THE STORY OF LAW AND ENTREPRENEURSHIP: 
DISRUPTION FRAMERS AND CREATIVE DESTRUCTION

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Abstract

The Law and Entrepreneurship field must expand beyond its roots in transactional law to develop a comprehensive jurisprudential theory of creative destructive legal conflict. It must go beyond analyzing how transactional lawyers can use law to assist entrepreneurial businesses, or how distinct areas of law (such as securities, intellectual property, antitrust, employment, and bankruptcy) can encourage entrepreneurship. The heart of Law and Entrepreneurship is legal conflict, not stable business transactions; therefore, business law scholars must elucidate a jurisprudential model capable of synthesizing and systematizing legal conflict that entrepreneurial companies encounter when their innovative business models violate laws.

The contemporary transactional account of Law and Entrepreneurship stems from Adam Smith’s classical economic theory where lawyers have come to be viewed as transaction cost engineers who facilitate business deals. But, ironically, classical economic theory scarcely mentions entrepreneurship and its accompanying disruptive innovations. Legal theory on entrepreneurship should not be based on an economic theory that largely ignores entrepreneurship. Instead, legal theory on entrepreneurship should track Joseph Schumpeter’s economic theory, where entrepreneurs play a central role of destroying existing industries while creating new ones through a creative destructive process. When viewed from the perspective of creative destruction, lawyers are disruption framers, not transaction cost engineers.

This article issues the call to use creative destruction not just as the animating ethos of an economic explanation of entrepreneurship but as the organizing principle of the jurisprudence of Law and Entrepreneurship. For example, this article demonstrates that a creative destructive legal analysis readily explains contemporary legal battles involving several entrepreneurial ventures (e.g., Uber and Tesla, among others) whose innovative business models challenge existing laws. But these examples—which arise at the defining moment of Law and Entrepreneurship, where an innovative business is deemed legal or not—lie completely outside of a transactional theory of Law and Entrepreneurship. Accordingly, a more comprehensive theory is needed to capture the creative destructive jurisprudence that is central to Law and Entrepreneurship.

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I. Introduction

Paris, France: riots in the streets, shattered windows, smashed mirrors, slashed tires, bleeding hands, eggs and stones, and attackers trying to get in.\(^2\) The scene is not from the French Revolution. It is from 2014, and it epitomizes the story of Law and 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).\(^3\) 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 India, Chicago, Seattle, and Denver, among numerous other places.\(^4\) It is the classic story of Law and Entrepreneurship in which entrepreneurs threaten to upend a stagnant market through disruptive innovation\(^5\) and in the process often run afoul of the law.

Yet, despite entrepreneurs’ tendency to challenge legal precedent through groundbreaking innovations, the Law and Entrepreneurship movement\(^6\) is rooted in and continues to emphasize a transactional perspective.\(^7\) Ronald Gilson’s seminal analysis of business lawyers as “transaction cost engineers”\(^8\) continues to provide the Law and Entrepreneurship movement with its primary theoretical model to explain the lawyer’s role in counseling start-up companies, even though Gilson’s model was not originally developed specifically for entrepreneurship. Under the

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\(^6\) This article refers to “Law and Entrepreneurship” primarily as a movement, field, discussion, or perspective without engaging the friendly debate over whether Law and Entrepreneurship is properly considered 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, and that “[i]f the legal profession continues to insist upon a separate field of law and entrepreneurship as a category within legal studies, then there will be a field”); 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, supra note __, at 84 (discussing Law and Entrepreneurship in the context of debates over new academic disciplines, 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 and explaining lessons to be learned “beyond the particulars of cyberspace”).
\(^7\) See infra Part II.
transaction cost engineer model, attorneys add value to business transactions by reducing the transaction costs inherent to business deals.\(^9\)

