

## **CREATIVE DESTRUCTIVE LEGAL CONFLICT: LAWYERS AS DISRUPTION FRAMERS IN ENTREPRENEURSHIP**

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Entrepreneurship, in theory as in practice, suggests creative innovation that disrupts markets and threatens to destroy existing businesses. And when innovative entrepreneurs upend the status quo, the result is often legal conflict. This article proposes to unite the legal conflict that entrepreneurs experience into one cohesive body. This unified approach tracks economic theory on entrepreneurship—namely, creative destruction and disruptive innovation—instead of following law’s traditional doctrinal boundaries where entrepreneurial legal conflict is haphazardly dispersed in myriad legal specialties.

Furthermore, this article proposes that the lawyer’s role in entrepreneurship is that of disruption framer, not transaction cost engineer. When entrepreneurs encounter legal conflict, transactional attorneys who typically advise entrepreneurs are often ill-prepared, irrelevant, or both. Beyond transaction cost engineering and avoidance of legal conflict, disruption framers develop legal strategy in areas such as social media, public relations, advertising, and political and industry lobbying, to guide entrepreneurs towards and through legal conflict.

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## INTRODUCTION

Paris, France: riots in the streets, shattered windows, smashed mirrors, burning vehicles, bleeding hands, eggs and stones, and attackers trying to get in.<sup>1</sup> The scene may be reminiscent of the French Revolution of 1789. But it is from the 21st Century, and it represents the core of law and entrepreneurship. In fact, the scene shows the law *of* entrepreneurship.

The fighting in the streets of Paris derives from a clash over economic opportunities between old-guard business interests (traditional taxi drivers) and upstart entrepreneurs armed with innovative technology (Uber's Internet application (app) that matches riders and drivers via smartphones).<sup>2</sup>

1. Alissa Rubin & Mark Scott, *Clashes Erupt Across France as Taxi Drivers Protest Uber*, NEW YORK TIMES (June 6, 2015), [http://www.nytimes.com/2015/06/26/business/international/uber-protests-france.html?\\_r=0](http://www.nytimes.com/2015/06/26/business/international/uber-protests-france.html?_r=0) [<https://perma.cc/HQ2G-P8FZ>]; Carol Matlack, *Paris Cabbies Slash Tires, Smash Windshields in Protest against Uber*, BLOOMBERG BUSINESSWEEK (Jan. 13, 2014), <http://www.businessweek.com/articles/2014-01-13/paris-cabbies-slash-tires-smash-windshields-in-protest-against-uber> [<https://perma.cc/R23W-VGZ6>].

2. Romain Dillet, *Protesting Taxi Drivers Attack Uber Car Near Paris*, TECHCRUNCH (Jan. 13, 2014), <http://techcrunch.com/2014/01/13/an-uber-car-was-attacked-near-paris-as->

And though the conflict has boiled over into physical confrontations, its essence is a legal battle—one that has flared up not only in Paris, but in Brussels, India, Chicago, Seattle, and Denver, among numerous other places.<sup>3</sup> It is the classic story of law and entrepreneurship in which entrepreneurs threaten to upend a stagnant market through “disruptive innovation”<sup>4</sup> and in the process often run afoul of the law. It is the inexorable reality of “[c]reative [d]estruction,”<sup>5</sup> where entrepreneurs create new industries while simultaneously destroying the status quo.

But despite entrepreneurs’ tendency to challenge legal precedent through groundbreaking innovations, the law and entrepreneurship field<sup>6</sup>

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taxi-drivers-protest-against-urban-transportation-startups/ [https://perma.cc/NWT9-LUDPA.

3. Tom Fairless, *Tensions Erupt as Uber Drivers Attacked by Taxi Drivers in Brussels*, WALL STREET JOURNAL (Mar. 24, 2015), <http://www.wsj.com/articles/tensions-erupt-as-uber-drivers-attacked-by-taxi-drivers-in-brussels-1427140080>

[https://perma.cc/X8MT-7P76]. A website dedicated to opposing Uber lists numerous protests around the world. *News*, STOP UBER, <http://www.stopuber.com/> [https://perma.cc/KYZ9-YYR7] (last visited May 22, 2015).

4. See *infra* Part II.B. CLAYTON CHRISTENSON, *THE INNOVATOR’S DILEMMA* 47-54 (4th ed., Harper Bus. 2011) (1997).

5. See *infra* Part II.B. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 83 (3rd ed., Harper & Bros. 1950) (1942). Schumpeter’s theoretical framework has received renewed interest with the ascending prominence of creativity, entrepreneurship, and innovation in the Internet age. *E.g.*, Mirit Eyal-Cohen, *Legal Mirrors of Entrepreneurship*, 55 B.C. L. REV. 719, 736 (2014) (noting that “[t]he past three decades in particular have witnessed a ‘Schumpeterian renaissance’”); THOMAS K. MCCRAW, *PROPHET OF INNOVATION: JOSEPH SCHUMPETER AND CREATIVE DESTRUCTION* 503-04 (Harvard Univ. Press 2007) (observing that “Schumpeter’s pioneering work on innovation and entrepreneurship acquired a compelling new interest” in the late twentieth century and describing the renewed attention on Schumpeter’s work in numerous disciplines).

6. This article refers to law and entrepreneurship primarily as a field or discussion, without engaging the friendly debate over whether law and entrepreneurship is properly considered a “perspective” or an independent academic “discipline.” Benjamin Means, *Foreward: A Lens for Law and Entrepreneurship*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 1, 5, 13-18 (2011) (arguing that law and entrepreneurship should be conceived of as a “perspective” or “lens,” not a separate academic discipline); Darian M. Ibrahim & D. Gordon Smith, *Entrepreneurs on Horseback: Reflections on the Organization of Law*, 50 ARIZ. L. REV. 71, 83-89 (2008) (proposing law and entrepreneurship as a distinct field of legal study); Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241, 245 (1997) (“pursuing the idea of entrepreneurship as an academic discipline in the law school setting”). For discussions of law and entrepreneurship in the context of other emerging fields, see generally Ibrahim & Smith, at 84 (describing the struggle for acceptance of other new academic fields, such as Internet Law, Health Law, and Environmental Law); Frank Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207-15 (grouping the “Law of Cyberspace” with the “Law of the Horse” due to an alleged lack of legal distinctiveness); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 503 (1999) (defending the study of cyberspace law).

has been rooted in and continues to emphasize a transactional perspective.<sup>7</sup> Ronald Gilson's seminal analysis of business lawyers as "transaction cost engineers" remains the primary theoretical model for the law and entrepreneurship field, even though Gilson's model was not originally developed specifically for entrepreneurship.<sup>8</sup> Under the transaction cost engineer model—including subsequent expansions on Gilson's pioneering work<sup>9</sup>—attorneys add value to business transactions by reducing the transaction costs inherent to business deals.<sup>10</sup>

To the extent entrepreneurship is simply about business transactions, transaction-based theories apply appropriately enough. Start-up entrepreneurs do benefit from transactional legal advice.<sup>11</sup> And transactional attorneys are often the first lawyers to represent entrepreneurs because in the start-up phase of a new venture entrepreneurs need transactional legal counsel.<sup>12</sup> So it makes intuitive sense that the standard law and entrepreneurship framework would adopt a transaction-based approach.

But the law and entrepreneurship field should not be subsumed under transactional law. Instead, the legal theory that attaches to entrepreneurship should track a more robust understanding of what entrepreneurship actually entails. Outside of law, theories of entrepreneurship do not center around business transactions.<sup>13</sup> The leading descriptions of entrepreneurship, both in theory and in practice, involve disruptive innovation and creative destruction, where entrepreneurs introduce new products or new business models that threaten existing market leaders.<sup>14</sup>

From the perspective of creative destruction, entrepreneurship is revolution.<sup>15</sup> And this entrepreneurial revolution is often played out in a courtroom, not in the business transactions that typically garner the most attention in law and entrepreneurship studies.<sup>16</sup> Each of the examples in Part III highlights a disruptive innovation that has been the subject of litigation or has allegedly or actually been illegal (e.g., among other examples, Uber's court battles with the taxi industry, Tesla's conflicts with

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7. *See infra* Part I.B.

8. *See infra* Part I.B; Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239, 255 (1984).

9. *See infra* Part I.B.

10. *See infra* Part I.B.

11. *See infra* Part I.A.

12. *See infra* Part I.A.

13. *See infra* Part II.B.

14. *See infra* Part II.B.

15. *See infra* Part II.B.

16. *See infra* Part III.

traditional car dealerships, and Napster's intellectual property disputes with the music industry). Consequently, the examples illustrate the central role of law and lawyers—outside of the world of business transactions—in determining how society deals with the legal conflict that creative destructive entrepreneurship causes.

Beyond transaction cost engineering, then, this article proposes that the lawyer's role in representing entrepreneurs is more appropriately deemed that of "disruption framer."<sup>17</sup> When the creations of innovative entrepreneurs threaten to destroy the legal status quo, lawyers take center stage. But the lawyer's role in representing entrepreneurs through the existential battles of creative destruction has little to do with transaction cost engineering. The skills involved in crafting a long-term legal strategy for disruptive business models are not those of transactional advice or advocacy. Just as entrepreneurs create a business plan to chart a disruptive course into new markets, disruption framers develop legal strategies for a disruptive company to reimagine and reform existing legal frameworks to accommodate innovative business ideas. It is a mistake, therefore, to equate law and entrepreneurship too closely with transactional law. The law and entrepreneurship lens must expand beyond business transactions to provide a more comprehensive account of the role of lawyers when entrepreneurs' disruptive businesses break laws, as the examples in Part III show.

This article seeks to unite creative destructive legal conflict into a cohesive body. Traditionally, examples of legal conflict in entrepreneurship have been categorized and widely dispersed under myriad legal disciplines (such as innovation law, antitrust/competition law, consumer protection law, intellectual property law, securities law, and employment law, along with numerous other legal fields). This lawyer-centric approach obscures the commonalities that diverse examples of entrepreneurial legal conflict share. Furthermore, defining the topic along the lines of traditional legal disciplines forces a legal rubric over a business phenomenon.

But what if jurisprudential analysis were organized around an economic theory, not around a legal discipline? This article proposes placing creative destructive legal conflict at the center and organizing law and entrepreneurship jurisprudence around economic theory, regardless of the boundaries of traditional legal disciplines. The business reality of disruptive innovation should serve as the unifying principle of the legal conflict that creative destructive entrepreneurs encounter. The result will be the emergence of a comprehensive and unified body of legal conflict

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17. See *infra* Part III and Part IV.B.

comprising the law *of* entrepreneurship.

For example, when creative destruction leads to legal conflict in different areas of substantive law (such as employment law, intellectual property law, and securities law), this article suggests that all three conflicts be categorized as the law of entrepreneurship, despite the differences in substantive laws. The diverse examples in Part III take an initial step towards uniting the law of entrepreneurship across multiple disciplinary areas, such as Tesla's anti-trust litigation, Uber's employment law conflicts, Napster's intellectual property law battles, and crowdfunding entrepreneurs' violations of securities laws. A unified approach to the law of entrepreneurship will facilitate meta-analysis and empirical study of creative destructive legal conflict that would otherwise remain isolated within independent legal disciplines, as further explained in Part IV.

Of course, lawyers and judges will continue to analyze cases within independent and specialized areas of law. But from an economist's or entrepreneur's perspective, disruptive innovation and creative destruction are the unifying themes for the law of entrepreneurship, regardless of legal discipline. To an entrepreneur, it does not matter whether a disruptive innovation encounters legal conflict from intellectual property law, employment law, or securities law—the common thread is simply that disruptive innovation creates legal conflict. This article therefore encourages further study of diverse legal conflicts organized around the unifying principles of disruptive innovation and creative destruction.

The result of developing a unified body of creative destructive legal conflict is also practical, not solely conceptual. A comprehensive understanding of creative destructive legal conflict will arm disruption framers with the strategic tools necessary to navigate entrepreneurial legal conflict, regardless of the substantive legal discipline in which the conflict arises. In creative destruction, legal conflict is an ever-present reality. And disruption framers are the ones to guide entrepreneurs through this adversarial reality, as Parts III and IV describe. Disruption framers use diverse strategies, often involving areas such as social media, public relations, advertising, and political and industry lobbying, to guide entrepreneurs towards and through legal conflict. Disruption framers might welcome or initiate legal conflict, but at a minimum they anticipate and strategize for it because legal conflict often awaits their clients' creative destructive business models.

After this introduction, Part I describes the influence of transactional law on the law and entrepreneurship field and summarizes the numerous and diverse intersections of law, policy, and entrepreneurship. Part I also reviews scholarship on law and strategy because the proposals in Parts III and IV extend the legal strategy literature to the role of disruption framers.

Part II draws on economics literature to move beyond the transactional conception of law and entrepreneurship. Classical economics was instrumental in inspiring the transaction cost engineer model that pervades the law and entrepreneurship field. Paradoxically, though, classical economics tends to marginalize the importance of the entrepreneur. Therefore, Part II argues that the law and entrepreneurship field should embrace an alternative approach to economics, one that places entrepreneurship and its creative destructive innovations at the forefront.

Part III advances a thesis both conceptual and practical. From a conceptual perspective, Part III argues that law and entrepreneurship scholars must cultivate a systematic and unified body of creative destructive legal conflict, without regard to legal disciplinary areas—the law *of* entrepreneurship. From a practical perspective, Part III envisions lawyers as disruption framers who leverage the law of entrepreneurship to develop a strategic playbook for guiding entrepreneurs through legal conflict. Part IV then offers forward-looking recommendations for further research in light of the article’s dual emphasis on creative destructive legal conflict and lawyers as disruption framers.

#### I. THE LAW AND ENTREPRENEURSHIP FIELD

In the interest of simplicity, the emerging law and entrepreneurship cannon can be organized into three rough categories, along with a fourth category that this article uses to explain the role of disruption framers. The first category arises out of law school clinical programs in transactional law<sup>18</sup> (including cross-disciplinary cooperation with business schools)<sup>19</sup> as

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18. See *infra* Part I.A. For listings of clinical programs, see Anthony J. Luppino, *Can Do: Training Lawyers To Be Effective Counselors to Entrepreneurs*, REPORT TO THE EWING MARION KAUFFMAN FOUNDATION 19-21, Appendix 2 (Jan. 30, 2008) [hereinafter Luppino, *Can Do*]; Richard Benham et. al., *Entrepreneurial Law Programs and Legal Needs*, 15 TRANSACTIONS 727, 727-38 (2014) (explaining the results of a survey of law schools in relation to law and entrepreneurship course offerings); *Transactional Clinics*, ENTREPRENEURSHIP.ORG, <http://www.entrepreneurship.org/entrepreneurship-law/law-school-entrepreneurship-clinics-in-the-united-states.aspx> [https://perma.cc/Z9ST-2SCV] (last visited May 1, 2015) (listing well over 100 law school clinics in the US “that provide assistance to entrepreneurs and innovators”).

For a sampling of recent textbooks on law and entrepreneurship, see CONSTANCE E. BAGLEY & CRAIG E. DAUCHY, *THE ENTREPRENEUR’S GUIDE TO BUSINESS LAW* (4th ed. 2012); GEORGE W. KUNEY & BRIAN K. KRUMM, *THE ENTREPRENEURIAL LAW CLINIC HANDBOOK* (2013); W. “RP” RAGHUPATHI & JONATHAN ASKIN, *ENTREPRENEURSHIP AND THE LAW* (2014); STEPHEN F. REED & ESTHER S. BARRON, *ENTREPRENEURSHIP LAW: CASES AND MATERIALS* (2013).

19. See *infra* Part I.A. For listings of course offerings in law and business schools, see Luppino, *Can Do*, *supra* note 18, at 22-23, Appendices 5-6 (cataloguing course offerings). See also J. Mark Phillips, *Entrepreneurial Esquires in the New Economy: Why All Attorneys*

well as the many entrepreneurship incubators and accelerators<sup>20</sup> where practicing transactional attorneys assist budding entrepreneurs.<sup>21</sup> The second category contains the doctrinal backbone for the transactional focus that dominates the law and entrepreneurship discussion. A third category unites broader conceptual approaches to how law impacts entrepreneurship and is concerned generally with establishing optimal legal structures to encourage entrepreneurship.<sup>22</sup> A fourth category includes research on law, business strategy, and competitive advantage, which provides a theoretical grounding for the role of disruption framers in creative destructive legal conflict, as explained in Parts III and IV.

#### A. *Clinical Programs and Incubators*

In assessing the state of the law and entrepreneurship field, one study finds that “[t]he vast majority—though certainly not all—of the law faculty who appear to be on the cutting edge of law and entrepreneurship are affiliated with clinical programs.”<sup>23</sup> Similarly, one of the non-clinical scholars of law and entrepreneurship asserts that “‘law and entrepreneurship’ thrives not in doctrine, or even in current interdisciplinary law and social science, but on the ground in clinical programs.”<sup>24</sup> Achieving a clinical foundation of “what is now a ‘law and entrepreneurship’ movement”<sup>25</sup> is a milestone in its own right, in view of

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*Should Learn about Entrepreneurship in Law School*, 8 J. BUS. ENTREPRENEURSHIP & L. 59, 67-72 (2014) (discussing entrepreneurship training in legal education).

20. See Brad Bernthal, *Opportunism and Informal Relationships in Investment Accelerators*, STAN. J.L. BUS. & FIN. (forthcoming 2016), available at [https://lawweb.colorado.edu/profiles/pubpdfs/bernthal/Investment%20Accelerators\(SJLBF%202016\).pdf](https://lawweb.colorado.edu/profiles/pubpdfs/bernthal/Investment%20Accelerators(SJLBF%202016).pdf) [<https://perma.cc/9PJZ-MWV9>] (describing accelerators and distinguishing incubators).

21. See *infra* Part I.A. Stephanie Dangel & Michael J. Madison, *Innovators, Esq.: Training the Next Generation of Lawyer Social Entrepreneurs*, 83 UMKC L. REV. 967, 969-83 (2015) (noting numerous programs where legal and entrepreneurial training intersect); Dana Thompson, *Accelerating the Growth of the Next Generation of Innovators*, 8 OHIO ST. ENTREPREN. BUS. L.J. 379, 379-85 (2013) (describing business accelerators, incubators, and other university resources that support entrepreneurship). For a discussion of the practicing bar’s assistance to start-up entrepreneurs, see Kevin Davis, *Venturing into Startup Territory*, A.B.A. J., June 2014, at 55.

22. See *infra* Part I.C. For a compilation of scholarly perspectives on law and entrepreneurship, see CREATIVITY, LAW AND ENTREPRENEURSHIP (Shubha Ghosh & Robin Paul Malloy eds., 2011).

