long-term viability of their practices. Second, from a citizen's or client's perspective, whatever their personal resources, it makes no economic sense to pursue a grievance where the costs of legal representation exceed the expected returns from pursuing it – better to "lump" it than litigate it in such cases. Even in cases where the expected returns from pursuing a matter exceed the legal costs of representation, impecunious clients will find it neither rational nor in many cases even possible to pay for retainers or ongoing time-based legal fees before the

[23] See Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Canadian Forum on Civil Justice, Ottawa, 2013).

matter is resolved, given many other pressing and competing claims on their limited resources.[24] Contingency fees and class action procedures can alleviate some of these constraints, but in a limited range of cases.

In the case of all these actors – institutional and individual – an economic perspective on the administration of justice tends to focus on two recurrent issues: what is the *incentive structure* of the parties in question in motivating their behaviour; and what are the *opportunity costs* (both private and importantly social) of choosing one course of action or set of policies over another?

Hence, despite Oscar Wilde's quip, it turns out that at a systemic level, at the individual practitioner level, and at the individual citizen or client level, justice does indeed have a price, however disagreeable this brute reality may be. This reality then leads me to a critical cluster of issues – the relationship between prices and costs – where my central argument will be that the only way to substantially reduce the price of justice is to reduce its costs (recognizing that prevailing prices are largely a function of prevailing, underlying cost structures).

IV. PRICES AND COSTS

In most economic activities, economists assume that prices confronting consumers of the goods and services in question bear some, and typically a close, relationship to the costs of providing those goods or services. This is as true of legal services as most other categories of goods and services. Thus, if we are concerned (as we should be) about the price of justice, and how the prevailing price of justice precludes many citizens from obtaining access to justice (for civil justice in particular, for the purposes of my comments), we cannot avoid centrally focusing

[24] Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2015) 93 *Canadian Bar Review*, 1; for a recent survey of the costs of civil justice in Canada, see Trevor Farrow *et. al.*, *Everyday Legal Problems and the Cost of Justice in Canada: An Overview Report* (Canadian Forum on Civil Justice, 2016).

on the costs (fixed and variable) of providing legal and related services (including adjudicative services).

In this respect, a number of contemporary scholars argue that there is substantial potential for reducing the cost and hence the price of justice through two emerging and overlapping trends: liberalization of the rules governing the business structures through which legal services may be provided; and the role of information technology (IT) and artificial intelligence (AI) in reducing the costs of assembling, disseminating, and applying legally relevant information to individual citizens' or firms' needs.

A prominent proponent of this view is Richard Susskind, who has argued in a number of books that legal institutions and the legal profession are at a crossroads and are poised to change more radically over the next two decades than they have over the past two centuries. He argues that the bespoke specialist who handcrafts solutions for clients will be challenged by new working methods, characterized by lower labour costs, mass customization, recyclable legal knowledge, pervasive use of IT, and more. In a recent book, *Tomorrow's Lawyers: An Introduction to Your Future*,[25] Susskind argues that there will be three main drivers of change: the more-for-less challenge, liberalization, and information technology. The more-for-less challenge reflects the concern of many users or potential users of legal services over their costs, particularly in a contemporary low-growth economic environment. This concern applies across the spectrum, from large corporate clients and their in-house counsel, small businesses, and individual citizens. The liberalization challenge addresses prevailing concerns about the absence of choice in modes of legal service delivery. In this respect, the UK has led the way with the enactment of the *Legal Services Act 2007*, following a review of the regulatory framework for legal services by Sir David Clementi in 2004. This Act, *inter alia*, permits the setting up of new

[25] Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013).

