STARTUP LAWYERS AT THE OUTSKIRTS

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

C. What Makes Them Tick?

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

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

Si01 Tw -bTw -bTwu gss>BDC 0oey2wu gsweus coy2wu l6(t)-3.2(a)-3.or.3(a)6.5(t)-3e brm documentation for a venture capital financing for free on the NVCA website, and the websites of Silicon Valley firms make additional forms widely available for no cost.[18] While it may be surprising that law firms are willing to give away valuable work product, Silicon Valley firms appear to recognize a long-term benefit in cooperating to mitigate the extreme challenges of starting innovative companies. For example, a venture capital fund typically invests in a startup company through contracts that give the fund board representation, approval rights over major transactions, the ability to delay a portion of investment until milestones are met, and special financial rights. It is well chronicled that these features of standard venture capital contracts assist in monitoring the progress of uncertain business ventures and guarding against opportunistic behavior by the entrepreneurs who must be trusted with day-to-day operations because of their superior technical expertise.[19]

Silicon Valley lawyers act as reputational brokers by having the ear of top financing sources and using that access to vouch for promising clients. Lawyers are positioned to play this role because of their early interactions with entrepreneurs. Lawyers are often a startup company's first service provider, as company founders establish financial and management rights among themselves, protect intellectual property, and obtain benefits of a limited liability entity. This basic formation work allows a lawyer to observe client behavior

thinking about the profession.[35]

While this noted tension with conventional legal ethics at first sounds indicting, a deeper examination of legal ethics scholarship

influence client conduct by threatening to withhold services.[50]

At least one legal scholar has likened Silicon Valley lawyers to this favored historical ideal.[51] Admittedly, one has to be careful when invoking generalizations about the legal profession, past and present. Lawyers of the past did not always live up to lofty ideals,[52] and today's legal profession is too diverse for ascribing a single professional attitude.[53] But I still think the analogy between Silicon Valley practices and historical ideals has some merit. At the least, Silicon Valley lawyers operate in circumstances that permit a more formative role: Silicon Valley emerged from a relatively small and insular community that gave special importance to the strong norms of cooperation that lawyers instill in their entrepreneur clients;[54] entrepreneurs with little experience and training in financial transactions may find law firms to be a cost-effective source of business information;[55] and Silicon Valley lawyers have faced relatively little competition in their role as reputational brokers because more traditional financial intermediaries, such as registered broker-dealers, have not been pro startup lawyers in certain communities undergoing difficult economic transformations, but for now I only want to summarize how current legal ethics scholarship views startup lawyering. In short, startup lawyering is a mixed bag: it raises the possibility of client exploitation, but it also serves as a counterpoint to criticism of the profession's instrumental trajectory. In any event, startup lawyering does seem to be a unique professional identity worthy of scholarly attention.[57]

C. A Positive Effect on Entrepreneurship

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

While it is possible to dismiss startup lawyers' claims of broad-based benefit as self-promotion, several different strains of economic theory support these claims. First, we can think of the standard contract terms that startup lawyers develop and disseminate as having

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

II. STARTUP LAWYERING AT THE OUTSKIRTS

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

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

A. Similar Functions

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

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

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

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

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

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

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

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

B. New Context

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

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

In economic development circles, efforts to copy Silicon Valley have become a mainstay.[79] These efforts are often found in struggling local economies focused on traditional manu above, powerful agglomeration economies of established entrepreneurial clusters increasingly draw talent and resources as the knowledge-based economy takes on greater importance relative to traditional industries.[80] There are distinct winners and losers in this economic transformation. As human capital and tax base concentrate in entrepreneurial hot spots like Silicon Valley, they disappear elsewhere.[81] In other words, the same dynamics that are responsible for Silicon Valley's meteoric rise are potentially detrimental to other economic regions.

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

1. The Economic Development Challenge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Lawyer-Specific Challenges

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

Additionally, lawyers in aspiring clusters have to worry about entrepreneur mobility. Companies that stay in an aspiring cluster will be at a disadvantage rsgsen an aspir103.3(pat)-3.2(y. (e)-4(c)6J)-3.2(s)3dcup c6(k)10.4 en69[2(up .3

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

3. Public Service?

While I do not doubt that economic incentive explains a great deal of what startup lawyers do, it is also worthwhile to explore y own p my ow

But this cramped notion of the public interest is at odds with many accounts of historical tradition, in which lawyers in private practice were valued for serving as trusted advisors in the many aspects of life, politics, and business legal representation implicates. Kronman, for example, describes ronm21 4p0 Td (4.2(s)14( )-- Tw 15.104 0 0 Td)Tj 0 (e)7s

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

Without claiming to resolve the deeper philosophical question, I acknowledge that at some level of private benefit this essay's publicalternative to "smokestack chasing" or "buffalo hunting" subsidies of established firms in traditional industries? Centralized planning and economic development policies.[125] With that caution, I find some encouragement in the traction Portland has gained as a center for entrepreneurship. In recent years, the city has enjoyed a number of small successes, though large-scale successes remain elusive.[126]

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

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