23. Luppino, *Can Do*, *supra* note 18, at 13.

24. Jeffrey M. Lipshaw, *Why the Law of Entrepreneurship Barely Matters*, 31 W. NEW ENG. L. REV. 701, 703 (2009).

25. Anthony J. Luppino, *Minding More Than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. NEW ENG. L. REV. 151, 160 (2007) [hereinafter Luppino, *Minding More Than Our Own*



clinical education's historical roots in litigation.<sup>26</sup>

Teaching transactional law skills in an entrepreneurship law clinic is a natural fit.<sup>27</sup> Aspiring entrepreneurs want low-cost transactional legal assistance just as law students want to develop transactional law skills through interactions with real clients.<sup>28</sup> For example, typical transactional matters include activities like forming business entities, drafting governing documents, creating contract templates, and registering trademarks. But the law and entrepreneurship field, as expressed through and rooted in transactional legal clinics, will necessarily have a built-in predisposition towards business transactions and away from litigation because transactional law clinics typically are designed to avoid providing litigation services,<sup>29</sup> in keeping with the principle that “transactional work involves . . . assessing risks and actively avoiding the courtroom.”<sup>30</sup>

Similarly, interdisciplinary collaborations between law and business schools focus on transactional legal services, whether in a classroom setting, in a clinical environment serving local small businesses, or through university-sponsored start-up business plan competitions.<sup>31</sup> Law firms, too, embrace the transactional conception of law and entrepreneurship as a

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*Business*].

26. Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL'Y 85, 92-100 (2014) (describing the growth of transactional law clinics in the context of law school programs that were historically litigation-centric).

27. See Hobbs, *supra* note 6, at 252-64 (providing an overview of the legal needs of entrepreneurs and calling for appropriate legal training in law schools); Laurie A. Lucas & Griffin T. Pivateau, *Attorneys and Entrepreneurs: Creating Value for Small Business Startups*, 18 TEX. WESLEYAN L. REV. 717, 725-28 (2012) (describing necessary skill sets for attorneys to effectively add value for startups).

28. See Jones & Lainez, *supra* note 26, at 96 (emphasizing that both law students and small business owners benefit from transactional clinics); Luppino, *Can Do*, *supra* note 18, at 6-8 (describing legal concerns that law students can address in entrepreneurship law clinics).

29. For example, the website of the Entrepreneurship Clinic at the University of Michigan Law School is typical in stating that the clinic “generally does not provide” services for “litigation or dispute resolution.” *FAQs about the Clinic*, U. MICH. L. SCH. ENTREPRENEURSHIP CLINIC, <https://www.law.umich.edu/clinical/entrepreneurshipclinic/about/Pages/FAQs-About-the-Clinic.aspx> [<https://perma.cc/5RW7-SWDH>] (last visited May 28, 2015).

30. Jones & Lainez, *supra* note 26, at 97.

31. See Luppino, *Minding More Than Our Own Business*, *supra* note 25, at 181-219 (describing the structures of various collaborations between law and business schools); Luppino, *Can Do*, *supra* note 18, at 19-23 (summarizing the common goals and pedagogy of transactional clinics); Sean M. O'Connor, *Teaching IP from an Entrepreneurial Counseling and Transactional Perspective*, 52 ST. LOUIS U. L.J. 877, 883-87 (2008) (describing courses and an entrepreneurial law clinic with a focus on the intellectual property needs of businesses).

means of establishing relationships with promising entrepreneurs in hopes of generating future corporate clients.<sup>32</sup> Firms routinely sponsor entrepreneurship incubators and even provide discounted office space, among other incentives, to help start-up entrepreneurs succeed.<sup>33</sup>

Law and entrepreneurship has gained traction, then, through transactional law clinics, business school collaborations and start-up business plan contests, and law firms' involvement with entrepreneurship incubators. All share a transactional approach to helping start-up entrepreneurs. And as a starting place for the law and entrepreneurship field, transactional legal services are a valuable and appropriate first step.

### B. *Transaction Cost Engineers*

But when law and entrepreneurship is narrowed to include solely or primarily transactional law issues, then one scholar's conclusion that "the law of entrepreneurship barely matters" is not too far-fetched.<sup>34</sup> That is, although "theorists have attempted to . . . advance a theory of the law of entrepreneurship, in most cases entrepreneurship is about something other than jurisprudence."<sup>35</sup> This is a natural conclusion when the field of law and entrepreneurship is conceived of through the lens of transactional law. A transactional focus—by definition and design—necessarily moves away from jurisprudential analysis of how law intersects entrepreneurship in litigation. Instead, attention centers on the paradigm of transaction cost engineering as the doctrinal backbone of the law and entrepreneurship field.<sup>36</sup>

The transaction cost engineer theory is undoubtedly helpful as an explanation of why transactional lawyers exist and what value they add to business deals.<sup>37</sup> The theory is premised on the capital asset pricing model (CAPM) and, especially, on the failure of certain assumptions on which the model depends.<sup>38</sup> Most notably, CAPM assumes a world of no transaction costs (among other assumptions) in order to derive a hypothetical perfect market where "capital assets will be priced correctly as a result of market

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32. Davis, *supra* note 21, at 56-57.

33. *E.g., id.* at 57-58 (describing examples of such initiatives by law firms in Chicago, San Francisco, and Austin).

34. Lipshaw, *supra* note 24, at 701.

35. *Id.* at 709-10.

36. Jones & Lainez, *supra* note 26, at 103-04 (recognizing "the doctrinal contribution" of "Gilson's seminal work" as a foundation for transactional law clinics).

37. Gilson, *supra* note 8, at 256-94; Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 7-14 (1995).

38. Gilson, *supra* note 8, at 250-53.

forces.”<sup>39</sup> But because transaction costs are in fact “pervasive,”<sup>40</sup> Gilson posits that “[l]awyers function as *transaction cost engineers*, devising efficient mechanisms which bridge the gap between capital asset pricing theory’s hypothetical world of perfect markets and the less-than-perfect reality of effecting transactions in this world.”<sup>41</sup> As a result, Gilson asserts that “the pervasive use of business lawyers . . . raises an inference that it is a cost-saving, in my terms value-creating, phenomenon.”<sup>42</sup>

Gilson is keen to observe that value creation is not a form of distributive bargaining, where one party simply obtains a larger slice of the pie at the other party’s expense.<sup>43</sup> Instead, Gilson’s thesis is that skilled transaction cost engineers actually increase the size of the pie itself.<sup>44</sup> For example, just as a business improves its profit margins by reducing *production* costs (e.g., a more efficient factory leads to higher profits), so also a service that reduces *transaction* costs results in a positive return.<sup>45</sup> Transaction cost engineers create value by reducing transaction costs through skilled structuring of business deals.<sup>46</sup> In sum, the *raison d’être* of transactional lawyers who facilitate business deals is “cost-saving,” or more proactively, “value-creating.”<sup>47</sup>

Under a transaction-based theory, then, “[t]he best thing lawyers can do is to reduce transaction costs—in essence, get the law out of the way of the entrepreneurial engine.”<sup>48</sup> To the extent such a transactional perspective encapsulates the law and entrepreneurship field, it is easy to see why the law of entrepreneurship may not matter much. Even Gilson recognizes that transaction cost engineers need not be lawyers, for other professionals, such as accountants and investment bankers, can also reduce transaction costs in business deals, and in some cases more efficiently than lawyers.<sup>49</sup>

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39. *Id.* at 251.

40. *Id.* at 253.

41. *Id.* at 255.

42. *Id.* at 254.

43. *Id.* at 244-45.

44. *Id.* at 246.

45. *Id.* at 254.

46. *Id.*

47. *Id.*

48. Lipshaw, *supra* note 24, at 710 n.31 (“The thrust of this work is essentially Coaseian”).

49. Gilson, *supra* note 8, at 294-303. For instance, Gilson notes that lawyers’ “historical domination of that role [of transaction cost engineer] rests neither on its inherently legal character nor . . . on skills acquired through traditional legal training . . .” *Id.* at 301. Gilson therefore envisions two possible futures for transactional lawyers: “In one, the legal profession continues to play a central role in designing the structure of business transactions. In the other, however, the profession’s transactional role is reduced

Later transactional law theorists after Gilson have largely (but not universally)<sup>50</sup> adhered to the Coasean<sup>51</sup> doctrinal construct that highlights the impact of transaction costs on organizational or business decisions.<sup>52</sup> For instance, Schwarcz focuses on the role of business lawyers in reducing regulatory costs for corporate clients.<sup>53</sup> Similarly, Fleischer suggests a “friendly amendment” to Gilson’s model to emphasize how business lawyers engineer regulatory costs to their clients’ advantage in the role of “regulatory arbitrageurs.”<sup>54</sup> Looking specifically at venture capital communities, Okamoto stresses the value lawyers bring to entrepreneurs and investors alike by making introductions and signaling quality as “reputational intermediaries.”<sup>55</sup> Bernstein applies Gilson’s paradigm to several value-enhancing roles that transactional attorneys play in Silicon Valley,<sup>56</sup> and Suchman and Cahill highlight Silicon Valley attorneys as “facilitators” in venture capital financing transactions.<sup>57</sup> More broadly, Dent argues that Gilson’s approach is too narrow and seeks to encompass a wider range of activities that business lawyers perform outside the context of sophisticated mergers and acquisitions as “enterprise architects.”<sup>58</sup> But

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from engineer to draftsman . . . .” *Id.*

50. Jeffrey M. Lipshaw, *Beetles, Frogs, and Lawyers: The Scientific Demarcation Problem in the Gilson Theory of Value Creation*, 46 WILLAMETTE L. REV. 139, 143-45 (2009) (questioning the “privileged status as scientific truth” that Gilson’s economic explanation of the value of transactional attorneys often enjoys and offering an explanation centered on the “meaning” or “cultural or hermeneutic significance” of the role of transactional lawyers in consummating business deals).

51. Gilson, *supra* note 8, at 253 (situating the CAPM theory within the “Coasean world”). The allusion, of course, refers to Ronald Coase’s earlier landmark work on the impact of transaction costs on the organization of firms. R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 386-405 (1937).

52. See *infra* notes 53-58. See also Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client’s Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17, 36-50 (2003) (discussing transactional lawyers’ role in a global knowledge economy); Alison R. Weinberg & Jamie A. Heine, *Counseling the Startup: How Attorneys Can Add Value to Startup Clients’ Businesses*, 15 J. BUS. & SEC. L. 39, 42 (2014) (emphasizing the importance of communication skills for transactional lawyers who counsel startups).

53. Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 506-07 (2007).

54. Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 236-37 (2010).

55. Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15, 22-26 (1995).

56. Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineer?*, 74 OR. L. REV. 239, 245-51 (1995).

57. 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, 690 (1996).

58. George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279, 295-318 (2009).

the economic theory underlying each transactional analysis remains the same; thus, in accordance with the CAPM formulation, each analysis furthers the understanding of how transactional lawyers add value to business deals by reducing costs.

Though a Coasean doctrinal construct is helpful to explain lawyers' multifaceted roles in representing entrepreneurs in corporate transactions and business relationships, law and entrepreneurship as a field is broader than transactional activities, as the examples in Part III demonstrate. Furthermore, as Part II shows, the classical economic theory underlying the transactional approach minimizes the importance of entrepreneurial activity itself, making it a poor fit for modeling the law and entrepreneurship field. Therefore, law and entrepreneurship must not be subsumed under an exclusively transactional rubric and instead must embrace a theoretical approach where entrepreneurship is central. Analytical tools unique to the study of entrepreneurship—namely, creative destruction and disruptive innovation—should guide law and entrepreneurship research. The law of entrepreneurship matters plenty when viewed from the perspective of creative destruction, as the examples in Part III show.

### C. *Laws to Encourage Entrepreneurship*

Other work that has influenced the law and entrepreneurship field has gone in a different direction than transaction-based theories. Though not expressly unified as law and entrepreneurship research, numerous scholars have investigated how discrete areas of law and policy impact entrepreneurship.<sup>59</sup> More precisely, this category of research is broadly concerned with how law can (or cannot), or should (or should not), encourage (or discourage) entrepreneurship.<sup>60</sup>

As a baseline, scholars note the importance of property rights and the stability of the legal system as precursors for vibrant entrepreneurial

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59. See, e.g., Lawrence J. Trautman, Anthony J. Luppino & Malika Simmons, *Some Key Things U.S. Entrepreneurs Need to Know About the Law and Lawyers*, \_\_\_ TEX. J. BUS. L. \_\_\_ (forthcoming), available at <http://ssrn.com/abstract=2606808> [<https://perma.cc/5G62-P8B4>] (citing literature on numerous intersections of law and entrepreneurship).

60. E.g., D. Gordon Smith & Masako Ueda, *Law and Entrepreneurship: Do Courts Matter?*, 1 ENTREPRENEURIAL BUS. L.J. 353, 357 (2007) (“law and entrepreneurship studies should focus on the study of the optimal legal structures that facilitate the commercialization of entrepreneurial opportunities, as well as the regulation of entrepreneurial firms”); Simon C. Parker, *Law and the Economics of Entrepreneurship*, 28 COMP. LAB. L. & POL’Y J. 695, 695-715 (2007) (reviewing literature on how “law interacts with economic aspects of entrepreneurship”); Ibrahim & Smith, *supra* note 7, at 82 n.65 (cataloging numerous examples that “help us understand connections between law and entrepreneurship”).

communities.<sup>61</sup> More aggressively, law and policy can also be viewed as a proactive tool for enhancing entrepreneurship.<sup>62</sup> The countless efforts to clone Silicon Valley's entrepreneurial success have inspired broad law and policy studies on how government, university, military, and private initiatives can foster entrepreneurship.<sup>63</sup> From a comparative law perspective, law and entrepreneurship scholars have proposed the "adaptability hypothesis" as an empirically testable explanation of how "courts may facilitate the evolution of legal rules to address novel issues raised by entrepreneurial firms" — the hypothesis being that common law judges can "encourage entrepreneurship" because they "have more room to maneuver than judges in civil law systems."<sup>64</sup>

Other scholarly work related to law and entrepreneurship seeks to develop "innovation law" or "innovation policy."<sup>65</sup> Innovation law and

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61. D. Gordon Smith & Darian M. Ibrahim, *Law and Entrepreneurial Opportunities*, 98 CORNELL L. REV. 1533, 1550-1569 (2013); Lipshaw, *supra* note 24, at 708-09 ("Entrepreneurship flourishes in a society that builds the rule of law from Lockean assumptions about the primacy of property and the freedom to own it and trade it."); Matthieu Chemin, *The Impact of the Judiciary on Entrepreneurship: Evaluation of Pakistan's Access to Justice Programme*, (CIRPÉE, Working Paper 07-27, 2007), available at <http://ssrn.com/abstract=1018901> [<https://perma.cc/V34W-LBG3>] (evaluating the impact on entrepreneurship of judicial reforms that increase the predictability and efficiency of the legal system); Parker, *supra* note 60, at 711-14 (discussing economics literature showing that "[w]ell-protected property rights help promote entrepreneurship and innovation").

62. Viktor Mayer-Schönberger, *The Law as Stimulus: The Role of Law in Fostering Innovative Entrepreneurship*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 153, 183-85 (2010).

63. See, e.g., Amram Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 647-69 (2014) (reviewing "key legal developments that enabled the rise of Web 2.0"); Darian M. Ibrahim, *Financing the Next Silicon Valley*, 87 WASH. U. L. REV. 717, 723-32 (2010) (discussing the Silicon Valley ecosystem and the necessary elements to create an entrepreneurial community); Amir N. Licht, *The Entrepreneurial Spirit and What the Law Can Do About It*, 28 COMP. LAB. L. & POL'Y J. 817, 817, 850-61 (2007) (exploring whether "policy-makers [can] do something to promote entrepreneurship"); Megan M. Carpenter, *'Will Work': The Role of Intellectual Property in Transitional Economies—From Coal to Content*, in CREATIVITY, LAW & ENTREPRENEURSHIP 49, 52-60 (Shubha Ghosh & Robin Paul Malloy, eds., 2011) (describing university and government intersections with entrepreneurship); Abraham J. B. Cable, *Incubator Cities: Tomorrow's Economy, Yesterday's Start-Ups*, 2 MICH. J. PRIVATE EQUITY & VENTURE CAP. L. 195, 205-25 (2013) (discussing "state-sponsored venture capital" through "venture development funds").

64. Smith & Ueda, *supra* note 60, at 364-65.

65. E.g., Aryeh S. Friedman, *Law and the Innovative Process: Preliminary Reflections*, 1986 COLUM. BUS. L. REV. 1, 6-37 (1986) (seeking a framework for the study of innovation and law); Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 56-67 (2008) (proposing a federal "Office of Innovation Policy" to oversee and coordinate innovation policy instead of leaving it to disparate federal agencies); Tom Nicholas, *What Drives Innovation?*, 77 ANTITRUST L.J. 787, 789-807 (2011) (describing antitrust implications of viewing innovation from the perspectives of intellectual property law, supply-side economics, and venture capital financing).

innovation policy promote business innovation, or technological advancement, as the primary goal for legal doctrine to serve.<sup>66</sup> For innovation law scholars, the relevant legal doctrine usually consists of a fusion of antitrust and intellectual property law.<sup>67</sup>

In addition, as separate disciplines, antitrust<sup>68</sup> and intellectual property<sup>69</sup> each offer a wealth of analyses on the intersection of law and innovation, especially in high technology industries. For example, current antitrust law scholars increasingly emphasize the harm to innovation that can result from excluding potential competitors from a market; whereas, antitrust law scholars have historically focused more on the classical economic concerns of lower prices and higher quantities achieved through competitive markets in the absence of collusion, cartels, and monopolies.<sup>70</sup>

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66. Herbert Hovenkamp, *Competition for Innovation*, 2012 COLUM. BUS. L. REV. 799, 800 (2012). *See also* Gaia Bernstein, *In the Shadow of Innovation*, 31 CARDOZO L. REV. 2257, 2290-310 (2010) (advocating increased attention on intellectual property laws that encourage the diffusion of innovations, not solely the creation of innovations).

67. Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 443, 452-54 (2015) (noting that legal scholars have “narrowed the study of innovation to IP, and in certain cases to competition law,” and advocating “a comprehensive regulatory approach” to innovation law); Hovenkamp, *supra* note 66, at 800, 812 (arguing for harmonized rules on intellectual property ownership and antitrust enforcement); Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534, 583-600 (2003) (describing a “competitive platforms model” for Internet and information technologies where competition law principles would merge with intellectual property laws); Mark A. Lemley, *Industry-Specific Antitrust Policy for Innovation*, 2011 COLUM. BUS. L. REV. 637, 641-52 (2011) (espousing an industry-specific approach where strong patent rights would apply when innovation requires substantial investment that cannot be achieved through competition (e.g., pharmaceuticals) but antitrust law would apply when open access and competition lead to greater innovation (e.g., internet technologies)).

68. Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663, 1686-1705 (2013) (examining how antitrust laws should apply and adapt to rapidly-evolving Internet technologies); Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 592-602 (2007); John J. Flynn, *Antitrust Policy, Innovation Efficiencies, and the Suppression of Technology*, 66 ANTITRUST L.J. 487, 491-506 (1998); Nicholas Timchalk, Note, *E-Books, Collusion, and Antitrust Policy: Protecting a Dominant Firm at the Cost of Innovation*, 38 SEATTLE U. L. REV. 161, 183-85 (2014).

69. Safeguarding entrepreneurs’ property rights in creative ideas is considered vital to encouraging entrepreneurship. *See, e.g.*, Sean M. O’Connor, *The Central Role of Law as a Meta Method in Creativity and Entrepreneurship*, in CREATIVITY, LAW AND ENTREPRENEURSHIP 87, 98-106 (Shubha Ghosh & Robin Paul Malloy, eds., 2011) (discussing historical influences in the development of intellectual property laws and entrepreneurship). *See also infra* notes 78-80.

70. Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L. J. 527, 527, 559 (2013) (highlighting “the particular threat exclusion poses to economic growth” while lamenting that “[e]xclusionary conduct is commonly relegated to the periphery in contemporary antitrust discourse, while price fixing, market division, and other

With respect to intellectual property, prominent current scholarly debates investigate the role of patent law<sup>71</sup> and copyright protection<sup>72</sup> in innovation, and the role of intrinsic and extrinsic motivation in creative pursuits.<sup>73</sup>

Moreover, numerous studies examine relationships between entrepreneurship and laws in the areas of securities, early-stage investing, employment, and bankruptcy. Securities law receives extensive attention because of the importance of access to capital for start-up entrepreneurs.<sup>74</sup> Venture capital contracting is a prominent area of study to understand how investors and entrepreneurs privately allocate incentives for successful innovation and risks for failed enterprises.<sup>75</sup> Employment law heavily impacts entrepreneurship, specifically in relation to flexible hiring practices, employee mobility, and non-competition agreements.<sup>76</sup> And

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forms of collusion are placed at the core of competition policy”); C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1187, 1235-1251 (2013) (proposing “parallel exclusion” (i.e., coordinated efforts of multiple firms to exclude competitors) as monopolistic conduct due to the resulting detrimental effects on innovation); Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement if Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 314-17 (2012) (noting that “from the perspective of innovation promotion, exclusion [of competitors] is . . . worse than consumers paying high prices”). See also Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005, 1007 (1987) (describing the classical approach to antitrust and the market-based position that “antitrust is not another form of regulation” but instead is designed to “sustain market competition”).

71. E.g., Adam Mossoff, *Who Cares What Thomas Jefferson Thought about Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 959-1011 (2007) (tracing historical influences on patent law).

72. E.g., Raymond Shih Ray Ku, Jiayang Sun & Yiying Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty*, 62 VAND. L. REV. 1669, 1676-84 (2009) (reviewing the justifications for copyright protection).

73. E.g., Yochai Benkler, *Coase’s Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369, 423-443 (2002) (discussing individual motivations for peer-production on collaborative Internet projects); Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 640-47 (2012) (arguing that intrinsic motivation, not the external incentives of intellectual property law—such as copyrights and patents—encourage entrepreneurial creativity); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 513-36 (2009) (identifying “love, desire, and other passions” as motivating entrepreneurial creations more than the incentive model of classical economics).

74. Ibrahim, *supra* note 63, at 753-61.

75. Smith & Ueda, *supra* note 60, at 359-64 (reviewing literature on entrepreneurship, investor protection laws, and venture capital contracting); D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315, 337-55 (2005) (discussing venture capital contracting practices that arise out of entrepreneurs’ and investors’ divergent interests in exit events); Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 STAN. L. REV. 1067, 1069 (2003) (asserting that “the keystone of the U.S. venture capital market is private ordering—the contracting structure that developed” to finance “early-stage, high-technology” companies).

76. For instance, the well-known comparison of employment laws in California and



bankruptcy law intersects entrepreneurship insofar as bankruptcy discharge laws affect people's willingness to launch entrepreneurial ventures that have a high risk of failure.<sup>77</sup>

The question of law's incentives, or disincentives, for entrepreneurship is rich in complexity, nuance, and potential for the future of the law and entrepreneurship field. Many discrete areas of law play a role in nurturing an entrepreneurial ecosystem. Instead of providing another example of where law intersects entrepreneurship, though, this article proposes an overarching analytical paradigm that uses creative destruction as the unifying principle of law and entrepreneurship legal conflict.

#### D. *Law and Strategy in Entrepreneurship*

As a practical application of this article's thesis proposing a jurisprudential model of law and entrepreneurship, this article also suggests a strategic playbook for disruption framers to use in creative destructive

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Massachusetts—the former seen to be encouraging entrepreneurship by frowning on non-competition agreements and the latter viewed as hindering entrepreneurship through more robust enforcement of noncompetition agreements—shows how law can potentially encourage or discourage innovation. *See generally* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999); ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1996). *See also* Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 965 (urging a uniform “rule of unenforceability of employee non-competes similar to California’s statutory provision”); Catherine L. Fisk, “*An Ingenious Man Enabled by Contract*”: *Entrepreneurship and the Rise of Contract*, (Duke Law School Legal Studies Research Paper No. 157, 2007), available at <http://ssrn.com/abstract=983739> [<https://perma.cc/R53X-8ERW>] (analyzing the effect on entrepreneurship of strengthening or weakening employee rights to employee inventions made on behalf of employers); Catherine L. Fisk, *The Story of Ingersoll-Rand v. Ciavatta: Employee Inventors in Corporate Research & Development – Reconciling Innovation with Entrepreneurship*, (Duke Law School Legal Studies Research Paper No. 120, 2006), available at <http://ssrn.com/abstract=924783> [<https://perma.cc/HF9M-YJVS>] (discussing a 1988 New Jersey case dealing with the enforceability of invention assignment agreements).

77. John Armour & Douglas Cumming, *Bankruptcy Law and Entrepreneurship*, 10 AM. L. & ECON. REV. 303, 305-20 (2008) (finding empirical support for a link between entrepreneurship and bankruptcy discharge); Kenneth Ayotte, *Bankruptcy and Entrepreneurship: The Value of a Fresh Start*, 23 J.L. ECON. & ORG. 161, 165-75 (2007) (discussing the benefits of debt forgiveness in bankruptcy for small business entrepreneurs); Parker, *supra* note 60, at 708-711 (describing “the economic literature [that] has propounded several arguments claiming that laxer bankruptcy laws encourage entrepreneurship”); John M. Czarnetzky, *The Individual and Failure: A Theory of the Bankruptcy Discharge*, 32 ARIZ. ST. L.J. 393, 399 (2000) (explicating an “entrepreneurial hypothesis” of bankruptcy discharge that “provides the entrepreneur the assurance that if he acts honestly but fails, he will not be subject to debt servitude”).

legal conflict. The disruption framer's playbook arises from the foundation that scholars on law, business strategy, and competitive advantage have established.<sup>78</sup> In simple terms, the robust literature on what constitutes a competitive advantage can be briefly summarized as strategies that create value over the long term and that competitors do not widely practice and cannot easily copy.<sup>79</sup>

One of the early business law scholars to examine how companies can use law strategically to create competitive advantages proposed a four step framework.<sup>80</sup> In Siedel's framework, company managers first seek to understand relevant laws.<sup>81</sup> Then they progress to a fight or flight reaction to legal problems.<sup>82</sup> Third, managers develop preventative solutions to legal problems, and fourth, they reframe legal concerns as business opportunities.<sup>83</sup> The fourth stage is the pinnacle of Siedel's process, where law actually merges into business strategy to create enduring competitive advantages for a company.<sup>84</sup>

Another framework for integrating law and business strategy consists of five pathways.<sup>85</sup> In Bird's framework, the first pathway is avoidance, where managers view law as a costly and arbitrary or random barrier to business.<sup>86</sup> Firms can also take a path of compliance, where law is considered a necessary constraint on business activity,<sup>87</sup> or a path of

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78. Constance E. Bagley, *What's Law Got to Do with It?: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587 (2010); Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 61 (2011); GEORGE J. SIEDEL & HELENA HAAPIO, *PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE FOR COMPETITIVE ADVANTAGE* (Gower Publishing, 2011); G. RICHARD SHELL, *MAKE THE RULES OR YOUR RIVALS WILL* (2011). For analysis of the ethical implications of law, strategy, and competitive advantage, see Daniel T. Ostas, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Laws*, 47 AM. BUS. L.J. 291 (2010); Daniel T. Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 AM. BUS. L.J. 487 (2009); Daniel T. Ostas, *Cooperate, Comply, or Evade? A Corporate Executive's Social Responsibility with Regard to Law*, 41 AM. BUS. L.J. 559 (2004).

79. See Bird, *supra* note 78, at 71-79 (discussing research on competitive advantage). Two particularly influential works on competitive advantage include MICHAEL E. PORTER, *COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE* (1998) and Jay Barney, *Firm Resources and Sustained Competitive Advantage*, 17 J. MGMT. 99 (1991).

80. GEORGE J. SIEDEL, *USING THE LAW FOR COMPETITIVE ADVANTAGE* 22-25 (2002).

81. *Id.* at 22.

82. *Id.* at 23.

83. *Id.* at 23-25.

84. *E.g., id.* at 24-25, 52-55, 71-75.

85. Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 12-38 (2008); Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGT. REV. 81, 82-88 (2014).

86. *Id.* at 12-17.

87. *Id.* at 17-23.

prevention, where law is used to preempt particular business risks.<sup>88</sup> The fourth pathway moves law to the value-creation level, where legal strategies result in a tangible boost to the firm's bottom line.<sup>89</sup> Finally, the fifth pathway involves transformation, where legal strategy becomes an essential component of long-term business strategy.<sup>90</sup> Firms on the fifth pathway capture competitive advantages because legal strategies create value for the company and merge into the company's very identity and culture, transforming the company in such a way that competitors cannot easily imitate.<sup>91</sup>

A third conception of legal strategy as competitive advantage in business centers around the notion of "legal astuteness."<sup>92</sup> Bagley analyzes the degrees of legal astuteness that top management teams possess.<sup>93</sup> She especially emphasizes a proactive instead of reactive approach to legal issues, wise and deliberative judgment in assessing legal questions, and intimate knowledge of a company's business as a precursor to high-quality legal advice.<sup>94</sup> Under Bagley's approach, the more legally astute a company's management team becomes, the more likely the company is to seize competitive advantages through legal strategy that seamlessly complements business objectives.<sup>95</sup>

As explained in Part IV.B., the role of disruption framers extends the law, business strategy, and competitive advantage literature into the context of creative destructive legal conflict.<sup>96</sup> And the role of disruption framers reaches the highest tiers of legal strategy that current models identify. Specifically, disruption framers operate at the level of reframing legal issues as business opportunities (Siedel), transforming entrepreneurial firms through strategic use of law (Bird), and developing legal astuteness

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88. *Id.* at 23-26.

89. *Id.* at 27-31.

90. *Id.* at 31-38.

91. *Id.*

92. Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378, 379 (2008).

93. *Id.* at 383.

94. *Id.* at 380-83.

95. *Id.* at 383, 387.

96. Other recent extensions of the law, strategy, and competitive advantage literature include intellectual property (David Orozco, *Legal Knowledge as an Intellectual Property Managerial Resource*, 47 AM. BUS. L.J. 687 (2010)), contract law (Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727 (2010)), international business (Justin W. Evans & Anthony L. Gabel, *Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework*, 39 N.C.J. INT'L L. & COMP. REG. 333 (2014)), and crowdfunding entrepreneurship (Jack Wroldsen, *Proactive Law as Competitive Advantage in Crowdfunding*, in STRATEGIC APPROACHES TO SUCCESSFUL CROWDFUNDING (D. Assadi ed., IGI Global (2015))).

as an integral part of business strategy (Bagley).

## II. ENTREPRENEURSHIP AND ECONOMICS

Before progressing to examples of the article's thesis in Part III, Part II explains how economic theory undergirds legal analysis in the law and entrepreneurship field. The transactional account of entrepreneurship is based on a classical approach to economics whose models ironically leave little room for entrepreneurial activity. In contrast, this article advocates an economic theory of entrepreneurship that places preeminent importance on entrepreneurs' creative destructive activities. Viewing entrepreneurship through a creative destructive lens is the springboard for the article's dual emphasis on the need for a unified body of creative destructive legal conflict and the lawyer's role as a disruption framer.

### A. *Entrepreneurs in Classical Economics*

The transaction-based explanation of what business lawyers do arose out of classical economic theory. As noted in Part I.B, to explain how lawyers add value to business deals by reducing transaction costs, Gilson's transaction cost engineer model explicitly relies on the capital asset pricing model (CAPM), which is part and parcel of classical economics.<sup>97</sup> In broad overview, classical economics posits as a fundamental tenet that supply and demand forces continually propel the economy towards a state of balanced equilibrium.<sup>98</sup> In classical economics, the analytical inquiry remains largely centered on business transactions where marginal cost and marginal utility dictate rational economic behavior.<sup>99</sup> And though behavioral economics helpfully demonstrates the shortcomings of the rational actor assumption,<sup>100</sup> behavioral economics generally does not alter the overarching analytical paradigm of classical economics that focuses on

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97. Gilson, *supra* note 8, at 250-53. Beyond Gilson, the law and economics literature is vast. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, (Aspen Pub., 7th ed., 2007) (examining the application of economic principles to the legal system).

98. Herbert Hovenkamp, *Schumpeterian Competition and Antitrust*, 1-3 (Univ. of Iowa Legal Studies Research Paper 08-43, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1275986](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275986) [https://perma.cc/U23T-AP57]. In contrast, "Schumpeter argues that capitalism's defining trait of constant change and innovation makes the whole idea of 'equilibrium' misleading." MCCRAW, *supra* note 5, at 163.

99. Licht, *supra* note 63, at 820.

100. Three recent and highly influential works in the burgeoning behavioral economics field include DAN ARIELY, *PREDICTABLY IRRATIONAL* (Harper Perennial, 2010), DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (Farrar, Straus & Giroux, 2013) and RICHARD THALER & CASS SUNSTEIN, *NUDGE* (Penguin Books, 2009).

supply and demand forces leading to market equilibrium.<sup>101</sup> Under a classical economic analysis, even as further elucidated through the insights of behavioral economics, transactional lawyers are indeed central, as they help grease the wheels of capitalism by helping consummate business deals. They reduce transaction costs, structure business enterprises efficiently, improve regulatory treatment of corporate transactions, and serve as reputational intermediaries.<sup>102</sup>

But classical economic theory largely ignores the entrepreneur: “From Adam Smith and David Ricardo on, a venerable line of classical and neoclassical economists have developed market models that assign little to no special significance to the entrepreneur.”<sup>103</sup> For instance, “[e]ntrepreneurs are largely absent from the economic theory of [Adam] Smith—he never uses the term . . . .”<sup>104</sup> Instead, Smith’s “depiction of an ‘invisible hand’ leading to market equilibrium drew attention away from the entrepreneur’s self-consciously generative role.”<sup>105</sup> And following Smith’s impetus, influential economists like John Maynard Keynes<sup>106</sup> as well as neoclassical economists in the twentieth century “have likewise tended to trivialize entrepreneurship in their formal models of a steady-state economy.”<sup>107</sup>

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101. For instance, in reviewing recent economics scholarship on entrepreneurship, the authors state that “[a]lthough maximizing agents and equilibrium concepts are still at the core of most models in behavioral economics, rational motivations are not required.” Maria Minniti & Moren Lévesque, *Recent Developments in the Economics of Entrepreneurship*, 23 J. BUS. VENTURING 603, 607 (2008).

102. See *supra* Part I.B.

103. David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 288 (2008); MCCRAW, *supra* note 5, at 70 (observing that “even though . . . [continual economic change] resonates with the experience of nearly all businesspeople, [it] has seldom been embraced by academic economists . . . . [U]nlike the idea of equilibrium, the phenomenon of entrepreneurship is almost impossible to ‘model’ through the use of equations yielding mathematical proof. Thus, even though academic economists have moved beyond the steady state, they have paid little attention to the entrepreneur, even to this day.”).

104. Pozen, *supra* note 103, at 288.

105. *Id.*

106. MCCRAW, *supra* note 5, at 481 (underscoring that Schumpeter believed “most economists had lost sight of the heart of the capitalist process, which in its endless dynamism was the opposite of Keynesian stagnationism.”). For a discussion of the influence of and differences between Keynes and Schumpeter, see Peter Drucker, *Schumpeter and Keynes*, FORBES (May 23, 1983), available at [http://www.forbes.com/2007/10/10/schumpeter-keynes-economics-biz-cz\\_pd\\_1011schumpeter.html](http://www.forbes.com/2007/10/10/schumpeter-keynes-economics-biz-cz_pd_1011schumpeter.html) [<https://perma.cc/BFA7-JR99>].

107. Pozen, *supra* note 103, at 288; MCCRAW, *supra* note 5, at 72 (“Schumpeter . . . argues that entrepreneurial interventions make the notion of the steady state a mere fiction, nothing more than a hypothetical teaching device. The idea of equilibrium itself becomes problematical, since continual disruption is the basis for economic development and

In an economic analysis where hypothetical models postulate perfect competition, perfect knowledge or information, and market equilibrium, little room is left for the destabilizing force of entrepreneurship.<sup>108</sup> The focus turns to how scarce resources are used most productively “thanks to market transactions that lead to equalizing marginal costs and utilities.”<sup>109</sup> Such a view of economics positions firms as the primary economic actors, and from the classical economic viewpoint, “the entrepreneur is nothing more than a person owning a firm.”<sup>110</sup>

It is at best incongruous and ironic, then, that the law and entrepreneurship field would gravitate towards and come to be closely associated with a transaction-based approach derived from an economic theory that deemphasizes entrepreneurship. And because Gilson’s transaction cost engineer paradigm is explicitly based on the assumptions of the classical economic model, it also fails to provide a comprehensive lens for studying entrepreneurship. For instance, in expressing skepticism about Gilson’s approach, Lipshaw observes that “[n]either physical science nor social science has an answer for radical, unexpected, game-changing, paradigm-shifting *surprise*.”<sup>111</sup> And as discussed in Part II.B, the lifeblood of a creative destructive approach to economics is precisely the point where classical economics falters: radical, unexpected, game-changing, paradigm-shifting innovation. The law and entrepreneurship field must therefore embrace a more robust vision of law’s relationship to entrepreneurship stemming from an economic theory that prioritizes instead of marginalizes entrepreneurial activity.

