

STARTUP LAWYERS AT THE OUTSKIRTS

ABRAHAM J.B. CABLE*

Startup lawyering is a distinctive style of law practice first observed in Silicon Valley decades ago. Like other business lawyers, startup lawyers form entities, protect intellectual property rights, and document financing transactions for clients starting new businesses. But startup lawyers also encourage entrepreneurship more broadly by promoting Silicon Valley's practices and conventions, such as standard contract terms that streamline negotiations with venture capital investors.

Today, startup lawyers practice not only in established entrepreneurial centers such as Silicon Valley or Boston, but also in the shadow of economic development efforts to promote entrepreneurship. In this new context, startup lawyering is susceptible to both positive and negative assessments: as productive and professionally satisfying civic engagement or as wasteful rent seeking. Based on the author's personal experiences and the academic literature, this essay identifies circumstances that support the more favorable view.

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INTRODUCTION

In Tokyo, prominent law firms sponsor the Japan Venture Capital Association and lawyers advocate for legal reforms intended to encourage venture capital investment.¹ In New Orleans, lawyers sponsor and donate services to the Idea Village, an organization dedicated to building a local “entrepreneurial ecosystem.”² In Portland, Oregon, lawyers help organize events that showcase local entrepreneurs to investors.³ These “startup lawyers,” while practicing outside of established entrepreneurial clusters, are emulating their successful counterparts in Silicon Valley by trying to build an infrastructure for entrepreneurship. This essay seeks to explain and assess the spread of startup lawyering in light of the considerable obstacles to replicating Silicon Valley.

Startup lawyers have been observed in Silicon Valley for decades. Like other business lawyers,⁴ startup lawyers earn fees

* Associate Professor, University of California Hastings College of the Law. This essay benefited from helpful comments from Mark Aaronson, John Crawford, Geoffrey Hazard, Darian Ibrahim, Mohsen Manesh, Ascanio Piomelli, and Morris Ratner.

1. Zenichi Shishido, *Law and Venture Capital: The Case of Japanese Entrepreneurs* (Mar. 2011), available at http://works.bepress.com/zenichi_shishido/5/ (discussing law reform efforts); *Supporters*, JAPAN VENTURE CAPITAL ASS’N, <http://jvca.jp/english/member/trade.htm> 1 (last visited Dec. 19, 2013) (listing supporters of the Japan Venture Capital Association); *About*, JAPAN VENTURE CAPITAL ASS’N, <http://jvca.jp/english/about/> (last visited Dec. 19, 2013) (describing legal reforms).

2. *Donate Professional Services*, THE IDEA VILLAGE, http://ideavillage.org/get_involved/support_entrepreneurs/donate_professional_services/ (last visited Dec. 19, 2013).

3. *About*, OR. ENTREPRENEURS NETWORK, <http://www.oen.org/about-oen/> (last visited Dec. 19, 2013).

4. I use the term “business lawyer” to mean a lawyer who provides prospective advice regarding business transactions and legal compliance, in contrast to a litigator who provides services in the context of disputes over prior dealings. I have chosen business lawyer over “transactional lawyer” because I want to capture the broader range of activities sometimes associated with the former. George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279, 295–313 (2009) (identifying a broad range of activities, beyond traditional transactions, engaged in by business lawyers), available at http://www.americanbarg.org/publications/the_business_lawyer/volume_64/number_2.html.

performing necessary legal services for new-start businesses, such as forming entities, drafting employment contracts, protecting intellectual property, and documenting financing transactions. But startup lawyers are distinctive in the intensity of their efforts to encourage entrepreneurship more broadly by promoting Silicon Valley practices. Through client work and volunteer efforts, startup lawyers pursue regulatory reforms, develop and popularize standard contract terms that reflect Silicon Valley financing conventions, and educate entrepreneurs in Silicon Valley customs.

Currently, startup lawyering is entering a new phase. It first emerged in a small community that local law firms dominated⁵ and then expanded to a handful of entrepreneurial hot spots, both through expansion of Silicon Valley-based firms⁶ and adoption of startup lawyering practices by local firms in places like Seattle and Boston.⁷ Today, lawyers who are far from any established entrepreneurial center are importing the startup lawyer model, law schools almost uniformly offer courses or clinics focused on venture capital financings and related work for startups,⁸ practice guides for startup lawyers are widely available,⁹ and startup lawyer blogs abound.¹⁰

This expansion of startup lawyering accompanies a growing trend in economic development policy. A wide variety of regions concerned about their ability to compete in an increasingly knowledge-based economy are engaged in efforts to promote entrepreneurship, and startup lawyers are playing a leading role.

Viewed in a positive light, startup lawyers' involvement in

5. See generally Lawrence M. Friedman et al., *Law, Lawyers, and Legal Practices in Silicon Valley: A Preliminary Report*, 64 IND. L.J. 555 (1989).

6. *Seattle*, WSGR, http://www.wsg.com/WSGR/Display.aspx?SectionName=locations/loc_seattle.htm (last visited Dec. 19, 2013) (describing the Seattle office of a Palo-Alto based law firm).

7. *Emerging Business & Venture Capital*, PERKINS COIE, http://www.perkinscoie.com/merging_companies/ (last visited Dec. 19, 2013) (describing the emerging business group of a Seattle-based law firm).

8. Shawn P. O'Connor, *Law Schools Incorporate Entrepreneurship*, U.S. NEWS & WORLD REPORT (Apr. 16, 2012), <http://www.usnews.com/education/blogs/law-admissions-lookdown/2012/04/16/law-schools-incorporate-entrepreneurship> (describing law school clinics offering services to entrepreneurs).

9. E.g., MICHAEL J. HALLOREN, *VENTURE CAPITAL & PUBLIC OFFERING NEGOTIATION* (3d ed. 1996); LEE R. PETILLON & ROBERT JOE, *REPRESENTING START-UP COMPANIES* (1992).

10. See generally Ryan Roberts, *STARTUP LAWYER BLOG*, <http://www.startuplawyer.com> (last visited Dec. 19, 2013); Yoichiro Taku, *STARTUP CO. LAWYER BLOG*, <http://www.startupcompanylawyer.com> (last visited Dec. 19, 2013).

community-wide economic development efforts is a productive response to competition and may even include an element of public service or civic engagement.¹¹ This favorable view draws from personal experience, in addition to the academic literature. As a former business lawyer in an economic region that tried to emulate Silicon Valley, I observed lawyers embracing leadership roles in efforts to assist with difficult economic challenges facing the local economy. I count my own participation in such efforts among my most satisfying professional experiences.

But I also recognize there is no consensus on how, or if, the Silicon Valley model of entrepreneurship can be intentionally transplanted or “engineered.” In this uncertain policy environment, even well-intentioned activities could be harmful to economic growth. One lawyer’s meaningful civic engagement is another lawyer’s rent-seeking cottage industry.

These complications notwithstanding, I believe it is important to tell the story of how startup lawyers assist economic development efforts. First, this account may help individual lawyers assess whether their involvement in economic development efforts has a positive effect. Additionally, this narrative may inform the profession’s thinking about its public-service ideals. As a legal educator, I encounter students who seem apprehensive about private practice because they think it requires forfeiting the opportunity for meaningful work that drew them to law school in the first place. The problem seems especially acute in a business law practice where conventional pro bono activities are hard to locate and typical

11. When describing the nature of startup lawyering, I intentionally use the terms “civic engagement” and “public service” rather than “public interest” or “pro bono.” In the context of the legal profession, public-interest work is often associated with a relatively narrow set of legal careers dedicated full-time to particular public-regarding goals. *Federal Loan Repayment Assistance Information*, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/loan_repayment_assistance_programs/federal_loan_repayment_assistance_information.html (last updated Sept. 21, 2012) (describing eligibility for federal loan forgiveness programs). Pro bono work is primarily associated with legal work for low-income individuals. *See* MODEL RULES OF PROF’L CONDUCT R. 6.1 (2013) (defining pro bono work). The term public service does not appear to have such specific meaning in regards to the legal profession and is used in various contexts to describe a wide range of public-regarding activities. *See* ALAN D. DOWD, A NATION OF SERVANTS: DEFINING PUBLIC SERVICE FOR THE 21ST CENTURY (Jan. 1, 2004), *available at* <http://www.sagomoreinstitute.org>. Similarly, the term civic engagement is used in a wide range of contexts to describe collective efforts to solve community problems. *See* SCOTT KEETER ET AL., THE CIVIC AND POLITICAL HEALTH OF THE NATION: A GENERATIONAL PORTRAIT (2002), *available at* <http://www.civicyouth.org>; Robert Putnam, *The Strange Disappearance of Civic America*, THE AM. PROSPECT (Dec. 19, 2001), <http://prospect.org/article/strange-disappearance-civic-america>.

justifications for client-centered lawyering lose force. This essay introduces a type of lawyer who integrates civic engagement into a business law practice.

