More Markets, More Justice

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Abstract: People lack access to justice because the law is complex and expensive to use. Basic mechanisms of market competition can reduce both the complexity and the cost of law while securing law's principal function in society, which is to coordinate a community around a shared understanding of what is and what is not allowed. Creating markets for rules will make for better law and better legal systems by allowing people and organizations to select the rules and dispute-resolution processes that are best for them in a market in which providers of regulation compete on terms of cost and quality. Legal rules require special protection to make sure they deliver a more just, equitable world for all; this protection can be provided through a "superregulator," which licenses providers of law and legal services to sell their services in competitive markets.

e *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* , *Stanford Law Review* *Journal of Law, Economics, and Organization*, , *Annual Review of Political Science*-

In 1852, when the miners of Jackass Gulch needed a set of rules to manage the inevitable disputes that arose after hordes of hopefuls rushed in to stake a claim for California gold, they came up with six simple rules about how to stake and hold a claim. Everybody who wanted to pan for gold could understand them. Resolving disputes was quick and clear.

In the time of the California gold rush, the rules of mining mattered to ordinary people. Simple rules made the law accessible and useful. Today, the law of mining is the preoccupation, mostly, of commercial mining companies. Contemporary mining law is awash with statutes, regulations, and procedures, all adjudicated in case law accumulated over more than a century. It is no longer just about who gets the claim. There are rules about mine safety, environmental management, the interests of states and Native Americans, and more. Understanding the law of mining requires sophistication about a topic that fills volumes in a law library.

Today, most law has undergone the same transformation as mining law: law is complex for every-

doi:10.1162/DAED_a_00533

one, big or small, whether people are seeking divorce, protection against eviction, or unfair treatment at work. It is complex for a small business trying to comply with regulations, manage employment relationships, and avoid legal liability. It is complex for anyone concerned about privacy or the security of their data online. Up to a point, more complex law helps address more situations and concerns. Yet when law becomes too complex, it stops performing its key function: to coordinate a community around a shared understanding of what is and what is not allowed.

As the law becomes more complex, a new and significant inequality emerges between those who can navigate legal rules and procedures and those who cannot. People who write the complex terms of service, consumer contracts, employment agreements, organizational policies, and administrative rules that govern daily life have a much clearer understanding of those rules than those who must "click to agree" to them. People and organizations that can retain expensive lawyers for help in navigating and sculpting complex legal terrain have an advantage over those who must muddle through alone, barely comprehending the landscape.

Calling for simpler rules is easy and tempting: Simplify the tax code! Use plain language! Cut the red tape! But these calls rarely succeed. They do not address the basic pressures creating greater complexity. To generate stable, simpler legal systems, we need to do what works to manage complexity in other segments of modern life: harness the incentives of markets. Competitive markets prompt the designers of smartphones and laptops, for example, to make them able to do more, without becoming harder to use. Creating markets for rules can similarly prompt private legal designers to develop better laws and better systems for the users of law. Markets for legal rules make sense only if they can deliver a more just, equitable world for all, and if they can be made truly competitive. In many cases, this can and should be done.

At bottom, the law is a set of rules for structuring relationships among people, organizations, businesses, and governments. It helps resolve disputes among those actors and makes it easier for people and organizations to plan by making behaviors easier to predict. Accessing the law means having the capacity to prod others – employers, government agencies, neighbors, businesses, prosecutors, police, school officials, landlords – into following the rules. Securing that capacity takes knowledge: understanding the rules and how to take steps needed to activate and shape the behavior of officials charged with enforcing the rules.

The more complex rules and processes are, the costlier it is to secure the capacity to ensure that the relationships are structured by the rules. More complex rules and processes require more steps and inputs; more steps equal more time and money to achieve an objective. More complex systems present more oppor-

because it would make rules unresponsive to the subtleties, ambiguities, and varieties of life. For example, landlords could never/always evict someone, fathers would always/never get custody of children, and businesses would always/never be responsible for injuries suffered by users of their products. Since the kinds of laws people want to live with require some complexity, they also entail costly specialized help, consuming resources in the training and compensation of people who develop the expertise needed to manage the complex rules and systems.

A key reason that access to justice is out of reach for many people is that contemporary legal systems are highly complex.[2] Many lay people find complex and difficult to understand the procedures needed to do what lawyers see as routine: for example, when they seek to expunge a criminal record, respond to an eviction notice, or challenge a child support order.