Though Gilson’s frame of reference was the corporate law firm specializing in mergers and acquisitions, subsequent scholars have expanded the transactional framework to include other contexts and capture other roles.\(^10\) For instance, lawyers can be seen as “reputational intermediaries” in the venture capital community.\(^11\) Their role in negotiating business agreements can be viewed as that of “regulatory arbitrageurs.”\(^12\) Or transactional attorneys can also be considered “enterprise architects” in the broader corporate world.\(^13\) Gilson’s model, and each of these subsequent modifications and enhancements, build from the same theoretical base of classical economics.\(^14\)

Classical economics sprouts from Adam Smith’s “invisible hand” that continually propels the economy towards a state of balanced equilibrium.\(^15\) In classical economics, the analytical inquiry remains largely centered on business transactions driven by supply and demand forces.\(^16\) And the transaction cost engineer model explicitly relies on classical economics—specifically the capital asset pricing model (CAPM)—to explain how lawyers add value by reducing transaction costs in business deals.\(^17\) Hence, to the extent entrepreneurship is simply about business transactions, transaction-based theories apply appropriately enough. And because transactional attorneys are often the first to represent entrepreneurs in the start-up phase, transaction-based approaches have been seamlessly adopted into the standard Law and Entrepreneurship framework.

But classical economic theory—on which the transactional characterization of lawyers’ roles is based—scarcely accounts for entrepreneurship.\(^18\) For all of Adam Smith’s merits and indelible influence, he and subsequent classical economic theorists either entirely ignore or fail to give prominent attention to entrepreneurship.\(^19\) Hence, it is misplaced (and ironic) for the Law and Entrepreneurship field to assimilate into a theoretical model where entrepreneurship itself is not central. The Law and Entrepreneurship movement must take a more comprehensive view of entrepreneurial activity and focus on an economic theory that prioritizes instead of marginalizes entrepreneurial activity.

The starting point should come, appropriately enough, from the economist (and lawyer)\(^20\) who most prominently explained economics in terms of the entrepreneur’s role and impact.\(^21\) Joseph Schumpeter approached economics differently than classical economists.\(^22\) Far from the

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\(^9\) See infra Part II.
\(^10\) See infra Part II.
\(^12\) Victor Fleischer, Regulatory Arbitrage, 89 TEX. L. REV. 227, 236-37 (2010).
\(^14\) See infra Part II.
\(^15\) See infra Part III.
\(^16\) See infra Part III.
\(^17\) Gilson, supra note __, at 250-53.
\(^18\) See infra Part III.
\(^19\) See infra Part III.
\(^20\) 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”).
\(^21\) See infra Part III.
\(^22\) See infra Part III.
world of stable business transactions guided by an invisible hand of self-interest and supply and demand, Schumpeter viewed capitalism as an existential struggle. His memorable characterization of entrepreneurship as a “creative destructive” force places entrepreneurs at the center of economic activity. 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. And his theoretical framework has received renewed interest from contemporary scholars who focus on the ascending prominence of creativity, entrepreneurship, and innovation in the Internet age.

This article highlights the fundamental role that law frequently plays in creative destruction. From the perspective of creative destruction, the heart and soul of economics is entrepreneurship, and entrepreneurship in turn is revolution. And this entrepreneurial revolution is often played out in a courtroom, not in the business transactions that typically garner the most attention in the Law and Entrepreneurship movement. Accordingly, this article contributes to moving the Law and Entrepreneurship discussion beyond meaningful, but incomplete and at times uninspiring, descriptions of transactional lawyers serving business leaders as transaction cost engineers or other transaction-based portrayals.

From the perspective of creative destruction, this article proposes that the lawyer’s role in representing entrepreneurs is more appropriately deemed “disruption framer.” 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. 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.