### B. *Entrepreneurs in Creative Destructive Economics*

The law and entrepreneurship field should take its analytical cue from

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embodies the essence of capitalism.”).

108. Eyal-Cohen, *supra* note 5, at 733-34; Pozen, *supra* note 103, at 289 (asserting that in such a world “entrepreneurs would have nothing to offer; the concept of entrepreneurship would not even make much sense.”); MCCRAW, *supra* note 5, at 353 (“Such models [of perfect competition] contemplate frictionless transactions . . . . Perfect competition lends itself very well to mathematical modeling, . . . and that advantage has been almost irresistible to economists. But because it neglects the dynamics of creative destruction, Schumpeter finds perfect competition wholly unsuitable for understanding a modern capitalist economy.”).

109. Licht, *supra* note 63, at 820; Thomas Arthur, *The Costly Quest for Perfect Competition: Kodak and Nonstructural Market Power*, 69 N.Y.U. L. REV. 1, 9-10 (1994) (observing that “[p]rice and cost rule this artificial world. Market prices are dictated by the equilibrium of supply and demand.”).

110. *Id.* at 821.

111. Jeffrey M. Lipshaw, *What Is It Like to Be a Beetle? The Timelessness Problem in Gilson’s Value Creation Hypothesis*, 15 U.C. DAVIS BUS. L.J. 23, 37 (2014).

leading economic theory on the nature<sup>112</sup> of entrepreneurship. Though a precise, all-encompassing definition of entrepreneurship may remain elusive,<sup>113</sup> certain fundamental components of entrepreneurship are well established, as explained below. This article focuses solely on a creative destructive theory of entrepreneurship: the dialectical process whereby entrepreneurs create new markets and simultaneously destroy existing markets or market leaders through disruptive innovation.

Abstractly, the term “entrepreneurship” connotes creativity or novelty applied to opportunity,<sup>114</sup> and an interdisciplinary context is immediately apparent.<sup>115</sup> Historically, the study of entrepreneurship owes much to the initial insights of Richard Cantillon, who not only “introduced the term into mainstream economic discourse” in the mid-1750s but also “identif[ied] risk bearing as a constitutive element.”<sup>116</sup> In the 1900s, Frank Knight’s impetus further refined the understanding of entrepreneurship through research that distinguished between risk and uncertainty.<sup>117</sup> Knight argued

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112. Entrepreneurship can be limited to start-up company innovation backed by venture capital investment, expanded to small business “mom-and-pop” operations, or widened to “intrapreneurship” that established firms pursue to launch new products. Means, *supra* note 7, at 7-15; Smith & Ueda, *supra* note 60, at 356. Beyond capitalist entrepreneurs, the definition can also encompass other types of entrepreneurs—social entrepreneurs, policy entrepreneurs, norm entrepreneurs. See Pozen, *supra* note 103, at 294-315 (chronicling society’s and scholars’ application of the term “entrepreneur” in a variety of contexts); Robin Paul Malloy, *Real Estate Transactions and Entrepreneurship: Transforming Value Through Exchange*, 43 IND. L. REV. 1105, 1116-21 (2010) (discussing “entrepreneurship as occurring in three different market settings identifiable as private, public and social entrepreneurship” and identifying four types of entrepreneurs: simple transaction entrepreneur, speculator entrepreneur, innovator entrepreneur, and network entrepreneur). A leading school of entrepreneurship even has a trademarked phrase to describe itself as the educator for “Entrepreneurs of All Kinds.” *About Babson*, BABSON COLLEGE, <http://www.babson.edu/about-babson/Pages/home.aspx> [https://perma.cc/5HGP-CXL8] (last visited May 1, 2015).

113. Pozen, *supra* note 103, at 285 (“Theories of entrepreneurship abound, but we have no completely satisfying synthetic account of the practice, and we probably never will.”); Licht, *supra* note 63, at 819 (“A well-known problem in the . . . field of entrepreneurship is the lack of an agreed definition . . .”); Smith & Ueda, *supra* note 60, at 355 (noting that “entrepreneurship as a distinct field of research is still searching for an identity”); Means, *supra* note 6, at 5-12; Ibrahim & Smith, *supra* note 6, at 83-89.

114. See Smith & Ibrahim, *supra* note 61, at 1540-1545 (summarizing academic research on “entrepreneurial opportunities”); Ibrahim & Smith, *supra* note 6, at 84.

115. See R. Duane Ireland & Justin W. Webb, *A Cross-Disciplinary Exploration of Entrepreneurship Research*, 33 J. MGMT. 891, 894 (2007) (cataloguing entrepreneurship research in distinct academic disciplines, including accounting, anthropology, economics, finance, management, marketing, operations management, political science, psychology, and sociology); Licht, *supra* note 63, at 819-50 (reviewing academic literature from economics, psychology, and cultural studies on entrepreneurship).

116. Pozen, *supra* note 103, at 287.

117. *Id.* at 291-92; Licht, *supra* note 63, at 823.

that market risk pertains to recurring events against which companies take out insurance.<sup>118</sup> In Knight's view, though, the entrepreneur is uniquely willing to bear "uncertainty," or unknown future events that are uninsurable, unpredictable, and derive from the process of discovering ever-changing market demands.<sup>119</sup>

But Joseph Schumpeter is perhaps the economist (and lawyer)<sup>120</sup> who most prominently and memorably explained capitalism in terms of the entrepreneur's role and impact.<sup>121</sup> Schumpeter approached economics differently than classical economists.<sup>122</sup> He disagreed that markets tend toward equilibrium and drew attention away from Smith's "invisible hand" metaphor.<sup>123</sup> Instead, viewing capitalism as an existential struggle, Schumpeter asserted that the natural state of capitalist markets is competitive upheaval.<sup>124</sup>

Schumpeter argued that

in capitalist reality as distinguished from its textbook picture, . . . the competition [that counts is] from the new commodity, the new technology, the new source of supply, the new type of organization . . . —competition which . . . strikes not at the margins of . . . existing firms but at their foundations and their very lives . . . [A] theoretical construction which neglects this essential element . . . neglects all that is most typically capitalist

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118. Pozen, *supra* note 103, at 291-92; Licht, *supra* note 63, at 823.

119. Pozen, *supra* note 103, at 291-92; Licht, *supra* note 63, at 823.

120. See McCraw, *supra* note 5, at 60-62 (describing Schumpeter's brief but successful law practice in Cairo); Thomas K. McCraw, *Classics: Joseph Schumpeter on Competition*, 8 COMPETITION POL'Y INT'L 194, 221 (2012) (noting that "Schumpeter had been trained at the University of Vienna as a lawyer as well as an economist, but he had left the practice of law in 1908").

121. McCraw, *supra* note 5, at 503-04.

122. Among other differences, Schumpeter viewed capitalism as an evolving process through a long-term lens where disequilibrium is the norm, contrasting his perspective with those of other economists who, in Schumpeter's estimation, were too focused on particular events or particular points in time where market equilibrium and simplifying assumptions, like perfect competition or perfect information, obscured entrepreneurial realities. See Schumpeter, *supra* note 5, at 84 (arguing that "the problem that is usually being visualized is how capitalism administers existing structures, whereas the relevant problem is how it creates and destroys them").

123. See Eyal-Cohen, *supra* note 5, at 726 (asserting that "Schumpeter, unlike Adam Smith, argued that there is no invisible hand directing the forces of the economy toward stability and growth").

124. Arthur, *supra* note 109, at 10-12; Schumpeter, *supra* note 5, at 31-32 ("[C]apitalist economy is not and cannot be stationary. Nor is it merely expanding in a steady manner. It is incessantly being revolutionized *from within* by new enterprise . . . . Economic progress, in capitalist society, means turmoil. And . . . in this turmoil competition works in a manner completely different from the way it would work in a stationary process, however perfectly competitive.").



about it; . . . it is like *Hamlet* without the Danish prince.<sup>125</sup>

Schumpeter took particular issue with how the classical economic assumption of perfect competition failed to account for innovation, noting that “[t]he introduction of new methods of production and new commodities is hardly conceivable with perfect—and perfectly prompt—competition from the start. And this means that the bulk of what we call economic progress is incompatible with” the classical economic assumption of perfect competition.<sup>126</sup> That is, innovation is by nature new and different; thus, perfect competition is impossible when radical, unexpected, game-changing, paradigm-shifting innovation occurs.<sup>127</sup> And if innovation is the primary catalyst of a capitalist economy, then an economic model that assumes away the catalyst of the system has grievously distorted the reality it claims to represent.

Schumpeter thus places innovation at the center of economics, describing capitalism as “industrial mutation . . . that incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism.”<sup>128</sup> Through technological progress, innovative competitors continually threaten to overtake and destroy industry leaders.<sup>129</sup> And when status-quo market leaders fall and are replaced due to competitors’ new technology or innovative business models, Schumpeter termed the process creative destruction.<sup>130</sup>

For Schumpeter, creative destruction is the disruptive dynamism and energy behind capitalist economies, where innovative creations continually challenge and destroy existing businesses, sometimes breaking laws in the process.<sup>131</sup> From the perspective of creative destruction, economies do “not

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125. Schumpeter, *supra* note 5, at 84-86.

126. *Id.* at 105 (“As a matter of fact, perfect competition is and always has been temporarily suspended whenever anything new is being introduced . . .”).

127. *Id.* at 106.

128. *Id.* at 83.

129. Michael L. Katz & Howard A. Shelanski, “Schumpeterian” *Competition and Antitrust Policy in High-Tech Markets*, 14 *COMPETITION* 47, 49 (2005) (explaining that “[a]t the heart of the Schumpeterian argument” is that “firms do not compete simultaneously for a share of the market, but rather sequentially for the market as a whole”); Eyal-Cohen, *supra* note 5, at 726 (noting that for Schumpeter, entrepreneurs’ “innovative new combinations destroy the basis of the old economy”).

130. Schumpeter, *supra* note 5, at 83.

131. Schumpeter described the entrepreneur’s role in capitalist society as follows: “Without innovations, no entrepreneurs; without entrepreneurial achievement, no capitalist returns and no capitalist propulsion. The atmosphere of industrial revolutions—of ‘progress’—is the only one in which capitalism can survive.” McCraw, *supra* note 5, at 1, citing Joseph Schumpeter, *BUSINESS CYCLES: A THEORETICAL, HISTORICAL AND STATISTICAL*

tend naturally toward stability and growth through the workings of an invisible hand, but rather . . . [they are] propelled forward in sudden leaps by the endogenous innovations of key entrepreneurs.”<sup>132</sup> In creative destruction, entrepreneurs are seen as the principle agents of change—“the pivot on which everything turns”<sup>133</sup>—indeed, even as revolutionaries.<sup>134</sup>

Later scholars have extended and refined Schumpeter’s approach.<sup>135</sup> For instance, Israel Kirzner envisions the entrepreneur’s primary characteristic as “alertness” to opportunities that others fail to appreciate.<sup>136</sup> Kirzner follows Schumpeter in concluding that “[o]pportunities for entrepreneurial profit only exist in disequilibrium”; therefore, from an entrepreneurial perspective, the usefulness of the classical economic assumption of “perfect knowledge [that] exists in a state of equilibrium” is highly suspect because of its disconnect from the reality of entrepreneurship.<sup>137</sup> In addition, William Baumol expands Schumpeter’s conception of innovation to include any economic activity performed in a novel way.<sup>138</sup>

Finally, a particularly influential contribution to entrepreneurship research stems from Clayton Christenson’s work on disruptive innovation that propels the process of creative destruction.<sup>139</sup> Christenson contrasted “sustaining innovations” with “disruptive innovations” and tied the latter directly to creative destruction.<sup>140</sup> He found that existing market leaders

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ANALYSIS OF THE CAPITALIST PROCESS 1033 (McGraw-Hill 1939).

132. Pozen, *supra* note 103, at 291.

133. McCraw, *supra* note 5, at 7, citing Joseph Schumpeter, HISTORY OF ECONOMIC ANALYSIS 555 (Oxford Univ. Press 1954).

134. Hobbs, *supra* note 6, at 285; Pozen, *supra* note 103, at 291. *See* Schumpeter, *supra* note 5, at 132 (arguing that “the function of entrepreneurs is to . . . revolutionize the pattern of production by exploiting an invention or, more generally, an untried technological possibility for producing a new commodity or producing an old one in a new way, by opening up a new source of supply of materials or a new outlet for products, by reorganizing an industry and so on”).

135. *See* Eyal-Cohen, *supra* note 5, at 730-37 (reviewing contemporary scholars’ additions to Schumpeter’s framework).

136. Pozen, *supra* note 103, at 292-93; Licht, *supra* note 63, at 823-24; Eyal-Cohen, *supra* note 5, at 733-34.

137. Eyal-Cohen, *supra* note 5, at 733.

138. Pozen, *supra* note 103, at 293; Eyal-Cohen, *supra* note 5, at 731-33.

139. Christenson, *supra* note 4, at 46-48. *See also* Richard N. Foster, INNOVATION: THE ATTACKER’S ADVANTAGE (Summit Books 1988) (arguing that “technological discontinuities” help explain how start-up companies overtake established firms); THOMAS KUHN, STRUCTURE OF SCIENTIFIC REVOLUTIONS (3rd ed., Univ. of Chicago Press 1996) (1962) (explaining “paradigm shifts” as the method of scientific progress advancing through revolutionary leaps in understanding, not linear steps in incremental knowledge).

140. *See* Christenson, *supra* note 4, at xxxiv of Preface (agreeing with a co-researcher that “disruptive technology is probably the cause behind the ‘creative destruction’ that economist Joseph Schumpeter observed to be the primary engine of economic progress”).

often successfully accomplish sustaining innovations, or incremental and marginal improvements on existing products.<sup>141</sup> But Christenson demonstrated that start-up entrepreneurs with new technologies, or “new product architectures involving little new technology per se,”<sup>142</sup> are frequently better positioned than existing market leaders to carry out disruptive innovations, which create new markets and eventually destroy old ones.<sup>143</sup>

For example, in the disk drive industry, Christenson found that established companies consistently led new entrants in developing ever faster disk drives with ever increasing storage capacity.<sup>144</sup> Similarly, in the heavy-equipment industry, new entrants rarely threatened market-leading manufacturers of earth excavators that used a cable pulley system.<sup>145</sup> As long as the underlying technology and product architecture remained constant, even with continuous marginal improvements (sustaining innovations), industry leaders successfully fended off new entrants.<sup>146</sup> In both examples, though, new entrants did eventually dethrone industry leaders.<sup>147</sup> But they did so only by developing new technology or new product architectures (smaller disk drives and hydraulic excavators) that eventually made the technology of the industry leaders obsolete (larger disk drives and cable pulley excavators).<sup>148</sup> Disruptive innovation thus propels

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141. *Id.* at 46 (noting that in Christenson’s data set “there was not a *single* example . . . of an entrant firm leading the industry or securing a viable market position with a sustaining innovation”).

142. *Id.* at 62.

143. *Id.* at 48-54. Schumpeter envisioned both start-up firms and large companies as driving forces behind disruptive innovation. *See* McCraw, *supra* note 5, at 215 (describing Schumpeter’s discussion of innovation driven by new firms and existing firms). Particularly in the context of technological change “where the new methods of production are embodied in new industries,” Schumpeter recognized what Christenson investigated empirically: that new entrants, not existing market leaders, are often the ones to found new industries. *See* Schumpeter, *supra* note 5, at 119 (concluding that “obviously the automobile plants were not financed from the depreciation accounts of railroads”); McCraw, *supra* note 5, at 74 (observing that “Schumpeter especially emphasizes the role of *new* companies in making innovations that interrupt” existing markets).

144. *See* Christenson, *supra* note 4, at 46-54 (describing how industry leaders maintained a market dominant position so long as standard disk drive product architecture remained at 5.25-inch drives, but new entrants replaced market leaders by developing a new product architecture in the form of a 3.5-inch disk drive).

145. *See id.* at 69 (explaining that even as the power source for excavator engines progressed from steam-power to gasoline to diesel to electric, market leaders maintained their dominant position, but once the underlying product architecture of the cable pulley system was replaced by a hydraulic system, new entrants successfully unseated established companies to become the new market leaders).

146. *Id.* at 46, 69-72.

147. *Id.* at 46-54, 72-81.

148. *Id.*

and explains creative destruction.

From the perspectives of entrepreneurship scholars, then, the essence of entrepreneurship is not business transactions leading to market equilibrium. It is instead the ever-evolving world of creative destruction where disruptive innovations threaten the very existence of market leading companies. Extending the economic principles into law, the crux of the intersection of law and entrepreneurship can be viewed as the legal conflicts that creative destructive business models encounter. The primary theoretical tool of the law and entrepreneurship field should not come from the assumptions of classical economic theory that have little or no place for the entrepreneur. Instead, the theoretical tools of law and entrepreneurship should arise from economic theories that place preeminent importance on the entrepreneur, such as creative destruction and its accompanying disruptive innovations.

### III. CREATIVE DESTRUCTIVE LEGAL CONFLICT

This article proposes creative destruction as more than solely an economic explanation of entrepreneurship. Creative destruction should also serve as the organizing principle of the jurisprudence of law and entrepreneurship. Despite the prevalent link between creative destruction as a business phenomenon and creative destruction as a legal phenomenon, no unified jurisprudence of creative destruction exists. The jurisprudential core of law and entrepreneurship is the creative destructive moment (or moments) in some entrepreneurial firms' growth cycles when a disruptive innovation encounters legal conflict, whether that conflict occurs in court or outside of court. Those moments encapsulate the law of entrepreneurship.

Creative destruction is a high stakes battle.<sup>149</sup> Market leaders do not go down quietly, and rising innovators do not arrive politely.<sup>150</sup> Market revolutions are bloody, whether figuratively or sometimes even literally (as in the case of the Uber protests in Paris). As such, legal conflict frequently is at the core of creative destruction.<sup>151</sup>

And though the battleground for creative destructive legal conflict is often traditional litigation, the law of entrepreneurship also includes the conflicts that occur outside the courtroom. For instance, creative

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149. SCHUMPETER, *supra* note 5, at 84-86.

150. *Id.* at 96 (noting that market leaders "can in various ways fight the threatening attack . . . that is to say, they can and will fight progress itself").