types of legal businesses called "alternative business structures" (ABSs) so that non-lawyers can own and run legal businesses; permits external investment, such as private equity or venture capital, to be injected into legal businesses by outside investors; and allows non-lawyers to become partners or principals in law firms.[26] Since the enactment of the *Legal Services Act*, new modalities for the delivery of legal services have emerged in the UK, and also in some states of Australia where similar reforms have been adopted. Several law firms have issued public offerings to finance a large network of branch offices, while a major UK building society has announced plans to provide legal services from its 330 UK bank branches, and a private equity-backed group of law firms – in effect a franchise network – have obtained concessions in many of the stores of a major retail giant. In the case of information technology, many new and emerging applications of IT and AI do not simply computerize and streamline pre-existing and inefficient manual processes. Rather than automate, many systems innovate, which means they allow tasks to be performed that were previously not possible or even imaginable, including the use of big data collections of court or regulatory decisions or rulings and their application to the facts of particular clients' circumstances. While Susskind may be a "techno optimist",[27] it is difficult to gainsay his central claim that lawyers are in the information business through the assembly, dissemination and application of information, and IT and AI innovations are as likely to disrupt traditional business models in law as they already have in the print and broadcast media, online shopping, taxi and ride sharing services, hospitality services, and other sectors of

[26] For a more detailed exploration of alternative business structures for the practice of law, drawing on economic theories of the firm and optimal capital structure, see Edward Iacobucci and Michael Trebilcock, "An Economic Analysis of Alternative Business Structures for the Practice of Law," (2013) 92 *Canadian Bar Review* 57; for proposals for multiple licensing tracks for legal service providers with limited but specialized training and limited sphere of practice, see Alice Woolley and Trevor Farrow, "Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges," (2016) 13 *Texas A & M L. Rev.* 549.

[27] See more generally, Erik Brynjolfesson and Andrew McAfee, *The Second Machine Age: Work, Progress and Prosperity in the Time of Brilliant Technologies* (NY: W.W. Norton, 2014); for a more pessimistic view of the impact of new technology, see Robert Gordon, *The Rise and Fall of American Growth: The US Standard of Living Since the Civil War* (Princeton, 2016)

society. It is equally difficult to gainsay the proposition that disruptive innovations often originate with upstarts outside an established industry, rather than incumbents who are more focused on sustaining innovations to existing business models.[28]

It is common to describe and often decry the legal profession as having a monopoly on the provision of legal services, but this is equally true of many other professions and skilled trades that impose entry requirements. However, this does not preclude competition within their licensed domain. In Ontario, there are about 24,000 lawyers with active practicing certificates, and a preliminary study by Iacobucci and me finds that most legal services markets in Ontario, by specialty and region, are structurally competitive.[29] Thus, the term "monopoly" is, economically speaking, misleading. But just as bricks-and-mortar retail stores vigorously competed against each other prior to online shopping, the advent of this new business model has profoundly affected competitive dynamics in many retail markets.

Susskind argues that the more-for-less challenge, liberalization, and information technology will drive immense and irreversible change in the way that lawyers work. He calls this a perfect storm in the making.[30] Frank Stephen similarly argues that a combination of more liberal rules on alternative business structures and a more expansive role for IT and AI has the potential for a technological revolution in lawyering by facilitating access to more sources of

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[28] See Clayton Christensen, *The Innovators Dilemma: When New Technologies Cause Great Firms to Fail* (Harvard Business School Press, 1997); Roy Worthy Campbell, "Rethinking Regulation and Innovation in the US Legal Services Market," (2012) 9 *NYU Journal of Law and Business*, p. 1.

[29] See Edward Iacobucci and Michael Trebilcock, "Self-Regulation and Competition in Ontario's Legal Services Sector: An Evaluation of the Competition Bureau's Report on Competition and Self-Regulation in Canadian Professions," (Report to the Federation of Law Societies of Canada, November 2008).

[30] For similar prognoses, see Frank H. Stephen, *Lawyers, Markets and Regulation* (Edward Elgar, 2013); Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Edward Elgar, 2015); Gillian Hadfield and Deborah Rhode, "How to Regulate Legal Services to Promote Access, Innovation and the Quality of Lawyering," (2016) 67 *Hastings Law Journal* 1191; Gillian Hadfield, "Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets," (2008) 60 *Stanford Law Review* 102; Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans," (2010) 37 *Fordham Urban Law Journal* 129, and most recently her tour-de-force, Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* (New York: Oxford University Press, forthcoming).