Much of the law that governs everyday actions like buying and selling is contained in contracts and other documents produced by private providers of goods and services. Most legal documents are written in legalese that most Americans, who read on average at an eighth-grade level, cannot really understand. The terms of service that shoppers "click to agree to" average two thousand words. Online user license agreements are routinely written at college reading levels.[3] Health plan guidelines are written at advanced college levels.[4] One study estimated that it would take someone approximately 250 hours a year, or forty minutes a day, every day, to read all the privacy policies he or she encountered online – and the vast majority would still not understand what they had read.[5]

The procedures to interact with large organizations – employers, schools, city officials, courts, administrative agencies – can be bewildering to ordinary people. A 2015 study found that one of the most common provisions in the contracts between such organizations and their consumers and employees – an arbitration clause – might as well be written in a foreign language: only 9 percent of people presented with a standard credit card contract containing an arbitration clause could answer these two questions correctly: Did the contract you read contain an arbitration clause? (Yes.) If you sign this agreement and the credit card company overcharges you, can you take that dispute to court? (No.)[6]

Procedures can be complex even when rules are not. When the Department of Justice investigated municipal court practices in the City of Ferguson, Missouri, after the Michael Brown shooting in 2014, investigators uncovered a system not only rife with racial bias and constitutional violations, but also one in which "it is often difficult for an individual who receives a municipal citation or summons . . . to know how much is owed, where and how to pay the ticket, what the options for payment are, what rights the individual has, and what the consequences are for various actions or oversights."[7]

Producing simplicity is not simple. Legal reasoning tends toward complexity: litigants press alternative interpretations of language to achieve the outcomes they seek, judges attempt to reconcile general language with the infinite variety of concrete circumstances they must judge, and multiple sources of law arise over time and require reconciling to maintain coherence and minimize conflicts.[8]

This complexity is created in a closed system that gives providers of law very little feedback on how well they are doing in fulfilling the needs of those who use the system. Legal systems are controlled and staffed almost entirely by lawyers, who all receive similar education, take the same tests to achieve entrance to the

This market for rules would be governed through *superregulation*. Government would license private regulators to compete in a competitive market. Instead of directly regulating the businesses that supply goods and services to consumers, businesses would choose their regulator from the market for regulators. Governments would then regulate the regulators, making sure the regulation they impose on the businesses that sign up with them achieve the objectives the government has set.

Although the idea of a competitive market for private regulators may seem outlandish, parts of such a system already exist. Today, many regulations are written by private standard-setting bodies and either adopted by governments or implemented voluntarily by businesses. Sometimes these organizations compete for "customers": the International Organization for Standardization, the Forest Stewardship Council, and the Canadian and American Pulp and Paper Associations, for example, offer environmental standards that companies can choose to implement to ensure their products come from properly managed forests. European law requires food suppliers to obtain certification from private independent certifiers to ensure compliance with relevant food safety standards. Brokers and dealers in U.S. securities are subject to oversight by a private nonprofit membership organization, the Financial Industry Regulatory Authority ( ). Many suppliers of large corporations like Apple and Nike are subject to rules written by those corporations with respect to issues like workplace safety, child labor, and environmental practices.

The difference between existing models and superregulation is that, in most of these existing cases, either the private regulator holds a government-granted monopoly – like , for example – or compliance with private standards is voluntary – as with privately developed environmental standards. Although the private regulators may be subject to some governmental oversight, that oversight is not tied to licensing based on the achievement (or not) of designated outcomes. Superregulation focuses government efforts on the regulation of the regulator, on the basis of outcomes, and requires a competitive market for regulators.

The clearest example of this model today is the United Kingdom's approach to the regulation of legal services. Parliament passed the Legal Services Act in 2007, creating the Legal Services Board, an independent agency whose members are appointed by government. The Legal Services Board has only one function: to approve the private bodies that apply to be the actual regulators of legal services. Parts of the system are clearly not (yet) very competitive: the primary regulators emerged out of the preexisting trade associations for barristers, solicitors, and legal executives and the barriers to switching regulators are high because those regulators impose different, and costly, educational requirements. But on the horizon is a closer competition for regulation of a new breed of legal provider in England and Wales known as "alternative business structures" – companies like Price Waterhouse or LegalZoom – that can now provide legal services in this market. As of 2015, these providers can choose between licensing by the Solicitors Regulation Authority or by the Bar Standards Board.

The strategy of specifying general principles or outcomes instead of specific rules is known in the field of regulation as outcomes-based or principles-based regulation. It is already used in some settings such as environmental law, where instead of specifying what technologies or procedures a factory must use to reduce

pollution, governments establish acceptable levels of pollution. Under current approaches, the government leaves it up to the factory to decide what technology or procedures to use to achieve the required levels of pollution.