151. *Id.* at 132-133 ("The resistance which comes from interests threatened by an innovation in the productive process is not likely to die out as long as the capitalist order persists.").

destructive legal conflict encompasses pre-litigation positioning and governmental and industry lobbying designed to smooth the path for disruptive innovations. Even further, creative destructive legal conflict also entails public relations advocacy, social media strategy, and advertising targeted at swaying public opinion. The “jurisprudence” of law and entrepreneurship is thus significantly broader than solely litigated cases; it includes the full panoply of legal conflicts that creative destructive entrepreneurs encounter outside of court. As discussed below, disruption framers deploy a host of legal strategies to confront all manner of legal conflict that creative destructive entrepreneurs encounter.

As described in Part I, creative destructive legal conflict has received little systematic attention in law and entrepreneurship scholarship, for at least two reasons. First, the predominant focus on business transactions that has been at the vanguard of the law and entrepreneurship field tends to sideline creative destructive legal conflict because it concentrates on attending to entrepreneurs’ transactional needs.<sup>152</sup> Second, jurisprudential analyses typically<sup>153</sup> conform to doctrinal boundaries that legal disciplines necessarily impose on their subject: antitrust jurisprudence considers antitrust cases just as intellectual property or securities jurisprudence evaluates the laws underlying their respective legal disciplines.

But doctrinal categorization ignores the motivating cause of the legal conflict: creative destruction through disruptive innovation. Of course, some doctrinal legal analyses helpfully apply a creative destructive paradigm to jurisprudential research within an established legal discipline, such as patent, copyright, or antitrust law.<sup>154</sup> But law and entrepreneurship scholarship should consolidate the dispersed examples to develop a holistic and systematic, instead of scattered and piecemeal, jurisprudence of creative destruction, including legal conflict both inside and outside of

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152. *E.g.*, Malloy, *supra* note 112, at 1107 (“In developing an understanding of the relationship among property law, real estate transactions, and entrepreneurship, it is important to understand that this analysis is from the perspective of transactional law theory.”).

153. For the law and entrepreneurship field, an important exception to the typical disciplinary approach is Smith and Ueda’s adaptability hypothesis, described in Part I.C.

154. *E.g.*, Hovenkamp, *supra* note 98 (considering how Schumpeter’s work applies to antitrust laws); Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 CALIF. L. REV. 805, 844-45 (1988) (adopting an explicitly “Schumpeterian framework for its analysis” of patent laws); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 268 (2002) (arguing that “file sharing enabled by digital technology . . . is not theft” but instead is creative destruction of copyright law); Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 BERKELEY TECH. L.J. 539, 564-74 (2003) (interpreting court decisions on the fair use exception in copyright law through a creative destructive lens).

court.

The examples highlighted below do not fit a transactional model of law and entrepreneurship because they have nothing to do with business deals. The entrepreneurial companies are not in need of transaction cost engineers, regulatory arbitrageurs, reputational intermediaries, enterprise architects, or any other transactional service provider. Creative destructive entrepreneurs need disruption framers to provide strategic counsel through the legal conflict that accompanies entrepreneurship, as Part IV explains.

#### A. *Tesla*

A prominent recent example of creative destructive legal conflict is Tesla, an innovative manufacturer of electric cars.<sup>155</sup> Tesla sells new cars directly to consumers, both over the Internet and through company-owned showrooms.<sup>156</sup> Though such direct sales practices are commonplace in most industries, direct sales of automobiles violate some states' franchise and car dealership laws, many of which were initially established when Ford's Model-T was cutting-edge technology.<sup>157</sup> In Texas, for instance, legal obstacles have caused the seemingly ludicrous situation of Tesla being permitted to display its cars in showrooms so long as the price of the cars remains a secret and no test drives occur.<sup>158</sup> In other states, Tesla has been barred from even operating a showroom because the company refuses to sell its cars through a middleman.<sup>159</sup>

On the surface, Tesla's legal conflict revolves primarily around the

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155. TESLA MOTORS, <http://www.teslamotors.com> [<https://perma.cc/4WVQ-7CA6>] (last visited May 29, 2015).

156. *Find Us*, TESLA MOTORS, <http://www.teslamotors.com/findus#> [<https://perma.cc/37SJ-WGYV>] (last visited May 29, 2015).

157. Mike Ramsey & Valerie Bauerlein, *Tesla Clashes With Car Dealers*, WALL ST. J., (June 18, 2013), <http://www.wsj.com/articles/SB10001424127887324049504578541902814606098> [<https://perma.cc/699F-XCEM>]; Mark Rogowsky, *After the New Jersey Ban, Here's Where Tesla Can (And Cannot) Sell Its Cars*, FORBES, (Mar. 15, 2014), <http://www.forbes.com/sites/markrogowsky/2014/03/15/after-the-new-jersey-ban-heres-where-tesla-can-and-cannot-sell-its-cars/> [<https://perma.cc/9UH2-UM9Z>].

158. Marcus Wohlsen, *Car Dealers Are Terrified of Tesla's Plan to Eliminate Oil Changes*, WIRED, (Mar. 14, 2014, 6:30 AM), <http://www.wired.com/2014/03/car-dealers-fear-teslas-plan-end-oil-changes-forever/> [<https://perma.cc/M5TQ-PMY6>].

159. Justin Hyde, *In Tesla Sales Fight, Automakers Take the Dealers' Side*, YAHOO! AUTOS, (Mar. 20, 2014), <https://www.yahoo.com/autos/bp/in-tesla-sales-fight—automakers-take-the-dealers—side-213905585.html> [<https://perma.cc/7XX3-2MTV>]; David Kravets, *West Virginia is the Latest State to Ban Tesla Direct Sales*, ARS TECHNICA, (Apr. 4, 2015, 1:27 PM), <http://arstechnica.com/cars/2015/04/west-virginia-is-the-latest-state-to-ban-tesla-direct-sales/> [<https://perma.cc/5PFV-EQPL>].

interpretation of car dealership rules and antitrust law.<sup>160</sup> Car dealership rules in many states have evolved to prohibit car manufacturers from selling cars directly to consumers through factory-owned stores.<sup>161</sup> Dealerships have successfully lobbied state legislatures to ban factory-owned stores on the grounds that independently owned car dealerships are more invested in local communities and would be at a competitive disadvantage if manufacturers could bypass dealers and sell directly to consumers at wholesale prices.<sup>162</sup> Accordingly, as Tesla attempts to sell its cars directly to consumers, car dealerships claim that Tesla's direct sales business model is a form of unfair competition.<sup>163</sup>

For example, dealership associations in Massachusetts and New York argued that it is unfair for Tesla to sell directly to consumers because all traditional car manufacturers sell through third-party dealerships.<sup>164</sup> In the dealerships' view, Tesla should not be an exception.<sup>165</sup> For its part, Tesla successfully argued in Massachusetts and New York that it should be free to sell cars directly to consumers because Tesla has no independent dealers; therefore, it would be impossible for Tesla to undercut a dealership's prices because there are no Tesla dealerships.<sup>166</sup> Furthermore, Tesla has buttressed its argument with reference to how technologically different electric cars are from traditional gas-powered vehicles and how many fewer vehicles Tesla sells compared to gas-powered vehicles.<sup>167</sup>

Following Tesla's victories in New York and Massachusetts, however, the Michigan legislature took action to preempt a similar result in the heartland of traditional U.S. car manufacturers.<sup>168</sup> The Michigan dealership statute previously stated that a manufacturer could not "sell any new motor

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160. *Matter of Greater N.Y. Auto. Dealers Ass'n v. Dep't of Motor Vehicles of the State of N.Y. LLC*, 969 N.Y.S.2d 721, 724-27 (Sup. Ct. Albany Cnty. 2013).

161. Cynthia Barmore, *Tesla Unplugged: Automobile Franchise Laws and the Threat to the Electric Vehicle Market*, 18 VA. J.L. & TECH. 185, 192-95 (2014); Rob Schwartz, Note, *Tesla, Vertical Integration, and Incumbent Legal Disadvantages in the New Car Retailing Market*, 60 WAYNE L. REV. 567, 579-82 (2014).

162. *Mass. State Auto. Dealers Ass'n v. Tesla Motors MA, Inc.*, 15 N.E.3d 1152, 1156-62 (2014).

163. *Id.*

164. *Id.*; *N.Y. Auto. Dealers Ass'n*, 969 N.Y.S.2d at 724-25.

165. *Mass. State Auto. Dealers Ass'n*, 15 N.E.3d. at 1156-62; *N.Y. Auto. Dealers Ass'n*, 969 N.Y.S.2d at 724-25.

166. *Mass. State Auto. Dealers Ass'n*, 15 N.E.3d. at 1156-62; *N.Y. Auto. Dealers Ass'n*, 969 N.Y.S.2d at 724-25.

167. *Mass. State Auto. Dealers Ass'n*, 15 N.E.3d. at 1156-62; *N.Y. Auto. Dealers Ass'n*, 969 N.Y.S.2d at 724-25.

168. Vince Bond Jr., *Tesla's Sales Limits in Michigan Tightened by One Word of Law*, AUTOMOTIVE NEWS, (Oct. 20, 2014, 8:32 AM), <http://www.autonews.com/article/20141020/RETAIL/141029995/teslas-sales-limits-in-michigan-tightened-by-one-word-of-law> [<https://perma.cc/D635-D3S4>].

vehicle directly to a retail customer other than through *its* franchised dealers.”<sup>169</sup> But the Michigan legislature voted to delete the word “its.”<sup>170</sup> Without that key word, the statute definitively requires all new motor vehicles to be sold through franchised dealers.<sup>171</sup> Therefore, the argument Tesla used successfully in New York and Massachusetts is much less likely to prevail in Michigan. The fact that Tesla has no franchised dealers will not help Tesla avoid application of Michigan’s dealership law to Tesla’s business model.

Regardless of the particularities of state car dealership rules or antitrust law, the root of Tesla’s legal conflict is disruptive innovation, which is manifested in two related ways. First, Tesla’s technology for manufacturing electric vehicles is a paradigm shift from the technology involved in producing gas-powered automobiles. Second, Tesla’s business model for selling and maintaining its cars flies in the face of the way new cars have been distributed since the invention of the automobile.

Tesla’s twin technological and business model disruptive innovations are inseparable from each other. Electric cars have been likened to “an app on four wheels,” such that “a Tesla without its outer shell looks like a cell phone on wheels. It’s basically just a big battery.”<sup>172</sup> Lacking an internal combustion engine—the hallmark of traditional automobiles—Tesla cars have “no spark plugs, no air filters, no fuel pumps, no timing belts,” which dramatically changes the type of maintenance that Tesla cars require.<sup>173</sup> Tesla updates the software in each car wirelessly and remotely over the Internet, and the car’s software automatically detects when new parts, such as brake pads or wiper blades, are needed.<sup>174</sup> Hence, because electric cars are technologically a different product from gas-powered cars, Tesla is reluctant to entrust third-party car dealerships with the crucial role of promoting and selling a product that not only competes with gas-powered vehicles but also undermines car dealerships’ revenue source of fee-for-service maintenance.<sup>175</sup> Consequently, the innovative design of Tesla cars goes hand in hand with the company’s strategy of selling and distributing cars directly. And for the automobile industry, a direct sales business model is an innovative, disruptive, and even illegal business model.

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169. *Id.*

170. *Id.*

171. *Id.*

172. Wohlsen, *supra* note 158.

173. *Id.*

174. *Id.*

175. *Id.*



### 1. Creative Destructive Analysis of Tesla

Using creative destruction as the touchstone of legal analysis reveals insights that would be missed under existing approaches to law and entrepreneurship. By definition, Tesla's legal conflict falls outside the scope of a transactional paradigm, but law and entrepreneurship should not be so limited. From an economic perspective, the hallmark of Tesla's entrepreneurial efforts is precisely its disruptive innovation, both in terms of its technology and its business model. Indeed, Tesla's disruptive innovation is precisely what leads to its legal conflict; therefore, the law and entrepreneurship field should embrace the legal conflict that disruptive innovation causes even though it falls categorically outside of transactional law.

Transactional attorneys do play a role in Tesla's entrepreneurial story. For example, transactional attorneys add value by creating a corporate structure that utilizes wholly-owned subsidiaries to sell cars in individual states, protecting Tesla's intellectual property, and counseling the company on selling stock in capital markets, among countless other areas. But once legal conflict arises, the contributions of the transactional approach typically cease. In legal scholarship, transactional theories are irrelevant to the legal conflict that entrepreneurs encounter. Similarly, in law practice, once a transactional matter enters a stage of legal conflict, large law firms pass the client from the corporate transactional group to a new set of lawyers in the litigation practice area. Law school clinics, too, are likewise bifurcated between transactional and litigation services.<sup>176</sup>

But the fact that legal skill sets require different attorneys to specialize in different areas is not a good reason for the law and entrepreneurship field to ignore Tesla's creative destructive legal conflict, which encompasses more than just litigation. Once the analytical lens of law and entrepreneurship expands to include legal conflict, it becomes immediately apparent that the key function for lawyers who counsel creative destructive entrepreneurs is to prepare and execute a comprehensive strategy for creative destructive legal conflict. For instance, beyond litigation, a key component of Tesla's creative destructive legal strategy involves social media,<sup>177</sup> lobbying,<sup>178</sup> and community mobilization among Tesla

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176. In a law school clinical setting, transactional clinics typically do not represent a client on matters that enter litigation. In an ideal scenario, a different clinic, such as the law school's civil litigation clinic, can assume representation. But seamless cooperation on client matters in the clinical environment is challenging because each clinic typically has its own wait list for potential new clients.

177. For example, Tesla's CEO has often taken to Twitter and other forms of social media to further Tesla's legal arguments. Ann Charles, *4 Social Media Secrets You Can Learn From Elon Musk*, FAST COMPANY (May 19, 2014),

supporters.<sup>179</sup>

These activities, like litigation, also fall outside the standard transactional account of entrepreneurship. One of Tesla's particularly effective lobbying strategies was to offer test drives to North Carolina legislators in an effort to fend off a new law that would have prohibited online sales of automobiles.<sup>180</sup> Legislators were impressed, and the new anti-Tesla measure never came up for a vote.<sup>181</sup> In view of the diverse strategic legal counsel that creative destructive legal conflict demands (beyond transactional advice), lawyers who counsel creative destructive entrepreneurs are more holistically conceived of as disruption framers, not transaction cost engineers, as further described in the examples that follow and in Part IV.

To develop legal strategy for entrepreneurs, disruption framers need unique skills that should be cultivated from a unified body of creative

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<http://www.fastcompany.com/3030697/bottom-line/4-secrets-teslas-ceo-and-other-leaders-teach-us-about-being-social-media-savvy> [https://perma.cc/DE52-4T2M]; Peter Delevett & Dana Hull, 2013: *Tesla's Media Strategy: Build A Brand Without Spending On Advertising*, SAN JOSE MERCURY NEWS (April 7, 2013), [http://www.mercurynews.com/business/ci\\_22976857/teslas-media-strategy-build-brand-without-spending-advertising](http://www.mercurynews.com/business/ci_22976857/teslas-media-strategy-build-brand-without-spending-advertising) [https://perma.cc/2UXV-FXFK]. For additional discussion of Tesla's social media strategy, see David Orozco, *The Use of Legal Crowdsourcing ("Lawsourcing") to Achieve Legal, Regulatory, and Policy Objectives*, 53 AM. BUS. L. J. 145, 163-64 (2016).

178. Tesla's lobbying activities have increased as it continues to seek state laws that accommodate its direct sales business model. See, e.g., Dana Hull, et al., *Tesla Takes On The Dealerships – And GM*, BLOOMBERG BUSINESSWEEK (Mar. 3, 2016), <http://www.bloomberg.com/news/articles/2016-03-03/tesla-takes-on-the-dealerships-and-gm> [https://perma.cc/N5NP-HPLN ] (describing successful efforts to derail an Indiana law that would have required Tesla to operate through a third-party dealership); Hugh R. Morley, *Top Businesses, Trade Groups Spent \$5.5M on Lobbying in NJ in 2014*, NORTHJERSEY (Mar. 12, 2015), <http://www.northjersey.com/news/business/where-business-lobbyists-put-their-cash-1.1287523?page=all> [https://perma.cc/E66W-VAT7 ] (detailing notable expenditures of business and trade-group lobbyists in 2014); David Saleh Rauf & Neal Morton, *Tesla Gears Up for Texas Lobbying Blitz*, SAN ANTONIO EXPRESS NEWS, (Dec. 18, 2014), <http://www.expressnews.com/news/local/article/Tesla-gears-up-for-Texas-lobbying-blitz-5967219.php> [https://perma.cc/RHP6-ENPR ] (discussing Tesla's Texas lobbying strategy).

179. Tamara Walsh, *Tesla's Cult-Like Following is Starting to Resemble Apple's*, BUSINESS INSIDER, (Sept. 2 2014), <http://www.businessinsider.com/teslas-cult-like-fans-resemble-apples-2014-9> [https://perma.cc/F37E-HN99]. Tesla's website includes numerous points of engagement for its supporters to help further Tesla's legal advocacy. *Forums*, TESLA MOTORS, <http://my.teslamotors.com/forum/forums/tesla-advocacy-web-site> [https://perma.cc/HM6L-SBWH ] (last visited June 26, 2015).

180. Julie Bykowicz & Angela Greiling Keane, *Tesla Woos Car-Guy Lawmakers to Counter Dealers' Cash*, BLOOMBERGBUSINESS, (Nov. 26, 2013), <http://www.bloomberg.com/news/articles/2013-11-26/tesla-woos-car-guys-with-rides-to-counter-dealers-cash> [https://perma.cc/24SP-AXRA].

181. *Id.*

destructive legal conflict. Without a unified framework of creative destructive legal conflict, Tesla's legal disputes simply fall under the two unrelated categories of state regulations of car dealerships and antitrust law. The former is too limiting and the latter is too narrow. Focusing the analysis on state regulations misses the more universal and generalizable theme of disruptive innovation, which occurs in many more contexts beyond state regulations. And housing Tesla's legal conflict under antitrust law prioritizes one aspect of the dispute (namely, allegations of unfair competition)<sup>182</sup> but avoids connections to other cases of creative destructive legal conflict where antitrust law is not central. Even in Tesla's case, the legal strategy goes beyond antitrust law: Tesla has considered seeking federal legislation under the commerce clause that would facilitate Tesla's direct sales model nationwide.<sup>183</sup> Tesla's legal strategy thus involves constitutional law, which demonstrates that antitrust law is insufficient to capture even the full range of Tesla's creative destructive legal conflict, not to mention the creative destructive legal conflict that other entrepreneurial firms encounter, as the examples below further demonstrate.