capital and managerial, marketing and IT expertise, permitting the realization of greater economies of scale, scope, and specialization in more efficiently transforming a wider range of inputs into more highly valued outputs.[31] In the US, the emergence and growth of legal service providers such as Legal Zoom and Rocket Law that provide a combination of online interactive legal advice and assistance, supported by a referral network of fixed-fee lawyers exemplifies a similar, albeit more muted, trend in North America. In short, the future of the legal profession is likely to be more entrepreneurial and more IT and AI intensive. While this may threaten existing business models in the profession, it does not necessarily imply less employment for lawyers. Lawyers will practice in increasingly varied business structures with different roles and responsibilities that better respond to the demand for legal services by citizens who presently lack effective access to them. There may not be a fortune to be made at the bottom of the pyramid, but almost certainly adequate professional incomes.[32]

Susskind also argues that the courts will not be immune from these trends and predicts a dramatic expansion of online dispute resolution and virtual trials, as well as a dramatic expansion of non-court based online dispute resolution, citing by way of example the fact that eBay has resolved some 60 million complaints through informal online dispute resolution (e-adjudication). Private arbitration generally of commercial, family, consumer and employment disputes is already expanding dramatically (although often raising legitimate concerns in the latter two cases of coerced consent through fine print, take-it-or-leave-it clauses in standard form contracts).[33] Courts are thus not the only game in town for resolving civil disputes (and progressively less so). However, if they price themselves out of the market for resolving civil disputes, this will come at

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[31] Frank Stephen, *Lawyers, Markets and Regulation* (Edward Elgar, 2013), chap. 8.
[32] See C.K. Prahabad, *The Fortune at the Bottom of the Pyramid: Eradicating Poverty Through Profits* (NY: Prentice Hall, 2010).
[33] See Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2012).

a significant social cost in terms of foregoing the incremental development of the law through the accumulation of a body of authoritative judicial precedents and the public articulation of important social norms.[34] In the near future, legal education may in turn be exposed to various disruptive technologies.[35]

In terms of enhancing access to justice and realizing more fully our ideal of equality before the law, we really only have two basic choices: either to devote substantially more public resources to the administration of justice within the existing modalities and institutions, or to devise much more innovative, lower-cost, lower-priced modalities for ensuring that many more legal services are within the reach of our fellow citizens. Both choices present major political economy challenges. In my concluding comments, I mainly focus on the challenges posed by the latter choice.

V. SELF-REGULATION OF THE LEGAL PROFESSION

In his insightful recent book, *Legal Services Regulation at the Crossroads: Justitia's Legions*,[36] Professor Noel Semple compares two models of legal services regulation: the professionalist-independent model of legal services regulation that has largely prevailed in North America historically and continues to prevail today, with the competitive-consumerist paradigm that has increasingly come to predominate in much of Western Europe and Australasia. Semple argues that regulators must make four key policy choices with respect to legal services regulation: 1) occupational structure: whether to institute occupational unity (a single occupation of lawyer) as opposed to occupational multiplicity; 2) governance: how much scope

[34] See Trevor Farrow, *Civil Justice, Privatization, and Democracy* (University of Toronto Press, 2014), chap. 6.
[35] See e.g., Michele Pistone and Michael Horn, "Disrupting Law School: How Disruptive Innovation Will Revolutionize the Legal World" (Clayton Christenson Institute for Disruptive Innovation, 2016).
[36] Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Edward Elgar, 2015).

to allow for self-regulation as opposed to state or co-regulation; 3) insulation: whether to pursue regulatory insulation of legal service providers from business relationships with non-lawyers (through prohibition of non-lawyer investment in the firms providing legal services), as opposed to regulatory openness to such relationships; and 4) the unit of regulatory focus: whether individual legal service providers should be the exclusive focus of regulatory efforts, as opposed to also regulating the firms and enterprises in which they work. Semple concludes that the competitive-consumerist paradigm that has emerged in Western Europe and Australia has been more open to innovation with respect to all four of these issues than the traditional professionalist-independent model of legal services regulation that has predominated in North America. However, he goes on to argue that the latter paradigm has many virtues in terms of preserving the independence of lawyers in the legal profession from the state, which is often adverse in interest to many citizens that lawyers represent and that the legal profession as a self-regulatory institution is able to bring expertise and appreciation of the day-to-day realities of legal practice to the challenges of formulating, monitoring, and enforcing appropriate regulations.