For example, this article features modern-day cases of courtroom drama animated by creative destruction, such as Uber’s Internet app that disrupts standard taxi and limousine business models and Tesla’s direct sales of electric cars that cuts out intermediary car dealers, among other examples. The article also draws on examples of creative destructive legal conflict from the recent past (e.g., Napster’s now-defunct effort to challenge the music industry through peer-to-peer sharing of digital music and Netflix’s intellectual property lawsuit against Blockbuster) and not so recent past (the 1837 dispute over a new Boston bridge in Charles River Bridge). Each of the examples is or has been both allegedly illegal and the subject of

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23 See infra Part III.
24 See infra Part III.
25 See infra Part III.
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27 See infra Part III.
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31 See infra Part III.
32 See infra Part III.
litigation. Consequently, the examples illustrate the central role of law and lawyers—outside the world of business transactions—in determining how society deals with the powerful economic forces embodied in creative destruction.

The article’s thesis is that creative destruction should serve as the organizing principle of a comprehensive jurisprudential theory of Law and Entrepreneurship. Not all creative destruction involves legal conflict. But when creative destruction does result in legal conflict, the examples should be gathered together under one jurisprudential umbrella. Currently, the examples are widely dispersed under myriad legal disciplines (including, at a minimum, innovation law, antitrust/competition law, consumer protection law, intellectual property law, and securities law, along with numerous other legal fields). Dispersion naturally occurs in the absence of a unifying principle. Furthermore, defining the topic along the lines of traditional legal disciplines forces a legal rubric over a business phenomenon. Instead, the business principle of creative destruction should guide the legal analysis and serve as the unifying principle of jurisprudential models unique to a Law and Entrepreneurship academic field.

After this introduction, Part II traces the origins and development of the Law and Entrepreneurship field, concentrating on two primary themes. First, it describes how a transactional law perspective has influenced the contours of Law and Entrepreneurship. Second, Part II describes how numerous distinct legal disciplines have chronicled discrete instances where law intersects entrepreneurship in various ways. Part II also briefly highlights the shortcomings of the two themes in order to point towards the proposals in Parts III and IV.

Part III draws on economics literature to move beyond the transactional conception of Law and Entrepreneurship. Instead, it envisions lawyers as disruption framers in creative destructive entrepreneurship, akin to how lawyers are known as framers of the US Constitution in the political ambit. Part III further argues that Law and Entrepreneurship scholars must propose and cultivate a systematic jurisprudence of creative destructive legal conflict. Part IV then offers forward-looking recommendations for the Law and Entrepreneurship movement in light of the article’s dual emphasis on lawyers as disruption framers and the jurisprudence of creative destruction.

II. The Law and Entrepreneurship Field

In the interest of simplicity, the emerging Law and Entrepreneurship cannon can be organized into three rough categories, each of which is briefly explained in Part II. The first

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33 See infra Part III.
34 This article does not attempt to reconcile competing definitions of entrepreneurship. As described in Part III, the article focuses solely on a creative destructive theory of entrepreneurship: the dialectical process whereby innovative firms create new markets and simultaneously destroy existing market leaders. In any case, a complete definition of entrepreneurship might never be achieved. David E. Pozen, We Are All Entrepreneurs Now, 43 WAKE FOREST L. REV. 283, 285 (2008) (“Theories of entrepreneurship abound, but we have no completely satisfying synthetic account of the practice, and we probably never will.”); Means, supra note __, at 5-12; Ibrahim & Smith, supra note __, at 83-89; Amir N. Licht, The Entrepreneurial Spirit and What the Law Can Do About It, 28 COMP. LAB. L. & POL’Y J. 817, 819 (2007) (“A well-known problem in the . . . field of entrepreneurship is the lack of an agreed definition . . . .”); D. Gordon Smith & Masako Ueda, Law and Entrepreneurship: Do Courts Matter?, 1 ENTREPRENEURIAL BUS. L.J. 353, 355 (2007) (noting that “entrepreneurship as a distinct field of research is still searching for an identity”).
category arises out of law school clinical programs in transactional law (including cross-disciplinary cooperation with business schools), as well as the many entrepreneurship incubators where practicing transactional attorneys assist budding entrepreneurs. The second category explains 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.