This essay proceeds in three parts.

Part I describes distinctive functions and attitudes of startup lawyers and the important role these lawyers have played in Silicon Valley and other entrepreneurial centers.

Part II focuses on the spread of startup lawyering beyond established entrepreneurial centers. I describe the challenges that economic development actors and lawyers face in transplanting Silicon Valley practices, and consider explanations for why lawyers continue to take a leading role in promoting entrepreneurship despite these considerable challenges.

Part III concludes by identifying the circumstances in which startup lawyers are most likely to have a positive effect on local economies and considering what broader lessons can be drawn from this account of startup lawyering.

I. STARTUP LAWYERS IN SILICON VALLEY

Since the 1980s, legal scholars have suggested that lawyers played a special role in Silicon Valley's economic success.¹² This part first describes the basic functions that startup lawyers perform in Silicon Valley and similar entrepreneurial centers. It then considers what makes startup lawyers distinctive, focusing on the lawyer–client relationship and economic impact.

A. *What Startup Lawyers Do*

To understand the role of startup lawyers in Silicon Valley, it is first useful to understand the broader business climate in which they operate. Silicon Valley is the prototypical entrepreneurial *cluster*. It exhibits what economists call “agglomeration effects”—Silicon Valley startup companies become more productive by locating in close physical proximity to competitors, related industries, and specialized service providers. A significant body of empirical research and economic theory suggests that a social media startup, for

12. Mark Suchman and Mia Cahill's account of Silicon Valley lawyers is the seminal work in this vein. Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679 (1996). See generally Friedman, *supra* note 5.

example, will fare better if it locates its headquarters in Silicon Valley. Entrepreneurs increase their chances of success through physical proximity to industry leaders (Google, Facebook, etc.), the headquarters of venture capital funds that specialize in financing startups,¹³ and Silicon Valley law firms, bankers, and accountants. Even as communication and transportation costs decline dramatically, physical location appears to matter greatly to entrepreneurship.¹⁴ Other entrepreneurial clusters have emerged—Seattle and Austin, for example—but Silicon Valley remains the gold standard for nurturing high-impact entrepreneurship.

Lawyers engage in a wide variety of activities, besides offering technical legal advice, that support this robust environment for entrepreneurship. For example, they advocate for regulatory reform that assists entrepreneurs and venture capital managers.¹⁵ They also offer to defer fees, or work for stock in the company rather than cash, to absorb some of the risk of uncertain business ventures and conserve precious cash flow for investment in product development.¹⁶ Two roles that Silicon Valley lawyers assume are particularly important for this essay: promoting standard contract terms and acting as reputational brokers.

Silicon Valley lawyers collaborate—both informally and through organizations like the National Venture Capital Association (NVCA)—to develop and popularize standardized investment contracts that serve as a starting point for the vast majority of transactions in Silicon Valley.¹⁷ Today, one can find comprehensive

13. After startup companies have exhausted financing provided from personal resources and individual angel investors, they turn to venture capital. Professional managers of venture capital funds have special expertise in selecting, monitoring, and improving the business operations of startup companies within a particular industry. They take capital from institutional investors, such as insurance companies or pension funds, and invest it in a portfolio of startup companies. Abraham J.B. Cable, *Fending for Themselves: Why Securities Regulations Should Encourage Angel Groups*, 13 U. PA. J. BUS. L. 107, 112–15 (2010).

14. See generally Abraham J.B. Cable, *Incubator Cities: Tomorrow's Economy, Yesterday's Start-Ups*, 2 MICH. J. PRIVATE EQUITY & VENTURE CAPITAL L. 195 (2013) (providing an overview of agglomeration effects within industry clusters by discussing the work of Michael Porter, Richard Florida, and Edward Glaeser).

15. Suchman, *supra* note 12, at 705–08 (discussing the role of Silicon Valley lawyers in “shaping the larger legal regime”). Recently, for example, startup lawyers advocated for a reduced regulatory burden on venture capital managers relative to other investment advisers. Wilson Sonsini Goodrich & Rosati PC, Letter to the Securities and Exchange Commission (Jan. 24, 2011), <http://www.sec.gov/comments/s7-37-10/s73710-98.pdf>.

16. Suchman, *supra* note 12, at 691–94 (discussing fee structures).

17. *Id.* at 703 (stating that “readymade deals flourish in Silicon Valley”); *Model Legal*

documentation for a venture capital financing for free on the NVCA website, and the websites of Silicon Valley firms make additional forms widely available for no cost.¹⁸ While it may be surprising that law firms are willing to give away valuable work product, Silicon Valley firms appear to recognize a long-term benefit in cooperating to mitigate the extreme challenges of starting innovative companies. For example, a venture capital fund typically invests in a startup company through contracts that give the fund board representation, approval rights over major transactions, the ability to delay a portion of investment until milestones are met, and special financial rights. It is well chronicled that these features of standard venture capital contracts assist in monitoring the progress of uncertain business ventures and guarding against opportunistic behavior by the entrepreneurs who must be trusted with day-to-day operations because of their superior technical expertise.¹⁹

Silicon Valley lawyers act as reputational brokers by having the ear of top financing sources and using that access to vouch for promising clients. Lawyers are positioned to play this role because of their early interactions with entrepreneurs. Lawyers are often a startup company's first service provider, as company founders establish financial and management rights among themselves, protect intellectual property, and obtain benefits of a limited liability entity. This basic formation work allows a lawyer to observe client behavior and assess client trustworthiness without a large investment of time (especially if the work is based largely on forms, as has been the practice in Silicon Valley). A Silicon Valley lawyer can credibly communicate this assessment of an entrepreneur to potential financing sources because a lawyer has repeat dealings with those sources. That gives the lawyer something at stake (his or her reputation), which gives weight to any client introduction.²⁰ The end result is that, in Silicon Valley, getting the attention of the right law firm can be the

Documents, NAT'L VENTURE CAPITAL ASS'N, http://www.nvca.org/index.php?option=com_content&view=article&id=108&Itemid=136 (last visited Dec. 19, 2013).

18. The Silicon Valley office of Orrick, Herrington & Sutcliffe LLP provides a comprehensive "Start-Up Forms Library," complete with a "term-sheet calculator." *Start-up Forms Library*, ORRICK, <http://www.orrick.com/practices/emerging-companies/startup-forms/Pages/default.aspx> (last visited Dec. 19, 2013).

19. Cable, *supra* note 13, at 124–26.

20. Linda Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineer*, 74 OR. L. REV. 239, 245–48 (1995) (providing an economic analysis of "matchmaking" and "gatekeeping" by startup lawyers); Suchman, *supra* note 12, at 698 (discussing startup lawyers' role as "reputational brokers").

difference between obtaining crucial funding and failure.²¹

B. An Atypical Client Relationship: Old-Fashioned Influence

On their face, the functions of a startup lawyer are not entirely unique within the legal profession. Lawyers in a wide range of practice areas engage in law-improvement efforts by working on model legislation,²² accommodating cash-strapped clients through fee structures,²³ collaborating to standardize contract terms and other work product,²⁴ and making valuable business introductions.²⁵ If startup lawyers are only different in degree, perhaps all of the attention is misplaced and the spread of their practices is of little occasion.

In this case, differences in degree seem to be important. Startup lawyers' sustained and pronounced efforts at reputational brokering and promoting standard contract terms suggest an atypical client relationship. Specifically, these efforts require startup lawyers to be unusually willing and able to influence client conduct and objectives.

To protect their important relationships with financing sources, lawyers must screen out untrustworthy clients and coach entrepreneurs to act in accordance with standard Silicon Valley practices.²⁶ In their pioneering study of Silicon Valley lawyers, Mark Suchman and Mia Cahill observed lawyers declining representation of clients perceived as overly litigious and preaching "anti-adversarialism" in business negotiations.²⁷ Similarly, effectively proselytizing standard contract terms requires convincing clients that

21. Suchman, *supra* note 12, at 698 ("Silicon Valley law firms play a substantial role in determining which clients gain access to which investors, and vice versa.").

22. Lawyers, for example, collaborated to produce the ABA's Model Business Corporations Act. *See generally* MODEL BUS. CORP. ACT (2010).

23. The most obvious example is contingent fees plaintiffs' lawyers charge.

24. American Bar Foundation has produced a model indenture that has been the basis for corporate bond offerings since the middle of the last century. AM. BAR FOUND., COMMENTARIES ON INDENTURES (1971). The ABA produces a number of well-regarded form contracts for business transactions. *E.g.*, MODEL ASSET PURCHASE AGREEMENT WITH COMMENTARY (2001). Lawyers have also collaborated to standardize practices for rendering third party legal opinions in business transactions. Legal Opinions Committee, ABA Business Law Section, *Report on the 2010 Survey of Law Firm Opinion Practices*, 68 THE BUS. LAWYER 785–820 (2013).