Instead of forcing Tesla's legal conflict into existing disciplinary categories, this article suggests using the underlying economic driver of Tesla's legal conflict (creative destruction) as the organizing principle of jurisprudential analysis. And whereas innovation law and policy tends to emphasize antitrust and intellectual property law, this article's proposed framework would cross all legal disciplinary lines in an effort to unite creative destructive legal conflict as an economic and business phenomenon, irrespective of legal categories. Whether viewed as an expansion of innovation law or of the law and entrepreneurship field, then, this article's substantive proposal is to unify and organize all creative destructive legal conflict as one coherent body, in order to provide disruption framers with the strategic tools they need to advise creative destructive entrepreneurs.

### B. *Uber*

Another prime contemporary example of creative destructive legal conflict is Uber. Whereas traditionally people would hail a taxi cab on the street, Uber relies on an Internet app that allows riders and drivers to

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182. *N. Y. Auto. Dealers Ass'n*, 969 N.Y.S.2d at 724-27.

183. Ramsey & Bauerlein, *supra* note 157, at 3 (describing Tesla's interest in "a federal legal challenge based on limits to interstate commerce" and "new [federal] legislation in Congress"). For a discussion of commerce clause jurisprudence in the context of car dealerships, see Barmore, *supra* note 161, at 211-13, and Schwartz, *supra* note 161, at 574-79.

schedule a pickup electronically.<sup>184</sup> And whereas traditional taxi services are highly regulated enterprises with government-licensed cars and full-time drivers, Uber leverages part-time drivers who use their own cars so that practically anyone with a car and spare time can make extra money as an Uber driver.<sup>185</sup>

From a business perspective, Uber's successful results are undeniable. After operating for less than four years in New York, there are already more cars affiliated with Uber on the streets of New York City than there are taxi cabs.<sup>186</sup> Uber was valued near \$51 billion in its most recent investment round, tying Facebook as the highest-valued venture-backed company in history and achieving the \$50 billion milestone two years faster than Facebook.<sup>187</sup> Uber is currently the highest-valued venture-backed company in the US by a margin of some \$40 billion.<sup>188</sup> Uber has won all kinds of awards and recognition in the entrepreneurial community,<sup>189</sup> and though Uber is more prominent than its competitors, it is far from alone in the electronic ride-hailing market.<sup>190</sup> Outside of ride-hailing, other companies in the so-called "sharing economy"<sup>191</sup> are also challenging legal rules with their innovative business models, such as car-sharing firms like FlightCar and Turo (formerly called RelayRides),<sup>192</sup> and home-sharing

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184. *Boston Cab Dispatch, Inc. v. Uber Technologies, Inc.*, Civ. Action No. 13-10769-NMG, 2015 WL 314131, at \*1-2 (D. Mass. Jan. 26, 2015).

185. *Id.*

186. Melkorka Licea, Elizabeth Ruby & Rebecca Harshbarger, *More Uber Cars Than Yellow Taxis on the Road in NYC*, N.Y. POST, Mar. 17, 2015, <http://nypost.com/2015/03/17/more-uber-cars-than-yellow-taxis-on-the-road-in-nyc/> [<https://perma.cc/8CR5-KKXZ>].

187. Douglas MacMillan & Telis Demos, *Uber Valued at More than \$50 Billion*, WALL ST. J., July 31, 2015, <http://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457> [<https://perma.cc/BG4Z-3LQZ>].

188. Douglas MacMillan, Sam Schechner & Lisa Fleisher, *Uber Snags \$41 Billion Valuation*, WALL ST. J., Dec. 5, 2014, <http://www.wsj.com/articles/ubers-new-funding-values-it-at-over-41-billion-1417715938> [<https://perma.cc/B9F8-7MSF>].

189. For instance, Uber took home the prestigious Crunchie award for Best Overall Startup in 2014. Matthew Panzarino & Alexia Tsotsis, *Uber Wins the 2014 Crunchie for Best Overall Startup*, TECHCRUNCH, <http://techcrunch.com/2015/02/05/uber-wins-the-2014-crunchie-for-best-overall-startup/> [<https://perma.cc/67NU-D2LB>] (last updated Feb. 5, 2015).

190. Lyft and Sidecar are Uber's most prominent competitors in the US; Hailo and Gett in Europe; and Kuaidi Dache and Didi Dache (which have merged into one company but operate with different names) in China.

191. See Ranchordás, *supra* note 67, at 417-21, 455-74 (discussing regulatory concerns in the sharing economy, especially in relation to Uber and Airbnb).

192. Companies like FlightCar and Turo allow departing airline travelers to rent their vehicles to arriving airline travelers, instead of paying to park at the airport. Competitors (such as traditional car rental companies) and government officials (such as airport regulators) allege that the car-sharing business models constitute unfair competition and

platforms like Airbnb.<sup>193</sup>

From a legal perspective, though, Uber is a poster child for creative destructive legal conflict. Chronicling “Uber’s ongoing legal struggles,” one commentator observes that “Uber is good at two things: running a taxi service and getting on regulators’ nerves. The car service’s entire history has been a series of back and forth battles between it and the cities that it’s trying to operate in, with Uber frequently ignoring regulations when launching in a new location.”<sup>194</sup> Indeed, as regulators grapple with how to handle Uber’s business model, traditional taxi cab services continue to resist Uber’s presence—Parisian taxi drivers refer to Uber’s business practices as “economic terrorism”—and actively defend their turf through litigation.<sup>195</sup>

The litigation over Uber’s business model involves numerous legal disciplines.<sup>196</sup> For instance, as a leading company in the sharing economy, Uber’s business model, which classifies drivers as independent contractors instead of employees, has been under attack in court for potential violations

violate transportation laws, airport rules, and licensing requirements.

193. Airbnb and VacationRentals provide an Internet platform for individuals to rent real estate, generally for short stays. Competitors (such as hotels) and regulators have challenged the peer-to-peer sharing business model on grounds that it violates occupancy rules. *See, e.g.*, Kathleen Doler, *Renting Out: Airbnb Shows Pro and Con for Homeowners*, INVESTORS’ BUS. DAILY, June 18, 2015, <http://news.investors.com/061815-757971-some-cities-balk-at-short-term-vacation-rentals-like-airbnb.htm?ven=djcp&src=aurlabo> [<https://perma.cc/5T4T-DGX9>] (discussing legal restrictions on Airbnb’s business model); Will Coldwell, *Airbnb’s Legal Troubles: What Are the Issues?*, THE GUARDIAN, July 8, 2014, <http://www.theguardian.com/travel/2014/jul/08/airbnb-legal-troubles-what-are-the-issues> [<https://perma.cc/VE6K-WHH5>] (highlighting Airbnb’s legal obstacles from an international perspective).

194. *See also* Daniel Roberts, *A Brief History of Uber Scandals*, YAHOO FINANCE (Feb. 22, 2016), <http://finance.yahoo.com/news/uber-scandals-timeline-michigan-shooting-140035801.html#> [<https://perma.cc/UE59-KAEE>] (summarizing numerous legal conflicts involving Uber); Jacob Kastrenakes, *Uber’s Bumpy Road to World Domination*, THE VERGE, <http://www.theverge.com/2014/12/15/7393693/uber-fights-to-expand-across-the-globe-storystream> [<https://perma.cc/5ZLN-683F>] (last updated Feb. 1, 2016). Far from condemning Uber’s confrontational strategy, the commentator recognizes that “[f]or the most part, . . . [Uber’s] strategy has been successful. Major cities have reworked their taxi laws to account for Uber, as well as other services like it. But for every success, Uber seems to run into a new hurdle in another city or with another type of service.” *Id.*

195. Rubin & Scott, *supra* note 1, at 1.

196. Apart from creative destructive legal conflict stemming from the innovative ride-sharing business model itself, Uber also faces legal action related to an Uber driver’s sexual assault on a passenger and improper handling of driver tips, among other legal disputes. *See, e.g.*, Dan Levine & Edwin Chan, *Uber, Lyft Rebuffed in Bids to Deem Drivers Independent Contractors*, REUTERS, <http://www.reuters.com/article/2015/03/12/lyft-drivers-idUSL1N0WD2T520150312> [<https://perma.cc/RJ5G-N9MA>] (last updated Mar. 11, 2015 11:21 PM).

of employment laws.<sup>197</sup> Uber is also facing legal action from traditional taxi and limousine companies that see Uber as a competitive threat. These plaintiffs allege that Uber is engaged in unfair competition as an unlicensed taxi company<sup>198</sup> that avoids expenses such as medallion fees, which can be in the hundreds of thousands of dollars for each licensed taxi cab.<sup>199</sup> Additionally, state and local government regulators challenge Uber's compliance with a host of transportation and taxi regulations, such as insurance coverage minimums,<sup>200</sup> driver background checks,<sup>201</sup> and vehicle safety inspections.<sup>202</sup> Airports refuse to allow Uber drivers to pick up travelers, or force them to meet in less convenient locations, because Uber does not pay airport licensing fees.<sup>203</sup> In France, Uber's litigation is a constitutional law question,<sup>204</sup> and Uber has been barred from operating, at one time or another, in several European countries, South Korea, India, and Thailand.<sup>205</sup>

### 1. Creative Destructive Analysis of Uber

Uber is one the most prominent recent entrepreneurial success stories, and legal conflicts (not transactional legal issues) are a central theme of the company's growth. Uber's strategy has consistently been to enter new

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197. Douglas O'Connor v. Uber Technologies, Inc., No. C-13-3826 EMC, 2015 WL 1069092, at \*1-4 (N.D. Cal. Mar. 11, 2015).

198. United Independent Taxi Drivers v. Uber Technologies, Inc., No. BC513879, 2013 WL 3545872 (Cal. Super. July 2, 2013).

199. Josh Barro, *New York's Taxi Medallion Prices Fall Again*, N.Y. TIMES, Dec. 2, 2014, <http://www.nytimes.com/2014/12/03/upshot/new-york-taxi-medallion-prices-fall-again.html?abt=0002&abg=1> [https://perma.cc/T2MX-VFXG].

200. Jennie Davis, Note, *Drive At Your Own Risk: Uber Violates Unfair Competition Laws by Misleading UberX Drivers about Their Insurance Coverage*, 56 B.C. L. REV. 1097, 1107-10 (2015).

201. *Boston Cab Dispatch*, 2015 WL 314131, at \*1-2.

202. Brian Fitzgerald, *Uber Suspends Operations in Nevada*, WALL ST. J., Nov. 27, 2014, <http://blogs.wsj.com/digits/2014/11/28/uber-suspends-operations-in-nevada/> [https://perma.cc/8ERX-YJAK].

203. Mike Tierney, *Uber Closes in on Its Last Frontier: Airports*, N.Y. TIMES, May 25, 2015, <http://www.nytimes.com/2015/05/26/business/uber-closes-in-on-its-last-frontier-airports.html> [https://perma.cc/8JP7-FA97].

204. Sam Schechner, *Uber Wins French Court Reprieve Over Legality of Low-Cost Service*, WALL ST. J., Mar. 31, 2015, <http://www.wsj.com/articles/uber-wins-french-court-reprieve-over-legality-of-low-cost-service-1427794312> [https://perma.cc/NM9Y-TXRX].

205. Hayley Richardson, *Uber Fighting Back in Europe*, NEWSWEEK, Apr. 3, 2015, <http://europe.newsweek.com/uber-fighting-back-europe-319342> [https://perma.cc/Y2TS-S5BP]; Newley Purnell, *Uber Faces Scrutiny From Southeast Asia Regulators*, WALL ST. J., Dec. 3, 2014, <http://www.wsj.com/articles/uber-faces-scrutiny-from-southeast-asia-regulators-1417603194> [https://perma.cc/R24C-8PCF].

markets without asking for regulatory approval or permission.<sup>206</sup> By the time legal challenges from competitors or regulators come, Uber aims to be firmly established in the market with a loyal cadre of drivers and passengers. As such, a vital part of Uber's legal strategy, in addition to litigation, is public relations and lobbying to influence public opinion related to the acceptability of ride-hailing apps. Uber prioritizes business growth and addresses legal conflict *ex post*, not *ex ante*.

Transactional legal advice, in contrast, typically seeks to prevent and avoid legal conflict, and it is commonly said that venture capitalists will not invest in litigation, which makes intuitive sense. Logically, entrepreneurial companies that must overcome legal obstacles might be less attractive investments due to the increased cost and uncertainty that litigation poses. But Uber is a magnet for both historic sums of venture capital investment, as well as frequent and extensive litigation over its business model. So the fact that a highly successful venture-backed entrepreneurial firm is enmeshed in numerous legal disputes about the very legality of its innovative business model forces a re-examination of the transactional account of law and entrepreneurship. A law and entrepreneurship analysis that probes and explains Uber's seemingly contradictory situation should yield helpful insights for future entrepreneurs and the disruption framers who counsel them. A comprehensive theory of creative destructive legal conflict is necessary, if the law and entrepreneurship field is to represent the diverse reality of disruptive innovation, instead of a mere transactional snapshot of entrepreneurship.

Uber's creative destructive legal strategy appears to be working, though not without significant continuing opposition.<sup>207</sup> For instance, the mayor of New York City, Bill de Blasio, pushed a bill that would cap the number of Uber drivers allowed in the city, prompting Uber, in its characteristically provocative way, to add a "fake feature" to its app: when users clicked on "de Blasio mode," the app displayed "no cars available" in protest against de Blasio's proposed regulations.<sup>208</sup> Uber's "blitzkrieg strategy," which also included television advertisements and other public

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206. Josh Lowensohn, *Uber Launches in Portland, Oregon Despite Being Completely Illegal There*, THE VERGE, <http://www.theverge.com/2014/12/5/7342981/uber-launches-in-portland-oregon-despite-being-completely-illegal-there> [https://perma.cc/XH28-VR2R] (last updated Dec. 5, 2014 9:29 PM).

207. Nicole Dungca, *Even as Uber, Lyft Gain Riders, Drivers Face \$500 City Fines*, BOSTON GLOBE, May 27, 2015, <http://www.bostonglobe.com/metro/2015/05/26/even-uber-and-lyft-become-ubiquitous-boston-police-tickets-them-for-being-illegal/AntttSe6sBJ64nqIsKhU9K/story.html> [https://perma.cc/WG8L-H2DR].

208. Issie Lapowsky, *Uber's New Fake Feature in NYC Derides Regulators*, WIRED, <http://www.wired.com/2015/07/uber-de-blasio/> [https://perma.cc/Z6V9-KJ2C] (last updated July 15, 2015 2:55 PM).

and private lobbying efforts, forced the New York mayor to withdraw the proposed limits on Uber's activity.<sup>209</sup> Another creative destructive business in the sharing economy, Airbnb, deployed similar advertising and public relations strategies to defeat a California measure designed to restrict Airbnb's emerging business model.<sup>210</sup>

Gradually, regulatory bodies are beginning to accommodate Uber's business model, with the California Public Utilities Commission having been the first.<sup>211</sup> Colorado was the first to legislatively provide for "[t]ransportation [n]etwork [c]ompanies," such as Uber and its competitors, even though initially Colorado regulators resisted Uber's business model.<sup>212</sup> And other jurisdictions continue to make similar adjustments to eliminate gray areas in the law and affirmatively regulate Uber's business model.<sup>213</sup>

A creative destructive approach to law and entrepreneurship is useful because it uniquely captures and explains Uber's legal conflicts in a way in which existing disciplinary paradigms fail. Similarly, conceiving of lawyers who counsel Uber through its creative destructive legal conflicts as disruption framers—not as transaction cost engineers, lobbyists, or generic civil litigators—underscores attorneys' unique roles in developing legal strategy to guide entrepreneurial firms through the legal conflict that so often accompanies disruptive innovation. For instance, in response to a government crackdown against Uber in Hong Kong, Uber launched an

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209. Ross Barkan, *Why Did Uber Beat Bill de Blasio*, OBSERVER, July 27, 2015, <http://observer.com/2015/07/why-did-uber-beat-bill-de-blasio/> [<https://perma.cc/8S5M-UU5Q>].

210. Biz Carson, *Airbnb Is Fighting a Critical War in its Own Backyard this Week*, BUS. INSIDER, <http://www.businessinsider.com/airbnb-fights-prop-f-in-san-francisco-2015-10> [<https://perma.cc/U59K-WHGK>] (last updated Nov. 3, 2015 5:24 PM); Elizabeth Weise, *San Francisco Rejects Anti-Airbnb Measure*, USA TODAY, Nov. 4, 2015, <http://www.usatoday.com/story/tech/2015/11/04/anti-airbnb-measure-fails-san-francisco/75138092/> [<https://perma.cc/9QTL-RKVL>]. Airbnb is capitalizing on its victory to expand the reach of its business model through home sharing clubs. Elizabeth Weise, *Airbnb Flexes New Political Muscle with Plans for 100 Home-Sharing Clubs*, USA TODAY, Nov. 4, 2015, <http://www.usatoday.com/story/tech/2015/11/04/san-francisco-rejects-anti-airbnb-measure-but-fights-not-over/75153396/> [<https://perma.cc/J52V-9MMZ>].

211. Anthony Ha, *California Regulator Passes First Ridesharing Rules*, TECH CRUNCH, <http://techcrunch.com/2013/09/19/cpuc-ridesharing-regulations> [<https://perma.cc/LN6L-ESWK>] (last updated Sept. 19, 2013).

212. Niraj Chokshi, *Colorado Passes Nation's First Law Regulating UberX, Lyft*, WASH. POST, June 6, 2014, <http://www.washingtonpost.com/blogs/govbeat/wp/2014/06/06/colorado-passes-nations-first-law-regulating-uberx-lyft/> [<https://perma.cc/7TY6-S37K>].

213. Peter Fricke, *Arizona, Maryland Become Latest States to Pass Ridesharing Regulations*, DAILY CALLER, <http://dailycaller.com/2015/04/15/arizona-maryland-become-latest-states-to-pass-ridesharing-regulations/?print=1> [<https://perma.cc/JAW4-LYKG>] (last updated Apr. 15, 2015 11:33 AM).



online petition to “Keep Hong Moving!”<sup>214</sup> The petition garnered nearly 50,000 signatures in support of Uber’s operations.<sup>215</sup> Beyond transactional counsel, social media strategies, such as Uber’s Hong Kong petition, demonstrate the role disruption framers have in guiding disruptive innovators through creative destructive legal conflicts.

Creative destructive legal conflict is a necessary stand-alone category because it faithfully tracks the actual experience of disruptive innovation. Neither transactional lawyering nor any particular legal discipline captures Uber’s experience with creative destructive legal conflict. Law and entrepreneurship should do so in a comprehensive manner that connects Uber’s experience to all other creative destructive legal conflict, irrespective of legal disciplinary boundaries.