Under superregulation, however, the government would license third-party private companies to come up with specific methods for achieving pollution targets. It would then require the factory to become a customer of one of those third-party companies, to buy its regulatory services and comply with the methods its regulator develops. Individual factories in an industry might choose different regulators – just as companies now choose different accounting firms or computer systems – but all of the regulators available to be chosen would be licensed and required to demonstrate to government that the systems they impose on their regulatory customers achieve the government's required outcomes.

If the government requires that pollution not exceed a particular threshold, for example, then each private regulator would have to demonstrate that, across all of the factories it regulates, pollution does not exceed that level. Individual private regulators might achieve that objective in different ways: one might impose technology requirements on the factories it regulates, for example, while another might impose process requirements. They might charge different prices for their regulatory services. Those differences would be determined by the market; the role of governments would be to ensure that this market was competitive and that all of the providers offer systems that achieve the government's pollution targets.

Superregulation inserts an additional layer between governments and regulated businesses, creating an industry of private regulatory services. Although this seems like it would just make regulation more complex, if the market were competitive it could reduce complexity. The reason is the same as anywhere we see benefits from companies that specialize in part of a production process. For example, a company that manufactures automobiles can produce in-house all of the parts and perform all the services it needs as inputs. Or it can, as most do, contract out many of these parts and services to other companies: suppliers that specialize in building brakes, for example, or managing relationships with customers. Vertical integration looks less complicated, but it forgoes the benefits of specialization and scale. The companies that the auto-manufacturer contracts with can often produce higher-quality and lower-cost inputs than the auto-manufacturer itself because they dedicate themselves to innovating and excelling in this narrower task, and because they can achieve greater scale. The brakes manufacturer can sell to many vehicle manufacturers; the customer management service to many companies beyond the auto industry. This kind of specialization and decentralization is a key feature of the modern economy.

Superregulation recruits the benefits of specialization and scale for regulatory systems. By having for-profit and not-for-profit private companies, which are competing for business and motivated by the incentives of profit and mission, specialize in translating broad principles and specific regulatory outcome targets into rules, procedures, and technology, it is possible to have better, more cost-effective regulatory approaches that do a better job of balancing the costs and benefits of the complexity of the rules. To make that happen, governments must have the capacity to make sure that private regulators are competitive and producing systems that achieve government targets.

Consider whether this approach could improve the management of landlord-

identities. If a private regulator made it as difficult for a tenant to obtain fair enforcement of its rules against landlords as our current public housing courts do, we could anticipate market backlash or public outcry, and those tenants *with* effective housing choices would put pressure on the regulator to do a better job, generating benefits for those with little choice.

A superregulatory system should include the goal of making it possible for people to manage many of their ordinary legal situations on their own. Realistically, though, people and businesses will always need help understanding, navigating, and securing the benefits and protections of law. That is why it is critical to increase the use of markets to develop laws and to improve the performance of markets for legal help. Fundamentally, this means removing costly rules and barriers that are responsible for inflating the cost of accessing legal expertise. Current costs reflect the cost of conventional help from a lawyer, and the limited availability of alternative sources of legal assistance.

The other way in which we should be using markets better to increase access to justice is by reforming the market for legal services. The rules of professional conduct throughout the United States impose on the practice of law a business model that generates massive inefficiency. In law, a very large fraction of the hourly rate that clients pay ends up covering the cost of operating a barely sustainable business. Consider the following shocking finding. . . . is a company that seto-1.136 Td [(lmanidameve far)2t(c)-2waTJ 0.017 Tw 0[(c)-2 (y)75 (. In)0.5 (la)19 (w.219 64nil3