25. For instance, lawyers are commonly asked for introductions to other service providers, such as accountants.

26. Suchman, *supra* note 12, at 698.

27. *Id.* at 698–702.

the terms are acceptable.²⁸

The particularly formative role that startup lawyers play with their clients is not limited to traditional areas of legal representation—it also includes a broader socializing function. According to Suchman and Cahill, Silicon Valley lawyers “foster and reinforce community norms by promoting certain types of financing transactions over others” and “define and communicate the socially constructed range of ‘reasonable behavior’” to their clients.²⁹ For example, lawyers help entrepreneurs prepare business plans that conform to the expectations of venture capital funds,³⁰ and school clients in the unique terminology of startup company finance.³¹ In the words of one observer, Silicon Valley lawyers do not just represent their clients to the Valley, “they represent the Valley to their clients.”³²

According to some, the attitude of Silicon Valley lawyers towards their clients is so distinctive that it “treads near the boundaries of conventional legal ethics.”³³ If they take the right steps, Silicon Valley lawyers do not violate black-letter rules of professional conduct.³⁴ But, at a high level, it can appear that an individual startup client takes a back seat to the lawyer’s relationship with financing sources, reputation within the community, and fidelity to the Silicon Valley system of entrepreneurship. By prioritizing these external considerations, there is a tension with a client-centered, agency-based, or instrumental view of lawyering that dominates much

28. A lawyer in Suchman and Cahill’s study described his or her function as making clients “comfortable” with the terms of venture capital financings. *Id.* at 700.

29. *Id.* at 699–701.

30. A business plan is a non-legal document that describes the expected growth and development of the company. Suchman and Cahill give the example of a lawyer who coaches lawyers on the proper length of business plan. *Id.* at 701.

31. *Id.*

32. Richard W. Painter, *Afterward: Contractarian and Cultural Perspectives on Value Creation by Business Lawyers*, 74 OR. L. REV. 327, 332 (1995).

33. Suchman, *supra* note 12, at 701; see also Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1589–90 (suggesting that Silicon Valley lawyers’ self-constructed mythology rationalizes “a variety of personal wealth-producing behaviors (e.g., diminished advocacy in the interest of maintaining connections with venture capitalists, taking compensation from clients in stock options) that uncommitted observers would find at least worthy of discussion.”).

34. Of course, a lawyer must obtain consent to any conflicts due to simultaneous or prior representation of counterparty financing sources and must take any required steps to accept equity compensation in lieu of fees. MODEL RULES OF PROF’L CONDUCT R. 1.7, 1.9 (2013) (discussing conflicts of interests involving current and former clients); see also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 00-418 (2000).

thinking about the profession.³⁵

While this noted tension with conventional legal ethics at first sounds indicting, a deeper examination of legal ethics scholarship reveals ambivalence towards the client-centered approach with which Silicon Valley practices may conflict. The ethical underpinning of client-centered lawyering is client autonomy. To respect that autonomy, lawyers are implored to act nonjudgmentally towards clients.³⁶ Because this focus is most compelling in relation to disempowered clients, client-centered lawyering is understandably prevalent in clinical and similar settings.³⁷

But in other contexts—corporate practice in particular—many legal ethics scholars have misgivings about a client-centered approach. Lawyers, after all, are described as having a special responsibility to act in the public interest rather than solely for personal gain.³⁸ But many believe lawyers in private practice increasingly fail to satisfy this higher calling by bending to client demands that harm the public. According to this account, lawyers once effectively discouraged clients from acting contrary to the public interest through, for example, initiating frivolous litigation or violating legal duties.³⁹ But lawyers are no longer viewed as serving

35. David Binder, Paul Bergman, Paul R. Tremblay, and Ian Weinstein most famously articulated the client-centered view in their book *Lawyers as Counselors: A Client Centered Approach*. For a pithy overview of the client-centered approach and its primary alternatives, see Robert F. Cochran, Jr., Deborah L. Rhode, Paul R. Tremblay & Thomas L. Shaffer, *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591 (2003).

36. Cochran et al., *supra* note 35, at 605.

37. *Id.* at 604.

38. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1342–43 (1997) (summarizing varying meanings of the word “professionalism” and the common theme of public service); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1309–11 (1995) (describing a “dominant modern perspective on professionalism” that “[l]awyers should not act as normal businessmen or service-providers maximizing their own interests, but rather should respond to higher societal values that transcend economics”). These public-interest obligations have been described as the product of lawyers’ unique role in a democratic society. See Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1324–26 (2009). They have also been described as the reasonable price that lawyers must pay for the right to exclude others from providing legal services. See generally Deborah L. Rhode, *Symposium: Rethinking The Public in Lawyers’ Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1440 (2009) [hereinafter Rhode, *Rethinking the Public*] (discussing the origins of pro bono obligations).

39. Lawyers could do so through a variety of “gatekeeping” actions such as refusing to represent a client or potential client, successfully counseling a client to comply with applicable requirements, or alerting authorities or victims to the client’s misconduct. David B. Wilkins,

this gatekeeping function effectively due to increasing numbers of lawyers (and resulting economic competition) and changes in the market for legal services.⁴⁰ Beyond these practical challenges—or perhaps in an effort to rationalize these new circumstances—some argue the ideals of the profession have shifted, with many lawyers viewing their role as simply implementing “preformed” decisions of the client rather than positively influencing client decision making through active deliberation.⁴¹

Today, even the profession’s attempts at recognizing a public-service function are viewed by some as confirming an instrumental mindset. For example, ethics rules may require lawyers to discourage a client’s fraudulent or illegal conduct,⁴² but lawyers accepted these obligations kicking and screaming.⁴³ Their parameters have been set

Making Context Count: Regulating Lawyers After Kaye, Scholer, 66 S. CAL. L. REV. 1145, 1164 (1993) (discussing these three methods of influencing client conduct).

40. See ANTHONY T. KRONMAN, *THE LOST LAWYER, FAILING IDEALS OF THE LEGAL PROFESSION* 165–270 (1995); Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 557–59 (1998) (discussing increasing numbers of lawyers and competition in the market for legal services); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2077–85 (2010) (discussing Ronald Gilson’s account of declining gatekeeping activities due to the rise of in-house counsel and changes in law firm organization).

41. See David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals From Ideology in Legal Ethics*, 108 HARV. L. REV. 458, 468–69 (1994); see also Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 n.5 (2004) (citing numerous sources “who criticized the erosion of professional ideals under the weight of an increasingly business-centered model for providing legal services”); Suchman, *supra* note 12, at 699–701 (discussing the prevailing “agency view” of the profession and the “ideology of advocacy”).

42. For example, when a client cannot be dissuaded from committing fraud or crime, ethics rules generally require the lawyer to report up the chain-of-command within an organization and to withdraw if the conduct continues. See MODEL RULES OF PROF’L CONDUCT R. 1.13 (2013). Lawyers may in narrow circumstances be required to disavow a document or statement on which third parties continue to rely. See *id.* R. 1.2(d) cmt. 10, R. 1.4 cmt. 3. Lawyers may otherwise be permitted (but are generally not required) to expose wrongdoing as necessary to mitigate fraud or misconduct. *Id.* R. 1.6, R. 1.13.

43. John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1294 (2003). Professor Coffee states:

In response [to recent gatekeeping reforms], the bar associations themselves still seem locked in denial. Reacting with the same shocked alacrity of a patient in the dental chair when the drill hits an exposed nerve, they have answered: ‘You don’t understand; lawyers can’t undertake the obligations that you are proposing because they conflict with our duties to our clients.’

Id.

largely through pressure from external regulators,⁴⁴ rather than by lawyers articulating their own professional values through self-regulation.⁴⁵ Even pro bono programs serving low-income clients are criticized because separating public-service obligations into a “side” practice arguably frees lawyers to take more liberties in pursuing regular-client interests.⁴⁶

Against this backdrop, Silicon Valley practice may in fact resemble the perceived “Golden Age” of lawyering that preceded the profession’s current instrumental trajectory. According to Anthony Kronman’s influential account, a “lawyer-statesman” ideal guided the legal profession before declining in the 1950s.⁴⁷ The lawyer-statesman’s key attribute was a “practical wisdom” that allowed him or her to shape client objectives in positive ways.⁴⁸ Kronman contrasts this traditional ideal with the prevailing view of lawyering that accepts and executes initial client objectives.⁴⁹ Similarly, David Wilkins, drawing on the work of Ronald Gilson, provides an insightful historical account of the active gatekeeping function that corporate law firms once played. Before the rise of in-house counsel and other market forces conspired against the gatekeeping functions in recent decades, prominent law firms seemed far better positioned to

44. Wilkins, *supra* note 40, at 2073–74 (discussing IRS, SEC, and Office of Thrift Supervision pressure to enhance lawyer gatekeeper responsibilities).