Lawyers who specialize in discrete areas of law, such as antitrust or regulatory advocacy, are valuable in Uber’s situation; however, from a more strategic and holistic perspective, the legal counsel that most benefits Uber is that of a disruption framer. The skills involved in crafting a long-term legal strategy to facilitate the growth of a creative destructive business model are quite different from those of doctrinal advocacy or transactional advice alone. As further explored in Part IV, public relations, social media, and lobbying are at least as necessary as technical legal acumen when disruption framers guide entrepreneurs through creative destructive legal conflict.

### C. *Self-Driving Cars*

In contrast to Uber’s *ex post* approach to creative destructive legal conflict, other creative destructive businesses employ an *ex ante* legal strategy. For instance, Google and other companies developing self-driving cars moved proactively to obtain legislative permission before sending driverless cars onto the road *en masse*.<sup>216</sup> Even without laws specially tailored to automated driving, self-driving cars may be legal under existing transportation laws.<sup>217</sup> Consequently, even before state regulations were enacted to specifically address driverless cars, “Google’s fleet of

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214. Elizabeth Whitman, *Hong Kong Uber Arrests: Petition Supporting App Garners Close to 50K Signatures*, INTERNATIONAL BUSINESS TIMES (Aug. 2015), <http://www.ibtimes.com/hong-kong-uber-arrests-petition-supporting-app-garners-close-50k-signatures-2053818> [<https://perma.cc/JLQ5-3VZQ>].

215. *Id.*

216. John Markoff, *Google Lobbies Nevada to Allow Self-Driving Cars*, N.Y. TIMES (May 10, 2011), [http://www.nytimes.com/2011/05/11/science/11drive.html?\\_r=0](http://www.nytimes.com/2011/05/11/science/11drive.html?_r=0) [<https://perma.cc/78C7-4JLH>].

217. Bryant Walker Smith, *Automated Vehicles Are Probably Legal in the United States*, 1 TEX. A&M L. REV. 411, 412-15 (2014).

autonomous cars secretly drove more than 100,000 miles.”<sup>218</sup>

But Google sought to avoid a showdown with regulators by addressing potential issues before they arose, unlike Uber’s strategy of pursuing business growth with full awareness that legal conflict with regulators would follow. As a former legal director for Google explained, “[t]he tech giant wanted to make sure that before they pumped millions of dollars into driverless cars, the cars were explicitly legal and encouraged, not just probably legal and tolerated.”<sup>219</sup> To that end, Google mobilized an army of state lobbyists, starting in Nevada and later extending to numerous other states, to smooth the road for testing self-driving cars and obtaining not just tacit legislative approval, but active support for developing driverless technology.<sup>220</sup>

### 1. Creative Destructive Analysis of Self-Driving Cars

As case studies, Tesla, Uber, and self-driving cars offer different lessons in how to approach creative destructive legal conflict. The examples fall outside of a transactional conception of law and entrepreneurship and are not contained within existing doctrinal areas of law. They point towards the need for disruption framers as legal counsel to creative destructive entrepreneurs.

For instance, borrowing from the self-driving cars example, perhaps Uber could have proactively sought regulatory exemptions in advance to avoid legal disputes. The company could have drafted form statutes and volunteered alternative regulatory categories for its business model (though in one location, after 18 months of fruitless discussions with city officials, Uber launched illegally anyway to force regulatory action).<sup>221</sup> Part IV describes how disruption framers would benefit from systematic jurisprudential analysis that ties together different types of creative destructive legal strategies across history to facilitate comparisons and inspire effective counseling in future creative destructive situations.

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218. Amir Efrati, *Google’s Driverless Car Draws Political Power*, WALL ST. J. (Oct. 12, 2012, 3:14 PM), <http://www.wsj.com/articles/SB10000872396390443493304578034822744854696> [<https://perma.cc/7W3Q-TGYL>].

219. Maggie Clark, *States’ Self-Driving Car Laws Open Door to More Questions than Answers*, STATELINE (July 30, 2013), <http://www.governing.com/news/state/sl-driverless-cars-open-door-to-questions.html> [<http://perma.cc/6GLP-L5A4>].

220. Efrati, *supra* note 218.

221. Taylor Sopor, *Q&A: Here’s Why Uber Launched in Portland Despite Being Illegal*, GEEKWIRE (Dec. 5, 2014, 7:50 PM), <http://www.geekwire.com/2014/qa-heres-uber-launched-portland-despite-illegal/> [<https://perma.cc/ED6L-ADAE>].

#### D. Crowdfunding

A separate example of creative destructive legal conflict borrows elements from Uber's strategy and elements from Google's approach to self-driving cars. Recent laws on equity crowdfunding arose after crowdfunding entrepreneurs initially tried the Uber way of pursuing business growth first, and worrying about legal violations later.<sup>222</sup> In equity crowdfunding, the Uber strategy failed because equity crowdfunding sites that flaunted securities laws were shut down through federal<sup>223</sup> and state<sup>224</sup> cease-and-desist orders.

In one case, the ProFounder website, which facilitated equity investments in start-up companies through an Internet platform that brought entrepreneurs and investors together, was found to be in violation of California securities regulations.<sup>225</sup> In another case, the BuyBeerCompany website, which amassed approximately \$200 million in pledges from more than five million potential investors in order to purchase Pabst Brewing Company, was found to be in violation of federal securities regulations.<sup>226</sup> Specifically, both websites were illegal because they allowed investors to purchase stock in private companies even though the stock was neither registered nor exempt from registration, as applicable securities laws require.<sup>227</sup>

Apart from the particulars of the legal violations, the underlying cause of the legal conflict in equity crowdfunding is disruptive innovation. The Internet and social media allow entrepreneurs to reach a worldwide audience of potential investors at a very low cost in a very short time.<sup>228</sup> Correspondingly, the Internet, social media, and electronic payment systems allow investors to send money to entrepreneurs instantaneously.<sup>229</sup> Technological advances thus facilitate a type of mass, impersonal, and direct investing in start-up companies that was previously impossible.<sup>230</sup> It is too early to say whether the disintermediation that crowdfunding augurs

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222. C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 6, 24-27, (2012).

223. Cease-and-Desist Order for Michael Migliozi II and Brian William Flatow, Securities Act Release No. 9216 (June 8, 2011), *available at* <https://www.sec.gov/litigation/admin/2011/33-9216.pdf> [<https://perma.cc/S8SJ-JGWX>].

224. Consent Order to Desist and Refrain from State of California Department of Corporations to ProFounder Fin., Inc., 1 (Aug. 31, 2011), *available at* [http://www.dbo.ca.gov/ENF/pdf/2011/ProFounder\\_CO.pdf](http://www.dbo.ca.gov/ENF/pdf/2011/ProFounder_CO.pdf) [<https://perma.cc/7BNG-9EUT>].

225. Bradford, *supra* note 222, at 24-27.

226. *Id.* at 6.

227. *Id.* at 6, 24.

228. *Id.* at 10-14.

229. *Id.*

230. *Id.*

will ultimately prove to be a creative destructive threat to investment banks, venture capitalists, or some other group. But regardless, the legal conflict surrounding equity crowdfunding fits within a creative destructive paradigm because it results directly from a disruptive innovation that clashes with existing laws.

After legal violations caused early equity crowdfunding pioneers to fail (unlike Uber's ongoing success in the face of legal obstacles), the crowdfunding movement adopted a legal strategy more similar to Google's approach to laws regulating self-driving cars. But crowdfunding advocacy was more widely dispersed and had a more visible social media presence than Google's targeted lobbying efforts.<sup>231</sup> The fight to pass crowdfunding legislation encompassed a wide variety of constituencies advocating on behalf of an emerging industry.<sup>232</sup> In contrast, with respect to ride-hailing apps and driverless cars, the advocacy for creative destructive legal change was driven by particular trailblazing companies (Uber and Google), even though their competitors (Lyft and Mercedes, for instance) also benefitted. Crowdfunding laws were changed proactively through a combination of pressure from many corners: social media, business leaders, academics, politicians, entrepreneurs, and investors.<sup>233</sup>

### 1. Creative Destructive Analysis of Equity Crowdfunding

The grass-roots movement that resulted in Congress opening a pathway for equity crowdfunding to be practiced legally<sup>234</sup> is an example of how law and entrepreneurship is not only broader than transactional law, but also broader than any particular legal discipline. In the case of equity crowdfunding, securities law happens to be the doctrinal category where creative destructive legal conflict arose.<sup>235</sup> Notably, neither antitrust nor intellectual property law is implicated in crowdfunding's disruptive innovation; thus, the two doctrinal fields that form the backbone of "innovation law" are not especially helpful or even relevant for analyzing the legal conflicts in crowdfunding.

In contrast, using creative destruction as the organizing principle of

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231. John S. (Jack) Wroldsen, *The Social Network and the Crowdfund Act: Zuckerberg, Saverin, and Venture Capitalists' Dilution of the Crowd*, 15 VAND. J. ENT. & TECH. L. 583, 597-98 (2013).

232. *Id.*

233. *Id.*

234. See Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (addressing crowdfunding in Title III).

235. See generally Chris Brummer, *Disruptive Technology and Securities Regulation*, 84 FORDHAM L. REV. 977 (2015) (advocating a flexible regulatory approach to disruptive technologies in financial markets, including crowdfunding).

law and entrepreneurship legal conflict disregards doctrinal silos and places crowdfunding's legal conflict side-by-side with cases from other legal disciplines, such as the Tesla, Uber, and self-driving cars examples. If creative destruction were not used as the unifying theme, then the cases would naturally remain isolated and disconnected within their respective doctrinal categories. But creative destructive legal conflict crosses disciplinary lines because disruptive innovations can occur in any area. Legal analysis should follow the business reality of creative destruction instead of sorting creative destructive legal conflict into separate doctrinal categories. Failing to do so runs the risk of glossing over the underlying commonalities that doctrinally diverse creative destructive cases share.

The crowdfunding example also demonstrates how creative destructive legal conflict need not be (though it often is) spearheaded by a particular trailblazing company; disruption framers can also work on behalf of industry-wide innovations that alter industry-wide laws and regulations. Placing examples of creative destructive legal conflict side by side, irrespective of doctrinal boundaries, helps reveal different legal strategies for different situations. As described in Part IV, a unified, comprehensive, and interdisciplinary understanding of creative destructive legal conflict would inform the necessary skill set of disruption framers.

#### E. *Netflix*

Creative destructive legal conflict also arises when the innovative challenger uses the courts offensively. In the previous examples of Tesla and Uber, the status-quo market leader was suing an innovative competitor to defend its perch. But Netflix's claims against Blockbuster illustrate the opposite situation.<sup>236</sup>

Netflix created an innovative business model that destroyed Blockbuster.<sup>237</sup> Netflix relied on new technologies (namely, the Internet and video streaming) to threaten the status-quo market leader (Blockbuster), which struggled to adapt to new technologies while being saddled with expensive brick-and-mortar locations around the world.<sup>238</sup>

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236. *Netflix, Inc. v. Blockbuster, Inc.*, 477 F. Supp. 2d 1063 (N.D. Cal. 2007).

237. Dawn McCarty, Linda Sandler & Tiffany Kary, *Blockbuster Files Bankruptcy After Online Rivals Gain*, BLOOMBERG (Sept. 23, 2010, 10:35 AM), <http://www.bloomberg.com/news/articles/2010-09-23/blockbuster-video-rental-chain-files-for-bankruptcy-protection> [<https://perma.cc/T8MK-W4YY>]; Martin Peers & Shalini Ramachandran, *Dish Network to Close Its Remaining U.S. Blockbuster Stores*, WALL STREET JOURNAL (Nov. 6, 2013, 7:05 PM), <http://www.wsj.com/articles/SB10001424052702303763804579181853996821712> [<https://perma.cc/B77N-F9GC>].

238. Peers, *supra* note 237.

From a business perspective, it was vintage creative destruction. Netflix relied on a disruptive innovation to create a new business model and a new market while simultaneously undermining Blockbuster's business model and existing market.

### 1. Creative Destructive Analysis of Netflix

But the legal conflict it engendered shows a different wrinkle than the previous examples. Instead of Blockbuster suing Netflix to prevent Netflix's assault on Blockbuster's market-leading position, Netflix went on the offensive and alleged that Blockbuster was in violation of Netflix's intellectual property rights.<sup>239</sup> On the same day Netflix was issued a patent on its Internet business model, it sued Blockbuster for patent infringement.<sup>240</sup> Specifically, Netflix alleged patent violations related primarily to its online queue where customers maintain a prioritized list of movies and its rental-via-mail system that eliminated late fees for customers.<sup>241</sup>

Contrary to standard transactional legal advice on how to avoid the courtroom, the Netflix example demonstrates another tool (proactive litigation) for the disruption framer's toolbox in representing creative destructive entrepreneurs. Similar examples of disruptive innovators (distinguished from patent trolls) who use litigation against market leaders should be organized around the central theme of creative destruction, regardless of legal discipline. As Part IV describes, constructing a full panorama of creative destructive legal conflict should yield a cohesive strategic roadmap for disruption framers to use in advising entrepreneurs.

### F. Napster

The innovative entrepreneur is not always victorious in creative destructive legal conflict. Napster is a well-known example of an innovative business model that courts quashed after industry leaders objected.<sup>242</sup> Napster allowed individuals to upload music to the Internet

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239. Claire Hoffman, *Blockbuster.com Is Sued by Netflix*, L.A. TIMES (Apr. 5, 2006), <http://articles.latimes.com/2006/apr/05/business/fi-netflix5> [<https://perma.cc/N9LS-EHPL>].

240. Anders Bylund, *Netflix Awarded Business Model Patent, Immediately Sues Blockbuster*, ARS TECHNICA (Apr. 5, 2006, 11:20 AM), <http://arstechnica.com/uncategorized/2006/04/6528-2/> [<https://perma.cc/JX94-E836>].

241. *Id.*; Hoffman, *supra* note 239.

242. *A&M Records, Inc. v. Napster, Inc.*, 284 F. 3d 1091 (2002); Vickie Feeman, et. al., *Revenge of the Record Industry Association of America: The Rise and Fall of Napster*, 9 VILL. SPORTS & ENT. L.J. 35, 43-53 (2002).

and share it with others, a practice known as peer-to-peer file sharing.<sup>243</sup> But the music industry successfully argued that Napster's business model violated copyright law.<sup>244</sup> Even more recently, another upstart entrepreneurial effort, Aereo TV, was also shut down due to copyright violations for using miniature antennas to transmit TV programs over the Internet.<sup>245</sup> And, with the rise of three-dimensional (3D) printing, similar legal conflicts may soon arise in patent law too.<sup>246</sup>

### 1. Creative Destructive Analysis of Napster

There is thus a category of creative destructive legal conflict where law denies some innovative business models. Disruption framers would benefit from systematic analysis of examples throughout history where potentially creative destructive businesses were shuttered for legal violations. The examples should be categorized and gathered together under one jurisprudential umbrella. Though studying the examples within established legal disciplines is undoubtedly useful for deepening an understanding of respective legal disciplines, from the perspective of a disruption framer who counsels entrepreneurs, the unifying theme of the cases is creative destruction, independent of legal disciplines.

Furthermore, in some cases, the creative destructive business model that initially loses in litigation nonetheless spawns a creative destructive movement that ultimately upends an industry. Though the initial groundbreaking entrepreneur may lose (as in Napster's case, or the crowdfunding examples), the subsequent movement could ultimately

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243. Matt Richtel, *The Napster Decision: The Overview; Appellate Judges Back Limitations on Copying Music*, N.Y. TIMES, Feb. 13, 2001, <http://www.nytimes.com/2001/02/13/business/napster-decision-overview-appellate-judges-back-limitations-copying-music.html> [<https://perma.cc/MD2H-VEHQ>].

244. *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (2001); Mark Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1356-65 (2004). For a subsequent Supreme Court case also involving copyright infringement claims in peer-to-peer file sharing, see *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (establishing that peer to peer file sharing services could be sued for copyright infringement of third parties using that service).

245. *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014); Kevin Yoegel, Comment, *The Aereo Loophole: A Retrospective Inquiry into the Legality of Antenna Farms and Internet-Based Television*, 87 TEMP. L. REV. 339, 342-56 (2015); Krista Consiglio, Note, *Aereo and Filmon: Technology's Latest Copyright War and Why Aereo Should Survive*, 71 WASH. & LEE L. REV. 2557, 2600-02 (2014).

246. See Deven R. Desai & Gerard N. Magliocca, *Patents, Meet Napster: 3D Printing and the Digitization of Things*, 102 GEO. L.J. 1691, 1695-719 (2014) (analyzing the intellectual property implications, especially for patent law, which arise as 3D printers make it increasingly inexpensive to create and copy physical objects, just as the Internet, via Napster, allowed consumers to easily copy and distribute digitized media).

produce a new regulatory approach or a new technological solution that sidesteps the problems that derailed the groundbreaking entrepreneur. Napster may be one such example, as the sharing of digital music continues to grow while the music industry remains in flux as it struggles to adapt to the digital environment that Napster exploited. Additionally, in crowdfunding, new laws have already been passed to facilitate what was once an illegal business model. Analyzing the examples as a unified body should help disruption framers advise entrepreneurs on how to pivot from an initial creative destructive business model that loses in court towards another that can succeed.

#### IV. RECOMMENDATIONS

Without a systematic approach to creative destructive legal conflict, the seemingly disparate examples sketched above, and countless others like them, will remain isolated within their respective doctrinal areas. But they are not disparate examples; the common thread that unites them is creative destruction. And the existence of numerous examples dispersed throughout history shows the need for a comprehensive and systematic theoretical model of creative destructive legal conflict. If the essence of entrepreneurship is creative destruction, then, independent of disciplinary boundaries, legal analysis of entrepreneurship should focus on the legal conflict that accompanies creative destruction.

Furthermore, the role of lawyers in creative destructive legal conflict is that of disruption framers. Law and entrepreneurship is too often limited within the confines of transaction-based theories, which are incomplete because they neglect the comprehensive legal strategy that disruption framers design for creative destructive legal conflict. Accordingly, could law and entrepreneurship reimagine the lawyer's role? Could disruption framers be viewed in the business world as visionaries who help society confront the challenges of creative destruction?

Approaching law and entrepreneurship from the perspective of creative destructive legal conflict gives rise to two primary recommendations. The first involves delineating creative destructive legal conflict both inside and outside the courtroom. The second relates to the legal strategies of disruption framers.

##### A. *Jurisprudence of Creative Destruction*

For the field of law and entrepreneurship to mature, it must develop theoretical constructs for analyzing creative destructive legal conflict inside and outside of court—the law of entrepreneurship. Otherwise, law and



entrepreneurship will fail to grow beyond a merely transactional account of business lawyers serving entrepreneurs. It will also struggle to be more than a hodge-podge of analyses of seemingly random intersections that entrepreneurs experience with laws of diverse legal disciplines.