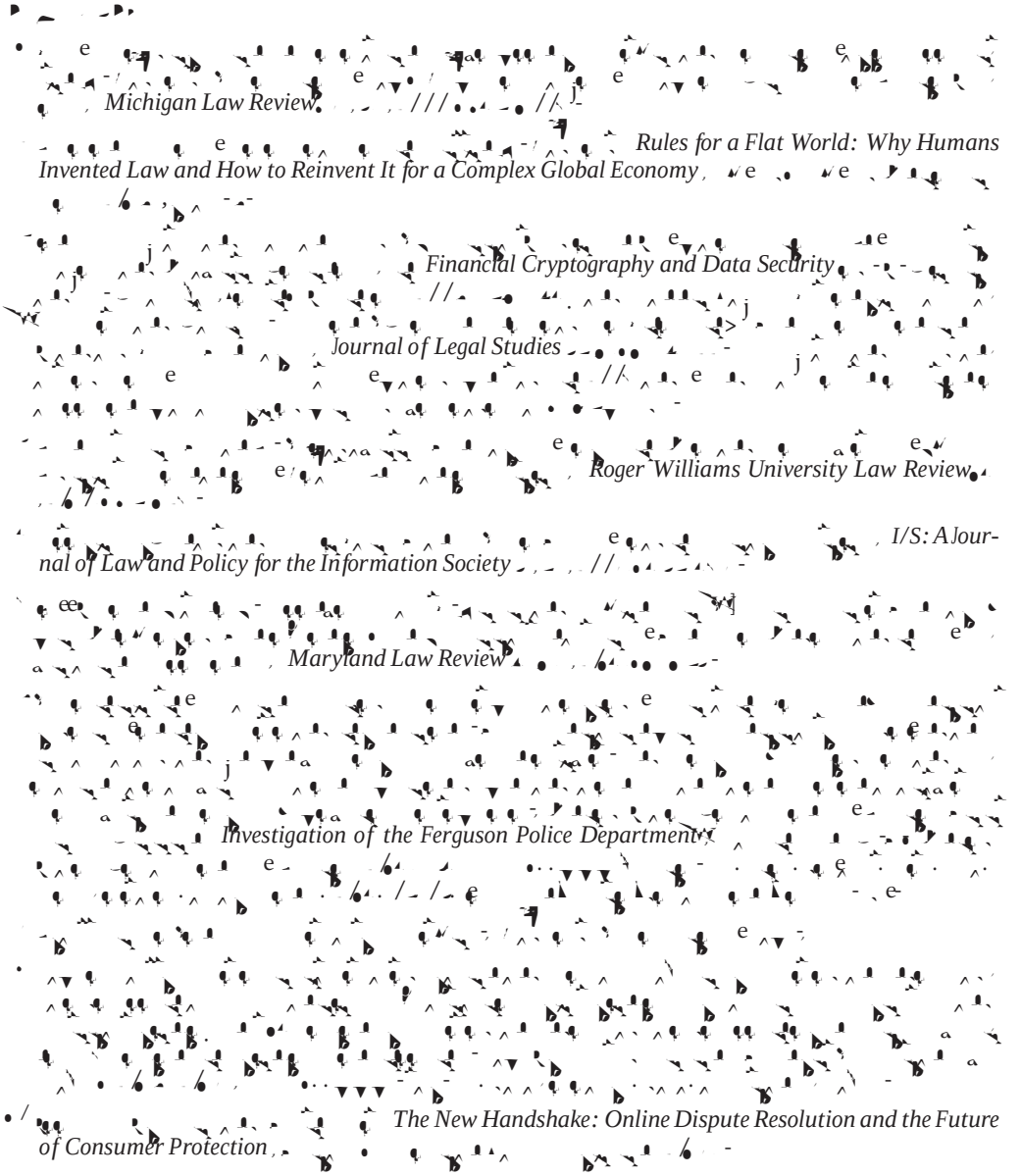
to people and businesses. Most lawyers don't want to run small businesses, and most lack the aptitude for it. They – and their clients – would be better off letting already established companies like LegalZoom, Avvo, RocketLawyer, Axiom, UpCounsel, and the like build a service platform, research the market, figure out pricing, handle billing, manage customer complaints, optimize the use of nonlawyer staff, and arrange financing, among other tasks.[13] Economies of scale could drive out a huge fraction of the current inefficiency in providing what millions need and most cannot get: advice from a lawyer.[14] Consider how many more people could afford some legal advice at $30 to $50 an hour compared with $260 – that is likely what a large-scale legal services company could deliver. And the lawyers would earn as much as they do today and spend more of their time practicing law, making the most of their expensive education and human capital.

A more efficient market for legal services requires changing the rules of professional practice to allow businesses that – like all other service businesses in our economy – are owned, managed, and financed by people other than the specialists who are providing services to clients to compete. More competition creates the incentive for people to invest in devising less costly ways to help people with their legal problems.

Some worry that lawyers employed by profit-making firms would cease to be independent and faithful lawyers for their clients. But changing the business model does not change the obligation of lawyers to give independent and loyal advice. Regulation of these new legal services providers would help ensure that, despite their corporate status, they delivered reli-

large organizations optimizing the deployment of different types and levels of expertise, to deliver cost-effective and high-quality legal assistance.

The key to all of this is opening up markets for innovation of new ways to deliver what people and businesses need: timely, reliable, and useful help navigating a complex legal world. Without those markets, law cannot attract the innovation, investment, and creativity it needs, and it cannot get out of the tightly sealed box in which lawyers, through bar associations, have secured the practice of law. Solving this problem requires talking seriously, and sensibly, about markets in law.



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