45. *Id.* at 2124 n.236.

46. *See* Cummings, *supra* note 41, at 7–20 (“Insofar as lawyers discharge their public service duty outside the scope of conventional client representation—by, for example, holding political office or handling pro bono cases—the ideology of advocacy is preserved.”); Wilkins, *supra* note 40, at 2075–76. Wilkins notes that an “agency” view of lawyers has resulted in:

[A]n increasing tendency among even the most public-regarding segments of the corporate bar to embrace what Robert Gordon calls ‘schizoid lawyering’ in which practitioners confine their public commitments to their own (increasingly scarce) private time, while accepting uncritically the instructions of their private clients unmediated by any attention to public ends.

Id.

47. KRONMAN, *supra* note 40, at 1–7.

48. *Id.* at 41–43.

49. Kronman explains:

In some cases, to be sure, instrumental help is all, and in every case it is a part, of what a lawyer is expected to provide. . . . But this is not the only kind of help for which lawyers are commonly asked, nor do I think it either the most challenging. The most demanding and also most rewarding function that lawyers perform is to help their clients decide what it is they really want, to help them make up their minds as to what their ends should be, a function that differs importantly from the instrumental servicing of pre-established goals.

Id. at 288.

influence client conduct by threatening to withhold services.⁵⁰

At least one legal scholar has likened Silicon Valley lawyers to this favored historical ideal.⁵¹ Admittedly, one has to be careful when invoking generalizations about the legal profession, past and present. Lawyers of the past did not always live up to lofty ideals,⁵² and today's legal profession is too diverse for ascribing a single professional attitude.⁵³ But I still think the analogy between Silicon Valley practices and historical ideals has some merit. At the least, Silicon Valley lawyers operate in circumstances that permit a more formative role: Silicon Valley emerged from a relatively small and insular community that gave special importance to the strong norms of cooperation that lawyers instill in their entrepreneur clients;⁵⁴ entrepreneurs with little experience and training in financial transactions may find law firms to be a cost-effective source of business information,⁵⁵ and Silicon Valley lawyers have faced relatively little competition in their role as reputational brokers because more traditional financial intermediaries, such as registered broker-dealers, have not been prominently involved in early-stage financing transactions.⁵⁶

To be clear, the purpose of this discussion is not to claim that Silicon Valley legal practice is ethically superior to a client-centered approach. In Part II, I will propose a normatively favorable view of

50. Wilkins, *supra* note 39, at 2077–80.

51. Painter, *supra* note 32, at 332 (comparing Silicon Valley lawyers to New York City lawyers in 1900, and citing the work of Robert Gordon).

52. Wilkins, *supra* note 40, at 2079–80 (asserting that law firms sometimes used positions of influence for personal gain at the expense of clients).

53. Geoffrey C. Hazard, *Is There an American "Legal Profession"?*, 54 STAN. L. REV. 1463 (2002) (describing diversity in the legal profession). Criticisms of instrumental lawyering have focused largely on the economic pressures facing large law firms. Wilkins, *supra* note 40, at 2081–85. But that practice setting is atypical. THE NALP FOUNDATION FOR LAW CAREER RESEARCH AND EDUCATIONS AND THE AMERICAN BAR FOUNDATION, AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS (2004) (describing practice settings based on a survey of law graduates two to three years after graduation). In addition, attitudes may differ across practice areas. Coffee, *supra* note 43, at 1299 (arguing that the securities lawyers are more open to gatekeeping obligations than litigators).

54. Friedman, *supra* note 5, at 556–57 (describing Silicon Valley before its growth). In this insular setting, pursuit of idiosyncratic client demands might be viewed as especially disruptive, and clients may have an easier time seeing how their lawyer's promotion of local conventions ultimately serves client interests.

55. This is something more sophisticated corporate clients might not need or might obtain from other specialized advisers.

56. Cable, *supra* note 13, at 136 (discussing the lack of registered broker-dealer involvement in early-stage financings).

startup lawyers in certain communities undergoing difficult economic transformations, but for now I only want to summarize how current legal ethics scholarship views startup lawyering. In short, startup lawyering is a mixed bag: it raises the possibility of client exploitation, but it also serves as a counterpoint to criticism of the profession's instrumental trajectory. In any event, startup lawyering does seem to be a unique professional identity worthy of scholarly attention.⁵⁷

C. A Positive Effect on Entrepreneurship

No matter how distinctive law practice is in Silicon Valley, it is hard to imagine startup lawyers being so widely emulated and studied without their association with Silicon Valley's particular style of economic success. Silicon Valley lawyers have been known to take credit not only for individual client successes, but also for the success of an entire economic system.⁵⁸ Commentators bolster these claims by discussing the "public" and "societal" role that startup lawyers played in Silicon Valley's rise.⁵⁹

While it is possible to dismiss startup lawyers' claims of broad-based benefit as self-promotion, several different strains of economic theory support these claims. First, we can think of the standard contract terms that startup lawyers develop and disseminate as having attributes of a public good. As with any technology, methods of financing must be disclosed to others in order to be useful; after disclosure, others can freely use those methods. As a result, financing methods embodied in standard contract terms may produce the same type of positive spillover effects, or externalities, as other innovations.⁶⁰ Second, we can think of lawyers as an important item

57. Friedman, *supra* note 5, at 561 (discussing how Silicon Valley lawyers distinguish themselves from New York lawyers); Suchman, *supra* note 12, at 701 (quoting a Silicon Valley lawyer) ("When I deal with lawyers from other parts of the country, they don't think like a Silicon Valley lawyer would think.").

58. Langevoort, *supra* note 33, at 1587–88 ("These lawyers are fond of portraying themselves (aided and abetted by legal journalists) as a new breed of more enlightened transactors, as much business advisers as legal advisers. They happily tell of the role they have played in the Valley's creation story."). Langevoort believes that startup lawyers claim a role in "societal (not just personal) wealth creation" to rationalize ethically questionable practices such as accepting equity in lieu of fees. *Id.* at 1589–90.

59. *Id.*; Painter, *supra* note 32, at 332 (discussing the "public function" of Silicon Valley lawyers).

60. Cable, *supra* note 14, at 223–25 (analogizing startup finance to technological innovations).

of “infrastructure.” Infrastructure has been defined as a shared resource that is used as an input for a wide variety of public, societal, and private goods.⁶¹ Because infrastructure aids a wide variety of “downstream” uses—many of which produce their own positive spillover effects—it has elevated importance in the trajectory of an economy. In this vein, Silicon Valley lawyers contribute to standardized financing arrangements, labor arrangements, and other practices that in turn contribute to a variety of technologies and products that benefit society and local economies. Finally, an emerging literature on cluster development identifies service providers as an important lubricant for the agglomeration effects that increase productivity within clusters.⁶² Because lawyers interact with a wide variety of cluster participants—including competitors and clients in related fields—they are particularly well positioned to convey the information spillovers that seem to fuel agglomeration.⁶³

Again, any claim of startup lawyering exceptionalism can be taken too far.⁶⁴ The beneficial activities of startup lawyers are not entirely unique. As stated above, other lawyers promote standard contract terms and engage in law reform or improvement efforts, and these activities may generate positive externalities similar to those startup lawyers generate.⁶⁵

What seems to distinguish startup lawyers, however, is the heightened policy importance of the economic system they promote. Silicon Valley is the prototypical “knowledge-based” economy where firms compete primarily through developing innovative products rather than producing commodities more cheaply. In the U.S., the knowledge-based economy continues to take on increasing importance as global economic trends, such as declining transportation costs and improved communication technology, permit outsourcing of other economic activity to lower-cost regions.⁶⁶

61. BRETT M. FRISCHMANN, *INFASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* xiv (2012) (defining infrastructure and using the terms broadly).

62. *Supra* text accompanying note 14.

63. Cable, *supra* note 14, at 216–17 (discussing the role of information spillovers in creating agglomeration effects within clusters, and citing the work of Michael Porter of Harvard Business School).

64. One observer characterizes startup lawyering as just a “model of good business lawyering.” Langevoort, *supra* note 33, at 1590.

65. *Supra* notes 22–24.

66. Cable, *supra* note 14, at 213 (“[T]he overall shift to a knowledge-based economy in the United States is widely perceived and evidenced by significant increases since 1950 in research and development spending, patents, and the number of scientists and engineers.”)

Beyond economic impact, Silicon Valley startups have cultural significance in the U.S.⁶⁷ Silicon Valley entrepreneurs have been described as the “cowboys” of our day,⁶⁸ and film and television prominently feature them.⁶⁹ The image of the maverick entrepreneur striking out on his or her own may resonate with deeply held societal values such as upward mobility.