Developing and explaining jurisprudential models of creative destructive legal conflict is a large-scale undertaking. Future scholarship should rise above disciplinary lines to use creative destruction as an organizing principle of jurisprudence. This approach should lead to an interdisciplinary jurisprudential category—creative destructive legal conflict—and should yield several benefits.

For instance, a stand-alone category of creative destructive legal conflict can facilitate empirical analysis of cases unified through a common economic principle, irrespective of traditional legal disciplinary areas. Commonalities in legal strategy can be recognized among entrepreneurial firms whose business models prevailed in creative destructive litigation. And, importantly, lessons from those that failed can be gathered and studied systematically.

Furthermore, creative destructive legal conflict can be compared and contrasted along numerous different metrics. The metrics could follow legal criteria (such as state court versus federal court, regulatory battles versus congressional advocacy, statutory law versus common law, civil law versus common law (extending the adaptability hypothesis),<sup>247</sup> contract rights versus property rights, formal/licensed market participants versus informal/unlicensed actors) or doctrinal distinctions (such as intellectual property law versus securities law). The metrics could also track non-legal criteria (such as creative destructive legal conflict involving entrepreneurial firms headed by women versus those headed by men, or those led by one racial group versus those led by another). Additionally, the metrics could break down by business category (such as telecommunications versus construction), or be examined by characteristics of the entrepreneurial firm (such as new start-ups—e.g., those with less than one or two years of operational history—versus more established entrepreneurial firms, or creative destructive legal conflict among public versus private companies). Furthermore, venture-backed firms involved in creative destructive legal conflict could be compared with non-venture-backed firms that experience creative destructive legal conflict.

In short, there remains a significant and largely untapped data source of case law in the area of entrepreneurship where law has perhaps its most profound impact: creative destructive legal conflict that entrepreneurial

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247. See *supra* Part I; Smith & Ueda, *supra* note 60, at 364 (discussing how courts influence the relationship between law and entrepreneurship).

businesses encounter. Law and entrepreneurship scholars should construct a more robust jurisprudential theory and develop paradigms that guide entrepreneurs, judges, and legislators towards optimal solutions in particular creative destructive situations. Systematic analysis of creative destructive legal conflict should also benefit disruption framers in devising strategies for advising entrepreneurs who embark on a creative destructive path.

### B. *Disruption Framers*

As an integral part of an entrepreneurial firm's leadership team, disruption framers strategize with entrepreneurs on how to successfully navigate the legal minefield that creative destructive businesses often encounter. Disruption framers conceptualize societal change whose impetus is innovative business ideas.<sup>248</sup> Like storytellers, disruption framers mold a legal narrative around ground-breaking ideas.<sup>249</sup> In a business plan, entrepreneurs craft a narrative to explain how the company will disrupt existing markets or create new markets; disruption framers in turn craft a narrative to explain how the company will coexist with current laws or seek to create new legal frameworks around a novel business idea.

And framing arguments can be especially effective in the context of creative destructive legal conflict.<sup>250</sup> Disputes over technological advances

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248. Disruption framers' strategic role also encompasses anticipation of new liabilities that arise from new technologies. Bryant Walker Smith, *Proximity-Driven Liability*, 102 GEO. L.J. 1777, 1788-94 (2014).

249. See Steven H. Hobbs, *Entrepreneurship and Law: Accessing the Power of the Creative Impulse*, 4 ENTREPRENEURIAL BUS. L.J. 1, 15 (2009) (observing that "lawyers have always been known as great storytellers," and advocating that lawyers use storytelling skills to serve entrepreneur clients). See also David Daokui Li, Junxin Feng & Hongping Jiang, *Institutional Entrepreneurs*, 96 AM. ECON. REV. 358, 358-62 (2006) (recognizing "skills beyond those of a traditional entrepreneur, such as dealing with government officials and public opinion" that entrepreneurs must develop, but without considering the lawyer's role in advising entrepreneurs).

250. Kimberlianne Podlas, *The Moral of the Story . . . Musical Artists Must Protect Their Own Rights in Digital Music*, 10 WAKE FOREST INTELL. PROP. L.J. 265, 267-68 (2010) (explaining that "the framing of a legal dispute often impacts its outcome," and that "[p]articularly, in the field of intellectual property and technology, courts regularly reach out for stories and analogies to simplify and explain complicated issues"); see also Anuj C. Desai, *Legal Traditionalism, Creative Destruction, and the Role of Media Law in the Intergenerational Social Contract*, 2011 WIS. L. REV. 167, 172-73 (2011) (arguing that the Supreme Court's decisions in "*Sony and Grokster* can best be explained by thinking about the social meaning of the case[s]"); Chris Riley, *The Rite of Rhetoric: Cognitive Framing in Technology Law*, 9 NEV. L.J. 495, 537-40 (2009) (demonstrating that winning briefs use effective framing); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1180 (2003) (establishing that "judgments will be much affected by the framing of the question").

often involve particularly “ambiguous terminology and uncertain social policy” precisely because they arise from new, innovative, and previously-undefined subjects with little direct historical precedent.<sup>251</sup> As a result, judges have significant interpretive flexibility and may rely implicitly on equitable judgments, which can be influenced through framing arguments that draw connections between known scenarios from the past and new situations.<sup>252</sup> Creating effective frames for interpreting novel legal questions in creative destructive legal conflict, then, is a valuable skill set for disruption framers to develop.

### 1. Law, Strategy, and Competitive Advantage

Consequently, the disruption framer paradigm goes well beyond transaction cost engineering. It builds most directly from frameworks that combine law, strategy, and competitive advantage, as described in Part I.D. And disruption framers fit within law and strategy scholars’ highest levels of integration between legal and business functions.

For instance, in Tesla’s case, under Bird’s framework,<sup>253</sup> the company could have chosen an avoidance path by conforming to existing dealership regulations. Instead, driven by the company’s disruptive innovations, Tesla’s business and legal strategy transforms the company itself and, in the process, the auto industry, too. Tesla’s direct sales model reinforces a unique and close connection to its customers that differentiates Tesla from all other car manufacturers. And other car manufacturers cannot imitate Tesla’s approach because they have helped enshrine the dealership model in state law, thereby painting themselves into a corner that legally requires them to sell their cars through independent dealers. Tesla, therefore,

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251. Riley, *supra* note 250, at 539. See also Donald Labriola, *Dissonant Paradigms and Unintended Consequences: Can (and Should) the Law Save Us from Technology?*, 16 RICH. J.L. & TECH. 1, 15-60 (2009) (discussing cognitive dissonance in the context of legal conflict related to technological change).

252. Riley, *supra* note 250, at 539-40 (describing a successful argument that framed creative destructive legal conflict as an illegal piracy theme instead of using a text-based analysis); Brad Bernthal, *Procedural Architecture Matters: Innovation Policy at the Federal Communications Commission*, 1 TEX. A&M L. REV. 615, 641-54 (2014) (analyzing how advocates before the Federal Communications Commission utilize several “stylized ‘plays’” to influence “how policy-makers frame and analyze [novel telecommunications] issues”); Desai, *supra* note 250, at 172-73 (recounting the successful argument that framed the legitimate corporate context of institutional research and development at a well-known company against innovation from a competitor that “arose from a hacker culture . . . based in the West Indies . . . [with] software [that] had been written by Estonian programmers working outside any institutional structure at all, or at least one recognizable to the Court.”).

253. See *supra* Part I.D (explaining the five pathways in Bird’s framework for integrating law and business strategies).

derives a competitive advantage against other car manufacturers because its legal strategy allows Tesla to be treated differently under the law than all of its competitors. And Tesla exploits its unique legal treatment to create a closer, almost cult-like relationship with its customers, thus demonstrating the integration of sales and marketing strategy with legal strategy.

Of course, Tesla's unique legal treatment does result in legal conflict, which can be costly. But Tesla's strategy transforms even its legal conflict into a competitive advantage. Tesla has a well-developed social media and publicity strategy that frames Tesla's legal conflict in favorable terms. Tesla promotes the straightforward, commonsense message that it simply seeks the freedom to sell its products directly to consumers without the intrusion and added cost of middlemen. Car dealerships, in contrast, are made to appear antiquated, opposed to progress, and insulated from competition after years of campaign contributions to state legislators produced what Tesla frames as protectionist laws. Tesla's law and policy strategy thus further complements its business strategy by uniting Tesla supporters behind a common goal and against a common enemy, reinforcing customer loyalty.

In Uber's case, Siedel's framework<sup>254</sup> illuminates how the company's legal strategy reframes legal obstacles as business opportunities. Instead of viewing restrictive and prohibitive taxi regulations as a barrier to entry for the Uber app, Uber has aggressively set up shop in hundreds of markets worldwide. Uber could have shied away from legal conflict, knowing that its business model and the sharing economy was at best unregulated due its novelty, or at worst in stark violation of existing laws. But Uber's strategy instead reframes legal obstacles as opportunities to establish the Uber brand and generate positive publicity as Uber battles taxi companies that are well-connected in local politics and have historically enjoyed government protection from competition through legally mandated taxi medallions. Through its disruptive innovation, therefore, Uber reframes legal obstacles into a business opportunity by advocating for changes in laws to accommodate new technologies.

In addition, Bagley's paradigm<sup>255</sup> of legal astuteness is a helpful lens for analyzing law and strategy in the other four examples highlighted in Part III. Google demonstrated a high level of legal astuteness in obtaining favorable regulation for self-driving cars, prior to any legal conflict, through targeted lobbying in only a few states. Netflix also demonstrated a high level of legal astuteness in its creative destructive legal conflict with

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254. See *supra* Part I.D (explaining Siedel's four step framework for companies to use law strategically to create competitive advantages).

255. See *supra* Part I.D (describing Bagley's approach to developing competitive advantages through legal astuteness).

Blockbuster because Netflix prepared its preemptive patent strategy in advance and waited patiently to execute it. In contrast, the initial attempts at equity crowdfunding exemplified a low level of legal astuteness because lack of knowledge or disregard of securities laws caused pioneering equity crowdfunding sites to be shut down. More astute legal advice intertwined with business strategy could have saved both crowdfunding sites if legal strategy had been implemented proactively before the websites violated securities laws. Similarly, Napster and Aereo were both forced to shut down their innovative business models due to violations of copyright law, betraying, in the court's final analysis, failed legal astuteness.

## 2. Interdisciplinary Skills

Understanding law and entrepreneurship through a strategic lens as more than a transactional discipline—and embracing the lawyer's role as that of disruption framer instead of transaction cost engineer—has implications for doctrinal legal education, cross-disciplinary education in business fields, and clinical legal education. Doctrinally, jurisprudence and advocacy coursework should incorporate creative destructive legal conflict. Typically, legal education for students interested in representing entrepreneurs has involved transactional law courses. But this is a lawyer-centric approach. An entrepreneur-centric paradigm would take the focus away from transactional work alone and encompass a broader range of skills that a disruption framer would use to counsel entrepreneurs through creative destructive legal conflict.

At least in the context of entrepreneurship, it is a false and lawyer-centric dichotomy to separate transactional and litigation work too rigidly. Transactional attorneys are bent on avoiding litigation, but disruption framers sometimes must embrace litigation and integrate it as part of a creative destructive legal strategy, as Part III highlighted. The advice of disruption framers may include transactional and regulatory guidance, of course, but it also captures lobbying, public relations, social media, and litigation strategy (in addition to cross-disciplinary business skills described below). A disruption framer paradigm enhances transactional and strategic advice because disruption framers, guided by an awareness of creative destructive jurisprudence, counsel entrepreneurs with an eye towards litigation planning, not necessarily towards litigation avoidance. Disruption framers embrace the idea that legal conflict is more than a possibility; it may be welcomed or intended as part of a creative destructive legal strategy.

Cross-disciplinary training is particularly vital for disruption framers. But where the transaction cost engineer framework calls for cross-

disciplinary training in finance and accounting,<sup>256</sup> a disruption framer paradigm encourages a wider set of cross-disciplinary skills.<sup>257</sup> For instance, disruption framers should be versed in entrepreneurship, strategic management and public relations, marketing and social media, economics and political science, as well as traditional legal skills in advocacy, litigation, and business transactions.

Accordingly, business schools should incorporate the view of lawyers as disruption framers into business coursework on law, entrepreneurship, and strategic management. Unfortunately, under a transactional model, business people sometimes begrudge lawyers as unavoidable transaction costs (e.g., a perfunctory \$200,000 legal bill to close a transaction), or in the best case, appreciate them as efficient reducers of transaction costs (e.g., a worthy \$200,000 legal bill that helped avoid millions of dollars in other costs and liabilities).<sup>258</sup> But when lawyers are viewed as more than transactional advisors and become integral members of a company's strategic management team, then legal strategy can become an enduring competitive advantage and positively impact a firm's bottom line.<sup>259</sup>

For lawyers to become strategic partners in the context of creative destructive entrepreneurship, lawyers must be deployed as disruption framers who craft proactive strategies for the legal conflict that disruptive innovation so often entails. One of the most important competitive advantages for creative destructive entrepreneurs to develop is the firm's disruptive innovation. Entrepreneurs, therefore, should look to lawyers as disruption framers who help fashion an overarching legal strategy for disruptive innovations instead of viewing lawyers in the more generic roles of transactional advisors or litigation advocates. Creative destructive entrepreneurship is unique and demands its own breed of lawyer—one with cross-disciplinary skills that are usually outside the standard toolbox of transactional and litigation attorneys alike.

In law school clinics, the transaction-based paradigm is so ingrained that entrepreneurship law clinics typically disclaim litigation services from the outset.<sup>260</sup> A disruption framer paradigm, though, can help open

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256. Gilson, *supra* note 8, at 303-05 (discussing the potential to correct the “mismatch of business law education and business law practice”).

257. For a hypothetical (and extreme) cross-disciplinary approach that would integrate the STEM fields (science, technology, engineering, and math) into legal education, see Daniel Martin Katz, *The MIT School of Law? A Perspective on Legal Education in the 21st Century*, 2014 U. ILL. L. REV. 1431, 1457-70 (2014).

258. *E.g.*, Bird, *supra* note 85, at 12-16, 27-31 (contrasting a negative “avoidance” view of law with a positive “value-creation” perspective).

259. *See supra* Part I.D (explaining that framing legal issues as business opportunities can be a highly effective strategy).

260. *See supra* Part I.A (discussing the transactional law skills that entrepreneurship law

entrepreneurship law clinics to a broader range of services, including, for example, general civil litigation, lobbying, and policy advocacy on behalf of entrepreneurs. In some cases, creative destructive legal conflict may only arise after entrepreneurs reach a certain level of commercial success, thus disqualifying those entrepreneurs from receiving services from need-based clinical programs (though not necessarily from clinics that focus on student-led entrepreneurship).<sup>261</sup> Nonetheless, an increased awareness that entrepreneurs benefit from litigation (and other non-transactional) assistance could help reduce the lawyer-centric silos that typically separate transactional advice from litigation advocacy.

For example, some recent clinical efforts strive to help small businesses that face patent litigation.<sup>262</sup> In addition, helping entrepreneurs through litigation can also complement the social justice mission that clinics often pursue.<sup>263</sup> For instance, one clinic in New York pursues both litigation and transactional matters in providing “civil legal services to grassroots community organizing groups that engage in a variety of community development, economic justice and social justice efforts.”<sup>264</sup> And a transactional clinic serving entrepreneurs in Chicago is affiliated with a sponsoring organization that pursues litigation “to enhance entrepreneurial opportunities and to strike down arbitrary and unconstitutional laws that stifle honest enterprise” in an effort to aid entrepreneurs and small businesses.<sup>265</sup> Entrepreneurs often need more than just transactional legal assistance, especially in the context of creative destructive legal conflict, so clinical programs that recognize and serve entrepreneurs’ diverse legal needs can take a valuable step towards helping students become future disruption framers.

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clinics typically develop and describing that such clinics typically do not provide litigation services).

261. As an example, the Entrepreneurship Clinic at the University of Michigan Law School assists “student-led entrepreneurial ventures.” *FAQs about the Clinic*, U. MICH. L. SCH. ENTREPRENEURSHIP CLINIC, <https://www.law.umich.edu/clinical/entrepreneurshipclinic/about/Pages/FAQs-About-the-Clinic.aspx> [https://perma.cc/R54M-SGGL] (last visited May 28, 2015).

262. See, e.g., Steven Seidenberg, *Law School Clinics Join to Help Battle Patent Trolls*, ABA JOURNAL (Mar. 1, 2015, 2:50 AM), [http://www.abajournal.com/magazine/article/law\\_school\\_clinics\\_join\\_to\\_help\\_battle\\_patent\\_trolls](http://www.abajournal.com/magazine/article/law_school_clinics_join_to_help_battle_patent_trolls) [https://perma.cc/6GVQ-VB63].

263. See Jones & Lainez, *supra* note 26, at 89 (observing that “true to their social justice underpinnings, transactional clinics often serve a social justice mission”).

264. *Cmty. Dev. & Econ. Justice Clinic: Course Description*, N.Y.U. SCH. OF L. <http://www.law.nyu.edu/academics/clinics/semester/commdeveconjustice> [https://perma.cc/AK7Y-3QLF] (last visited May 28, 2015).

265. William H. Mellor & Patricia H. Lee, *Institute for Justice Clinic on Entrepreneurship: A Real World Model Stimulating Private Enterprise in the Inner City*, 5 J. SMALL & EMERGING BUS. L. 71, 72 (2001).

In sum, disruption framers specialize in overarching issues and develop legal strategy for entrepreneurs in a creative destructive context. A systematic and unified jurisprudence of creative destruction would equip disruption framers with a historical roadmap to counsel entrepreneurs more effectively. It would guide disruption framers down recognized pathways to success, and missteps would be easier to avoid by referencing an organized and comprehensive corpus of how creative destructive legal strategies have failed in the past.

#### CONCLUSION

Law and entrepreneurship will struggle for a jurisprudential identity to the extent it remains tethered to a transaction-based account of entrepreneurship or surrenders analysis of creative destructive legal conflict to disparate legal disciplines. All creative destructive legal conflict should be consolidated as one unified body—the law of entrepreneurship—which will in turn guide disruption framers’ strategic counsel to entrepreneurs who transform business and even society through disruptive innovations. Systematic study of creative destructive legal conflict would identify norms and help delineate paths of successful and unsuccessful entrepreneurial efforts throughout history. The organizing principle of the law of entrepreneurship should be the legal conflict that arises in the defining crucible of entrepreneurship: creative destruction.