However, many critics of the traditional professionalist-independent model of self-regulation of the legal profession argue that the model exhibits inherent professional protectionist biases that render it inimical to innovation in the provision of legal services and in disciplining incompetent or dishonest practitioners; that the unity of the profession is something of a mirage, given the increasingly diverse demographic make-up of the profession; the increasing fragmentation of the profession into different areas of specialization; the increasing diversity of law firm size and orientation from solo and small practices to major national and international

law firms; and a proliferating and diverse range of interactions between lawyers and members of cognate professions and other business actors.[37]

In his recent book, referenced above, Richard Susskind argues that in law there are two distinct camps (and a few in between): the benevolent custodians and the jealous guards. The benevolent custodians are those who regard it as their duty to nurture the law and make it affordable and accessible to members of society. In contrast, the jealous guards wish to ring fence areas of legal practice and make it their exclusive preserve, whether or not the activity genuinely requires the experience of lawyers and with little regard to the impact of this quasi-protectionism on the affordability and viability of legal service. As he puts it, "turkeys rarely vote for an early Christmas." He implores tomorrow's lawyers to take up the mantel of the benevolent custodian.

I take a position somewhere between the two extremes of unqualified self-regulation and extensive direct state regulation of the legal profession, and have argued for the preservation of a qualified form of self-regulation of the legal profession, for most of the same reasons that Professor Semple defends this model, but most particularly the importance of preserving the independence of the legal profession from direct control by government. [38] My views here are influenced by my observation of the severely deleterious impacts of subjugation of the judiciary and the legal profession by often autocratic and repressive governments in many developing countries. However, self-regulation cannot be unqualified and unaccountable. Hence, I argue for strengthening both the number and quality of lay representatives on the governing bodies of

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[37] Frank Stephen, *Lawyers, Markets and Regulation* (Edward Elgar, 2013); Gillian Hadfield, "Legal Barriers to Innovation: The Growing Economic Costs of Professional Control Over Corporate Legal Markets," (2008) 60 *Stanford Law Review* 102; Harry Arthurs, "Will the Law Society of Alberta Celebrate Its Bicentenary?" (2008) 45 *Alberta Law Review* 15; Richard Devlin and Porter Heffernan, "The End(s) of Self-Regulation?" (2008) 45 *Alberta Law Review* 169; Philip Slayton, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession* (Toronto: Viking Canada, 2007).

[38] See Michael Trebilcock, "Regulating the Market for Legal Services," (2008) 45 *Alberta Law Review* 215.

the legal profession, in particular ensuring that lay members are genuinely representative of a range of demand-side interests, paralegals, and cognate professions; that rules of conduct promulgated by the governing bodies of legal professions should take the form of regulations that are subject to Ministerial or Cabinet approval; and that consideration be given to appointing non-lawyer ombudspersons to oversee and publicly report on the efficacy of the disciplinary processes of the legal profession.

Whether the legal profession in Canada is open to the challenges of regulatory rejuvenation both in terms of its governance structures and in terms of the substantive policies that it chooses to adopt in future with respect to the four major policy choices that Semple identifies, at least in the absence of a credible threat of direct regulation by government, is an open question. I remain cautiously optimistic, although the stakes are so large in terms of enhancing access to justice that failure to rise to these challenges will progressively undermine the credibility of the organized legal profession and inevitably, at some point in the future (as evident from recent experience in Western Europe and Australia), invite direct government intervention, for the simple reason that a broad range of the political constituents of government representatives will demand it.

In conclusion, to return to Oscar Wilde's quip, no sensible person would argue that everything of value in life has a price.[39] However, many dimensions of the justice system in the real world do have a price and discounting the importance of rigorous analysis of the determinants of these prices is likely to continue to compromise our collective commitments to access to justice and the rule of law, *especially* if we value these commitments highly.

[39] See e.g., Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (NY: Farrar, Straus and Giroux, 2012)