II. STARTUP LAWYERING AT THE OUTSKIRTS

Despite startup lawyering’s high profile, it was not always clear that the style of practice would extend much beyond Silicon Valley or survive the region’s maturation. Suchman and Cahill noted there was nothing inevitable about lawyers, rather than other professionals, playing the roles they do in Silicon Valley.⁷⁰ Another early examination questioned whether distinctive features of startup lawyering would survive as Silicon Valley firms grew in size and bureaucratic complexity.⁷¹

In fact, startup lawyering survived and spread. Today, startup lawyers appear not only in established entrepreneurial clusters where their positive effects are well chronicled, but also in “aspiring clusters”—communities trying to engineer a market for Silicon-Valley style entrepreneurship. In this part, I describe this new context and its effects on startup lawyering.

A. *Similar Functions*

Lawyers in aspiring clusters play many of the same roles as their Silicon Valley counterparts. They pursue legal reforms intended to

(citing RICHARD FLORIDA: THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE 44–47 (2002)).

67. Darian M. Ibrahim & Gordon Smith, *Entrepreneurs on Horseback: Reflections on the Organization of Law*, 50 ARIZ. L. REV. 71, 81 (2008) (describing the “mythological” importance of entrepreneurship).

68. See Joseph Bankman & Ronald J. Gilson, *Why Start-ups?*, 51 STAN. L. REV. 289, 290 (1999).

69. Examples of recent movies featuring Silicon Valley entrepreneurs are *The Social Network*, the story of Facebook’s founding, and *Jobs*, depicting the life of Apple’s Steve Jobs. A recent television show focusing on entrepreneurship is *Shark Tank*.

70. Suchman, *supra* note 12, at 711–12 (“As valuable as uncertainty management may be, law firms are hardly the only organizational actors capable of performing such services, and it would be extremely difficult to determine whether the prevailing arrangement is, in some abstract sense, the ‘best possible.’”).

71. Friedman, *supra* note 5, at 563–64.

encourage venture capital investing.⁷² They also support nonprofit organizations and trade associations that try to advocate for and educate entrepreneurs, much like the NVCA.⁷³ And of course, lawyers in aspiring entrepreneurial clusters are involved in the day-to-day work of providing services to entrepreneurs, where they can develop and communicate the standard contract terms and conventions that are so important to financing startups.⁷⁴

As a practicing lawyer in Portland, Oregon, I personally donated significant time to an organization named the Oregon Entrepreneurs Network (OEN), which provided educational and other support to aspiring entrepreneurs.⁷⁵ Through OEN, other local lawyers and I educated entrepreneurs about investor expectations such as standard venture capital and angel investment terms. For example, we made clear to entrepreneurs that venture and angel investors would require the entrepreneur to forfeit substantial control of the business. We also coached entrepreneurs to conform to non-legal conventions. For instance, we volunteered to review entrepreneurs' business plans. In this role, we advised entrepreneurs to demonstrate the "scalability" of the business (its potential for national or global expansion) and to articulate a credible "exit" opportunity (typically, sale of the company to an established firm). I conveyed similar legal and non-legal information in the context of client work and during initial consultations with prospective clients who never engaged my services. Similar to Suchman and Cahill's early description of Silicon Valley lawyers, Portland lawyers have helped define and communicate the range of reasonable behavior in the local entrepreneurial community.⁷⁶

In some respects, it is not surprising that lawyers in aspiring clusters act like their Silicon Valley counterparts. The two contexts are in many ways similar. Entrepreneurs in aspiring clusters often lack business experience and access to other professional advisors,

72. In Japan, for example, lawyers helped enact corporate law reforms designed to accommodate the Silicon Valley model of investing. Shishido, *supra* note 1.

73. Volunteer efforts that I observed in practice are described below. Another example is the Venture Law Forum in Tokyo, Japan. Shishido, *supra* note 1.

74. *Supra* text accompanying notes 17–32 (discussing standard contract terms).

75. OR. ENTREPRENEURS NETWORK, *supra* note 3 ("As the largest entrepreneur assistance organization in the state of Oregon, OEN fosters the flow of entrepreneurial ideas, services, and capital to entrepreneurs and helps connect emerging Northwest businesses to growth-stimulating expertise and valuable resources.").

76. Suchman, *supra* note 12, at 699–701.

creating an opportunity for lawyers to serve as a source of wide-ranging business advice. Lawyers in aspiring clusters may also have repeat dealings with financing sources—such as local angel investors or angel investor groups—giving lawyers additional influence with clients and credibility as reputational brokers. In fact, one could imagine lawyers in aspiring clusters having greater influence over clients. In an aspiring cluster, funding sources are scarcer than in Silicon Valley (enhancing the lawyer’s gatekeeping function) and entrepreneurs are rawer (more in need of coaching) due to lack of peers and mentors. In some respects, practicing in an aspiring cluster may be like practicing in Silicon Valley at its inception when lawyers first played their uniquely formative role.

B. New Context

In other ways, an aspiring cluster is a uniquely challenging context. Specifically, startup lawyers now practice in the midst of economic development efforts to promote entrepreneurship by emulating Silicon Valley—what I will call “cluster-building efforts.”

To understand this new context, it is first helpful to define “economic development.” The term typically denotes an effort with some level of government support, planning, or coordination to encourage local or regional economic growth. Economic development efforts typically have a distributive component—their success is measured in jobs or some other relatively dispersed economic benefit.⁷⁷ While public officials usually have some role in these efforts, they are undertaken by a web of traditional government entities, special purpose districts, private parties, and nonprofit organizations that I will refer to collectively as “economic development actors.”⁷⁸

In economic development circles, efforts to copy Silicon Valley have become a mainstay.⁷⁹ These efforts are often found in struggling local economies focused on traditional manufacturing and natural resource extraction, such as the U.S. Rust Belt. As discussed

77. PETER K. EISINGER, *THE RISE OF THE ENTREPRENEURIAL STATE: STATE AND LOCAL ECONOMIC DEVELOPMENT POLICY IN THE UNITED STATES* 3–4 (1988).

78. *RETOOLING FOR GROWTH: BUILDING A 21ST CENTURY ECONOMY IN AMERICA’S OLDER INDUSTRIAL AREAS* 14–23 (Richard M. McGahey & Jennifer S. Vey eds., 2008) [hereinafter *RETOOLING FOR GROWTH*].

79. Cable, *supra* note 14, at 218 (“In one recent survey, for example, over half of responding economic development organizations had studied or engaged in cluster development.”) (citing *RETOOLING FOR GROWTH*, *supra* note 78).

above, powerful agglomeration economies of established entrepreneurial clusters increasingly draw talent and resources as the knowledge-based economy takes on greater importance relative to traditional industries.⁸⁰ There are distinct winners and losers in this economic transformation. As human capital and tax base concentrate in entrepreneurial hot spots like Silicon Valley, they disappear elsewhere.⁸¹ In other words, the same dynamics that are responsible for Silicon Valley's meteoric rise are potentially detrimental to other economic regions.

Against this backdrop, the appeal of transplanting Silicon Valley practices to other locations is obvious. But economic development actors, and lawyers in particular, face major challenges in these efforts.

1. The Economic Development Challenge

From an economic development standpoint, efforts to replicate Silicon Valley face what Stanford Law School's Ronald Gilson deemed a "simultaneity problem." Each component of the Silicon Valley model is dependent on the other components. It is hard to imagine venture capital funds aggregating in a place without significant entrepreneurial talent. But developing entrepreneurial talent requires access to capital. Similarly, high-tech employees are unlikely to locate (or stay) in a place without a track record of successful startups. But building a successful startup requires a steady supply of high-tech workers.⁸²

There is no clear picture of how Silicon Valley overcame this simultaneity problem. Most accounts of Silicon Valley's emergence cite many helpful factors—good weather and features of California law have helped. Top academic institutions (Stanford and University of California, Berkeley) seemed to play an especially important role. But many of these helpful features are also present in less successful

80. *Supra* text accompany note 66 (describing knowledge-based economies).

81. Cable, *supra* note 14, at 213 ("Statistical evidence supports the well-established perception of Rust Belt decline. A high percentage of employment in manufacturing is correlated with poor economic performance (measured by employment, earnings, and gross metropolitan product) in the 1990s In contrast, high-tech hubs like Silicon Valley enjoy healthy economic growth.") (citing *RETOOLING FOR GROWTH*, *supra* note 78, at 35–36 and *FLORIDA*, *supra* note 66, at 219).

82. Ronald Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 *STAN. L. REV.* 1067, 1093–99 (2002–03) (discussing state-sponsored venture capital programs in Europe, Israel, and South America).

regions. Some accounts leave the impression that the right charismatic and talented people simply collaborated at the right time.⁸³

Despite the unpredictable origins of clusters, economic development actors have taken aggressive action to engineer them.⁸⁴ In many cases, these efforts involve direct or indirect subsidies intended to jumpstart one or more elements of the Silicon Valley model. State and local governments directly or indirectly fund technologies they think are promising, like software or bio-tech.⁸⁵ They establish programs to train workers for particular industries. Or they subsidize particular forms of financing, like angel or venture capital investment. For example, I have previously written about vehicles called “venture development funds” that use public funds to invest in local startups.⁸⁶

These cluster-building efforts are not immune to typical objections to subsidies and centralized planning. In a world of scarce resources, these efforts understandably tend to focus on a small number of promising industries or technologies.⁸⁷ But both economists in general and experts on cluster formation disfavor industry-specific subsidies. Targeting specific industries or technologies requires participants in cluster-building efforts to be prophetic about the direction of markets and the local economy. Misdirected subsidies and planning efforts are at best a wasted effort. Worse, they actually impede the development of market-based activities by crowding out another industry that would have been more productive.⁸⁸

Cluster-building efforts have a mixed track record. Some locations engaged in cluster-building efforts have enjoyed economic

83. Cable, *supra* note 14, at note 145 (citing a 2008 Kauffman Foundation report asserting that Silicon Valley’s emergence was largely “accidental”); Friedman, *supra* note 5, at 560 (characterizing the emergence of Silicon Valley law firms as “idiosyncratic”). For an overview of efforts to promote entrepreneurship, see Darian Ibrahim, *Financing The Next Silicon Valley*, 87 WASH. U. L. REV. 717 (2010).

84. Cable, *supra* note 14, at 202–05 (discussing collaborations among private parties, economic development agencies, and nonprofit organizations to fund entrepreneurship).

85. *Id.* at 223 n.163 (discussing efforts to nurture a software cluster in Portland and a bio-tech cluster in Pittsburgh).

86. *Id.* at 202–03 nn.28–31 (describing the structure and funding sources of venture development funds).

87. *Id.* at 223 n.163 (discussing cluster-building efforts targeted at specific industries).

88. Cable, *supra* note 14, at 209–10 (summarizing conventional arguments against subsidies to specific industries).

success,⁸⁹ and early subsidies of venture capital in the U.S. have been given some credit for catalyzing Silicon Valley's private venture capital market.⁹⁰ But it remains difficult to determine the effectiveness of cluster-building efforts, and there have been many failed attempts at emulating Silicon Valley. Economist Josh Lerner dedicated an entire book to these failures, depressingly entitled *Boulevard of Broken Dreams*.

2. Lawyer-Specific Challenges

In addition to this economic-development challenge, lawyers may face significant difficulties when importing the business model of Silicon Valley firms. Because a startup company does not have significant cash at the time representation starts, lawyers are basically investors in these risky companies. They invest by deferring initial fees with the understanding that the fees will be forgiven if the company never gets funded, or by taking an equity interest in their client in lieu of cash fees. Although most startup companies fail, the hope is that a few will succeed and become major clients.⁹¹ While Silicon Valley lawyers have reaped substantial profits from this model,⁹² it depends on a high volume of quality entrepreneurs that may be lacking in an aspiring cluster. With fewer viable clients, risk may be concentrated in too few entrepreneurs.

Additionally, lawyers in aspiring clusters have to worry about entrepreneur mobility. Companies that stay in an aspiring cluster will be at a disadvantage to their Silicon Valley counterparts and therefore less likely to succeed. Companies that achieve some early success might therefore relocate to Silicon Valley or similar locations, with the local firm having taken on the risk at the early stages without the reward of the later work.

89. JOSH LERNER, *BOULEVARD OF BROKEN DREAMS: WHY PUBLIC EFFORTS TO BOOST ENTREPRENEURSHIP HAVE FAILED—AND WHAT TO DO ABOUT IT* (2009). Lerner cites Israel as a rare example of a successful cluster-building program. *Id.* at 155–57. Austin, Texas, has also enjoyed success as a technology cluster following economic development efforts to recruit technology firms. Cable, *supra* note 14, at 220. *See also* DAVID HALPERN, *SOCIAL CAPITAL* 55, 305 (2005) (discussing apparently successful subsidy programs).

90. *Infra* note 96 (discussing justifications for finance subsidies).

91. Suchman, *supra* note 12, at 691–94 (discussing fee structures).

92. Punam Puri, *Taking Stock of Taking Stock*, 87 *CORNELL L. REV.* 99, 101–02 (2001) (discussing Wilson Sonsini's substantial stock portfolio, including an interest in WebVan with a \$50 million post-IPO valuation).

C. *What Makes Them Tick?*

In my view, the challenges described above are substantial enough to raise a question: what explains the persistence of startup lawyers in aspiring clusters? This question is instructive because the answer may shed light on whether lawyers and legal educators ought to continue dedicating resources towards extending this style of practice. Accordingly, I consider three plausible explanations below: rent-seeking behavior, productive long-term business development, and a public-service impulse.

1. Rent-Seeking?

At some level, well-chronicled competition in the market for legal services explains the activities of startup lawyers. In addition to trends affecting all lawyers—increasing numbers of lawyers and growing sophistication of in-house legal departments⁹³—those practicing in aspiring clusters may face an eroding corporate base or other regional economic difficulties that require aggressive client development.

An economic actor can respond to competition in ways that increase productivity and aggregate societal wealth, or they can respond in ways that are unproductive, wasteful, and harmful to the economy. For the most part, commentators take a dim view of increasing economic competition among lawyers. According to many legal scholars, lawyers are more likely to bend to inappropriate client demands or act opportunistically towards clients when they face economic pressure.⁹⁴ Similarly, commentators from outside the legal profession charge that competition spurs lawyers to retard economic growth by engaging in what economists call “rent-seeking behavior” on behalf of clients or themselves. Rent-seeking occurs when an economic actor turns his or her efforts away from increasing productivity and instead tries to limit competition or secure redistributive payments. Frequently cited examples of rent-seeking by lawyers include pushing through legal reforms intended to encourage litigation, unflinchingly assisting clients with frivolous litigation intended to harm competitors, or otherwise stirring up unproductive conflict.⁹⁵

93. *See supra* note 40 (discussing increasing numbers of lawyers and effects of in-house legal departments).

94. *Supra* text accompanying notes 38–41.

95. *See generally* Frank B. Cross, *The First Thing We Do, Let's Kill All The*

The commitment of public resources to cluster-building efforts raises the possibility of rent-seeking. As discussed above, the economic development initiatives in which startup lawyers often participate may involve direct or indirect subsidies. On the one hand, there is a theoretical justification for some subsidies. If financing methods and standard contractual terms are indeed a technology or infrastructure that provides broad benefits, then they have characteristics of a public good and there is a basis in economic theory to subsidize them.⁹⁶ On the other hand, there are examples of cluster-building subsidies that have outlived their usefulness (or that were never well conceived) because subsidy recipients and other beneficiaries focused on preserving and enlarging their subsidies, rather than increasing productivity.⁹⁷

The possibility of rent-seeking is not limited to subsidy programs. A lawyer may advocate for a regulatory reform that benefits a potential client's technologies or methods of finance but produces a harmful effect on society. For example, some have argued that relaxation of private offering regulations that were intended to benefit entrepreneurs ultimately harm investors.⁹⁸

2. Productive Business Development?

In some circumstances, economic pressure may align private and community interests. Startup lawyers in aspiring clusters may understand that their fate rests with the economic success of their region, so it is in their self-interest to help build an entrepreneurial environment. Commentators have explained the activities of Silicon Valley lawyers in these terms.⁹⁹

Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System, 70 TEX. L. REV. 645, 653 (1992) (discussing and rejecting these claims); Nelson P. Miller, *Lawyers and Economic Drivers—The Business Case for Legal Services*, 27 J. LEGAL PROF. 67 (2012) (summarizing Cross' work and the related literature on the economic impact of lawyers).

96. In short, markets will undersupply these public goods because no single lawyer, entrepreneur, or investor reaps the full benefits of developing and popularizing the methods and contract terms. Cable, *supra* note 14, at 223–25. Some commentators assert that early subsidies of the venture capital industry were justified on this basis. LERNER, *supra* note 89, at 66–69 (discussing how pioneering market participants generate a “virtuous cycle” of entrepreneurship).

97. LERNER, *supra* note 89, at 80–85.

98. *E.g.*, William K. Sjoström, *Rebalancing Private Placement Regulation*, 36 SEATTLE U. L. REV. 1143 (2013).

99. Painter, *supra* note 32, at 338 (“Some Lawyers, like those in the Silicon Valley, understand the importance of an underlying social fabric to their own livelihood.”).

Taking this positive view, the involvement of startup lawyers in organizations is ultimately productive. Theories of how clusters develop emphasize the positive role that “supporting institutions” play. Clusters have been described as a result of simultaneous competition and cooperation between local market participants. Trade associations, educational institutions, nonprofits, and similar groups are considered an important vehicle for the necessary cooperation (such as standards setting, research, and policy advocacy) and a vehicle for information spillovers. For example, the California wine region is considered a classic business cluster, and a leading trade organization (the Wine Institute) is believed to play a major role.¹⁰⁰ On this basis, there is a compelling case for the startup lawyer to become active in local supporting institutions, and it is hard to see why a lawyer should forgo these productive activities simply because of the existence of a subsidy.

3. Public Service?

While I do not doubt that economic incentive explains a great deal of what startup lawyers do, it is also worthwhile to explore noneconomic motivations. In my own case, I began volunteering at OEN as a marketing activity. Over time, my involvement expanded to exceed any plausible economic benefit, but I still drew intrinsic satisfaction from the experience because I internalized the organization’s public-regarding mission. In other words, startup lawyering presents an opportunity for public service. Specifically, participation in economic development efforts may be considered a form of civic engagement—defined as a collective effort to solve community-wide problems.¹⁰¹ By supporting entrepreneurship through client work and participation in economic development organizations, startup lawyers help their communities with the difficult economic transformations described above.¹⁰²

Beyond general societal benefits associated with civic

100. Michael E. Porter, *Location, Competition, and Economic Development: Local Clusters in a Global Economy*, 14 *ECON. DEV. Q.* 15, 21–25 (2000); Michael E. Porter, *Clusters and the New Economics of Competition*, 76 *HARV. BUS. REV.* 77, 77–78 (Nov.–Dec. 1998). See also HALPREN, *supra* note 89, at 54–56 (discussing the importance of “between firm social capital” in building clusters).

101. *Supra* note 11 (defining the terms public service and civic engagement).

102. *Supra* text accompanying notes 79–81 (describing effects of economic transformation).

engagement,¹⁰³ recognizing a public-service component in startup lawyering could also benefit the legal profession. The perceived failure of lawyers to satisfy their special obligations to the public is more than a public relations problem.¹⁰⁴ I believe this perceived failure also raises concerns about satisfaction within the profession.

I sense most students pursue a legal career with knowledge of the profession's loftier ideals. They expect to find meaningful work as lawyers, or to at least attain stature in their communities through their professional role. For many students, that means doing more with their hard-earned professional knowledge than working out the technicalities of preformed corporate objectives. But in many practice settings, lawyers may feel largely confined to that function.¹⁰⁵

For some lawyers, a traditional pro bono practice involving representation of low-income individuals is an effective outlet for public-service ideals, but business lawyers may struggle to find meaningful pro bono work. While there are pro bono programs focused on assisting small-businesses owned by low-income individuals, the nature of the work may not leverage core skills of business lawyers, who spend the bulk of their time negotiating and documenting business transactions and providing prospective advice regarding legal compliance with certain regulatory regimes.¹⁰⁶ Many

103. Civic engagement is associated with high levels of social capital—social networks, norms, and trust that enable pursuit of shared objectives. HALPERN, *supra* note 89, at 1 (citing ROBERT D. PUTNAM, *BOWLING ALONE: AMERICA'S DECLINING SOCIAL CAPITAL* (1995)). High levels of civic engagement are thought to both indicate, and contribute to, social capital. *Id.* at 258–59. Social capital is correlated with a number of desirable regional and national outcomes, including good health, effective government, and (most relevant to startup lawyers) economic productivity measured by gross domestic product. *Id.* at 55–65, 109–12, 192–95. On this basis, policy makers have undertaken a wide variety of measure to promote civic engagement. *E.g., id.* at 300–02; KEETER ET AL., *supra* note 11.

104. *Supra* text accompanying notes 38–42 (discussing negative views of the legal profession).

105. KRONMAN, *supra* note 40 (discussing instrumental lawyering in terms of professional satisfaction); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 60 (1988) (“No wonder lawyers exposed to such regimes are leaving them for investment banking and other businesses. Young professionals in the business world have real decisionmaking responsibility, quite different from the detailed technical tasks involved in executing the decisions of others.”).

106. The classic account of the role of business lawyers focuses on how they reduce transaction costs through crafting contractual provisions and designing due diligence processes. See generally Ronald Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984). Other accounts focus instead on advice regarding regulatory and other legal compliance. Dent, *supra* note 4, at 279 (summarizing Gilson's view

individual and small business transactions are routinized to the point of eliminating opportunities for lawyers to contribute.¹⁰⁷ Similarly, small businesses and low-income individuals typically interact with a different regulatory and institutional environment than most large corporate clients.¹⁰⁸

Recognizing something redeeming in the day-to-day work of startup lawyers, therefore, could be an important development for the legal profession. It is an example of how lawyers can weave civic engagement into their core work, rather than relegating public service to an ancillary practice. And since the functions of startup lawyers are not entirely unique,¹⁰⁹ recognizing the public-service element of startup lawyering could bring attention to the societal benefits that other types of lawyers generate.

Admittedly, characterizing the work of startup lawyers as a public service is somewhat out of step with the tone of much legal ethics scholarship. For the most part, scholars have not ascribed significant ethical import to the economic impact of lawyers in private practice.¹¹⁰ To the extent the current literature links ethics and economic impact, the analysis usually runs the other way with commentators occasionally suggesting that lawyers have diminished ethical standing when they assist in economically harmful (even if legal) client conduct.¹¹¹ When legal ethics scholars speak of the private bar's public-service obligation, the focus is predominantly on the question of access to justice.¹¹²

of business lawyers as transaction-cost engineers, Steven Schwarcz's view that business lawyers primarily lower regulatory compliance costs, and Dent's own view that business lawyers play myriad roles as "enterprise architects").

107. Real estate transactions, for example, have been standardized so that lawyers are generally not even necessary, and licenses for off-the-shelf software come on a take-it-or-leave-it basis.

108. Many business lawyers, for example, have little experience with economic development or social services agencies that may be vitally important to low-income clients.

109. *Supra* text accompanying notes 22–25.

110. Nelson P. Miller is one scholar who implies a connection between positive economic impact and lawyers' public-service obligations. He has recently argued that lawyers should embrace the role of promoting economic growth in order to not only combat negative public perception but also to help lawyers find meaning in their work. *See generally* Miller, *supra* note 95.

111. Cochran et al., *supra* note 35, at 607; Painter, *supra* note 32, at 337–38; Steven L. Schwarcz, *The Role of Lawyers in the Global Financial Crisis*, 24 AUSTRALIAN J. CORP. L. 214, 220–26 (2010) (discussing the role of lawyers in the financial crisis).

112. *E.g.*, Rhode, *Rethinking The Public*, *supra* note 38; *see also* MODEL RULES OF PROF'L CONDUCT R. 6.1 (2013) (prioritizing representation of low-income individuals over other forms of public service).

But this cramped notion of the public interest is at odds with many accounts of historical tradition, in which lawyers in private practice were valued for serving as trusted advisors in the many aspects of life, politics, and business legal representation implicates. Kronman, for example, describes the lawyer-statesman as first and foremost a “person who deliberates well over personal or political affairs.”¹¹³ Wilkins’ account of the so-called Golden Age describes lawyers as advising broadly on matters lying at the “intersection of law and business.”¹¹⁴ Other accounts of this period laud lawyers in private practice for their substantial commitment to a broad range of civic engagements.¹¹⁵

The notion of public service advanced in this essay is also more accepting of mixed motives than some legal ethics scholarship. In Silicon Valley, at least, startup lawyering has been lucrative. Law firms initially established in Silicon Valley are among the most profitable in the world, and top firms from across the country have opened shop in Silicon Valley.¹¹⁶ To some, the ability of Silicon Valley lawyers to capture a large share of economic benefits they create—“appropriability” in economic terms—likely undermines the public-service component of startup lawyering. Deborah Rhode, for example, has questioned the ethical import of law firm pro bono practices on the grounds that firms maintain and support them for largely self-interested reasons.¹¹⁷

But as Rhode acknowledges, there is no unanimity on whether a

113. KRONMAN, *supra* note 40, at 40–43.

114. Wilkins, *supra* note 40, at 2077.

115. Painter, *supra* note 32, at 332 (comparing Silicon Valley lawyers to New York City lawyers in 1900, and citing the work of Robert Gordon). *See also* Gordon, *supra* note 105, at 2–3, 15–17, 40, 59–60 (discussing Republican and Progressive ideals of the profession that once encouraged lawyers to engage in broad-ranging public service at higher levels than the current bar).

116. The Am Law 100 includes firms headquartered in Silicon Valley, including Wilson Sonsini Goodrich & Rosati PC and Cooley LLP. *Gross Revenue: A New Number One*, THE AM. LAWYER, <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202596371400> (last visited Aug. 18, 2013). In addition, many of the firms listed in the Am Law 100 have Silicon Valley offices. *E.g.*, Michael D. Goldhaber, *The Am Law 100, the Early Numbers: For Sidley, Silicon Valley Office Helps Boost Revenue, Profits*, THE AM LAW DAILY (Feb. 6, 2012), <http://amlawdaily.typepad.com/amlawdaily/2012/02/the-am-law-100-the-early-numbers-sidley.html>.

117. Rhode, *Rethinking the Public*, *supra* note 38, at 1436 (citing literature on altruism from psychologists, economists, and philosophers) (“As a matter of principle, an action taken because benefiting others feels intrinsically rewarding stands on different ethical footing than an action taken because it will bring extrinsic rewards”). *Id.*

good deed loses its ethical standing because of a simultaneous personal benefit.¹¹⁸ For instance, “hybrid” nonprofit and for-profit entities are a growing and generally well-received feature of the organizational landscape. One insight of the social enterprise movement is that close integration of profit-oriented and public-regarding activities may strengthen public-service commitments by making them less expendable.¹¹⁹ Similarly, a startup lawyer’s goal of broadly encouraging entrepreneurship might be particularly resilient because it is intertwined with his or her livelihood.¹²⁰

Without claiming to resolve the deeper philosophical question, I acknowledge that at some level of private benefit this essay’s public-service characterization is weakened, whether as a matter of principle or optics. In this vein, it is worth reiterating the substantial business challenges that startup lawyers face in aspiring clusters.¹²¹

III. WHERE DOES THAT LEAVE US?

I have presented competing views of startup lawyering in aspiring clusters. The favorable view is that promotion of entrepreneurship is a healthy response to competition in the market for legal services, and may even include an element of public service. The negative view is that startup lawyers risk engaging in rent-seeking behavior on behalf of clients or themselves by trying to influence allocation of public resources.

So which is it? I think it is extremely difficult to make generalizations. One problem is that an assessment of startup lawyering rests partially on unsettled questions about cluster-building efforts. Do they work? Are they an inappropriate allocation of public resources to a highly educated elite?¹²² Are they a welcome

118. *Id.*

119. See generally Julie Battilana et al., *In Search of the Hybrid Ideal*, STAN. SOC. INNOVATION REV. (Summer 2012), available at http://www.ssireview.org/articles/entry/in_search_of_the_hybrid_ideal.

120. One advantage of aligning public service and the lawyer’s financial interests is that it avoids the problem of a “schizoid” professional identity. A schizoid professional identity encourages lawyers to advance client interests at the expense of the public interest in regular client work (by taking advantage of legal loopholes, for example) only to turn around and undo the damage through public service (by closing the loophole). Gordon, *supra* note 105, at 22–23.

121. *Supra* text accompanying notes 91–92.

122. Some commentators criticize economic development efforts focused on technology clusters because of gentrification and distributional concerns. In short, these efforts are viewed as primarily beneficial to a highly educated elite. At least one proponent of cluster-

alternative to “smokestack chasing” or “buffalo hunting” subsidies of established firms in traditional industries? Centralized planning and industrial policy dressed up in new terminology?

Without resolving these broader questions, I can relate my personal experiences. I found the following circumstances encouraging:

- Small subsidies—The amount of any public subsidies to Portland’s cluster-building efforts have been relatively modest.¹²³ Large and persistent subsidies would seem to present greater danger of rent-seeking activity.
- Industry neutrality—The organizations I assisted lacked a specific industry focus. OEN helped companies in the semi-conductor, pet food, apparel, social media, and other industries. This neutrality potentially mitigated concerns about wasted efforts or crowding out due to backing the wrong industry.
- Civic-minded colleagues—I sensed that OEN volunteers were aligned with the organization’s mission as a public charity.¹²⁴ In fact, I observed a strong norm against service providers explicitly marketing their services in the course of representing the organization.
- Success stories—It can be a dangerous thing to draw too much encouragement from apparent successes. One noted danger of cluster-building efforts is the difficulty of gauging whether successes are because of, or in spite of,

based initiatives, however, has tried to extend these efforts to low-income urban neighborhoods. *RETOOLING FOR GROWTH*, *supra* note 78, at 9–10.

123. The Oregon state lottery has provided matching funds of up to \$1.5 million a year to an angel investor group, and the lottery and city governments have provided subsidies of between \$1.5 and \$1.25 million a year to the Portland Seed Fund. *About OAF*, OR. ANGEL FUND, <http://www.oregonangelfund.com/> (last visited Dec. 19, 2013); Mike Rogoway, *Portland Seed Fund Readies Second Act*, OR. LIVE BLOG (June 25, 2013), http://www.oregonlive.com/silicon-forest/index.ssf/2013/06/portland_seed_fund_readies_sec.html?utm_source=buffer&utm_campaign=Buffer&utm_content=bufferfelc6&utm_medium=twitter.

124. OEN describes its mission as follows: “OEN is a thriving, multi-faceted community that contains members from every walk of life, pursuing every aspect of entrepreneurship to better our state and region. OEN is the heart of our entrepreneurial community, fostering innovation, growth, success, and giving back.”

economic development policies.¹²⁵ With that caution, I find some encouragement in the traction Portland has gained as a center for entrepreneurship. In recent years, the city has enjoyed a number of small successes, though large-scale successes remain elusive.¹²⁶

Even in circumstances meeting the criteria above, I suspect that some lawyers will be predisposed to startup lawyering—and associated economic development efforts—while others will be more skeptical. Such predisposition may turn on deeply held views regarding risks of centralized planning, towards one end of the ideological spectrum, and distributive concerns, towards the other end. In other words, startup lawyering is akin to “cause lawyering.” The fact that some lawyers embrace the role¹²⁷ does not mean it will be any more widely motivating of lawyers, and redeeming in the eyes of the public, than protecting consumers, safeguarding the environment, opposing the death penalty, or other causes pursued by some segment of the bar due to what we might deem personal rather than professional values.

But there still may be a broader lesson for the legal profession. This account of startup lawyering suggests that a diverse profession makes diverse contributions to the public interest, insofar as that nebulous concept can be defined. Legal ethics scholarship and bar rules rightly recognize the importance of access to justice.¹²⁸ But some lawyers may find that the best opportunities to serve come through professional activities that are currently demoted in importance under prevailing pro bono definitions and that receive relatively little attention in legal ethics scholarship, such as involvement in bar associations and other lawyer groups, nonprofit

125. LERNER, *supra* note 89, at 142–52 (discussing difficulties in program evaluation).

126. Mike Rogoway, *Oregon's Startup Community by the Numbers; Tiny, But Strong*, OR. LIVE BLOG (July 7, 2012), http://www.oregonlive.com/silicon-forest/index.ssf/2012/07/oregons_startup_community_by_t.html.

127. Elaine McArdle, *Beyond a Reasonable Doubt*, BOSTON MAGAZINE (Oct. 2002), available at <http://www.bostonmagazine.com/2006/05/beyond-a-reasonable-doubt/> (profiling startup lawyers); Evelyn M. Rusli, *Law Firms Mine San Francisco for Internet Start-Up Gold*, DEALBOOK (Oct. 1, 2012), available at <http://dealbook.nytimes.com/2012/10/01/wilson-sonsini-retools-strategy-to-land-internet-start-ups/> (describing prominent Silicon Valley startup lawyers and their wide-ranging activities in the entrepreneurial community).

128. *Supra* text accompanying note 112 (describing current focus of legal ethics rules and scholarship).

board service, and drafting of model legislation.¹²⁹ Through these activities, lawyers build social capital by linking economic competitors, related industries, government, and other community stakeholders. These linkages generate societal benefits by improving a region's ability to adapt to ever changing economic and political conditions.¹³⁰ Startup lawyers may be particularly salient producers of social capital due to their unusual influence over clients and association with Silicon Valley's outsized success. But we should be careful not to overlook how a wide range of professional activities undertaken by a wide range of lawyers have similar effect.

CONCLUSION

This essay considers the newest phase of a distinctive style of practice. In my view, the spread of startup lawyering is a positive story for the legal profession. In its native environment, startup lawyers appear to have used their unusual degree of influence over client objectives to promote a system of entrepreneurship that has produced extraordinary results for not only clients but also the Silicon Valley and national economy. But at the end of the day, we still do not know precisely how Silicon Valley came to be and we are far from understanding how it can be recreated. This makes startup lawyering in aspiring clusters a potentially Quixotic endeavor with many opportunities for public service but also accompanying pitfalls.

For lawyers and law students considering this type of work, the lesson is to have a healthy awareness of the fine line between productive cooperation and unproductive rent-seeking. The broader lesson is that public-service contributions can be as varied as the legal profession itself.

129. *Supra* text accompanying notes 22–24 and 65.

130. *Supra* notes 89 and 103 (defining social capital and describing its beneficial effects).