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

Abstractly, entrepreneurship connotes creativity or novelty applied to opportunity, and an interdisciplinary context is immediately apparent, comprising at least numerous business fields (e.g., marketing, finance, management) as well as economics, psychology, and sociology. D. Gordon Smith & Darian M. Ibrahim, Law and Entrepreneurial Opportunities, 98, CORNELL L. REV. 1533, 1540-1545 (2013) (summarizing academic research on “entrepreneurial opportunities”); Ibrahim & Smith, supra note __, at 84; 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 __, at 819-50 (reviewing academic literature from economics, psychology, and cultural studies on entrepreneurship).

More concretely, entrepreneurship can be limited to start-up company innovation backed by venture capital investment, expanded to encompass small business “mom-and-pop” operations, or even widened to include “intrapreneurship” that established firms pursue to launch new product lines. Means, supra note __, at 7-15; Smith & Ueda, supra note __, at 356. More broadly, beyond capitalist entrepreneurs, the definition could also extend to other types of entrepreneurs—social entrepreneurs, policy entrepreneurs, norm entrepreneurs. Pozen, supra note __, at __ (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, speculative entrepreneur, innovator entrepreneur, and network entrepreneur). A leading school of entrepreneurship even has a trademarked phrase to describe itself as “the educator for Entrepreneurship of All Kinds.” About Babson, BABSON COLLEGE, http://www.babson.edu/about-babson/Pages/home.aspx (last visited May 1, 2015).


36 See infra Part II.A. For listings of course offerings in law and business schools, see Luppino, Can Do, supra note __ at 22-23, Appendices 5-6 (cataloguing course offerings).

37 See infra Part II.A. For a discussion of the practicing bar, see Kevin Davis, Venturing into Startup Territory, A.B.A. J., pp. 55-58 (June 2014).

38 See infra Part II.C. For a compilation of scholarly perspectives on law and entrepreneurship, see CREATIVITY, LAW AND ENTREPRENEURSHIP (Shubha Ghosh & Robin Paul Malloy eds., 2011).
of law and entrepreneurship are affiliated with clinical programs.” 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.” Achieving a clinical foundation of “what is now a ‘law and entrepreneurship’ movement” is a milestone in its own right, in view of clinical education’s historical roots in litigation.

Teaching transactional law skills in an entrepreneurship law clinic is a natural fit. Aspiring entrepreneurs want low-cost transactional legal assistance just as law students want to develop transactional law skills through interactions with real clients. But the Law and Entrepreneurship movement, 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, in keeping with the principle that “transactional work involves...actively avoiding the courtroom.”

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. Law firms, too, embrace the transactional conception of Law and Entrepreneurship as a means of establishing relationships with promising entrepreneurs in hopes of generating future corporate clients. Firms routinely sponsor entrepreneurship incubators and even provide discounted office space, among other incentives, to help start-up entrepreneurs succeed.

The Law and Entrepreneurship movement 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

39 Luppino, Can Do, supra note __, at 13.
42 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 clinical programs that have been historically litigation-centric).
44 Jones & Lainez, supra note __, at 96; Luppino, Can Do, supra note __, at 6-8.
45 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 (last visited May 28, 2015).
46 Jones & Lainez, supra note __, at 97 (emphasizing that “transactional work involves all of the legal skills used in establishing or growing a business, with an eye toward assessing risks and actively avoiding the courtroom”).
48 Davis, supra note __, at 56-57.
49 E.g., Davis, supra note __, at 57-58.
start-up entrepreneurs. And transactional legal services are a valuable and appropriate starting place for the Law and Entrepreneurship field.

**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.\(^{50}\) 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.”\(^{51}\) 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 analyses 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.\(^{52}\)

And the transaction cost engineer theory is undoubtedly helpful as an explanation of why transactional lawyers exist and what value they add to business deals.\(^{53}\) The theory is premised on the capital asset pricing model (CAPM) and, especially, on the failure of certain assumptions on which the model depends.\(^{54}\) 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 forces.”\(^{55}\) But because transaction costs are in fact “pervasive,”\(^{56}\) 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.”\(^{57}\) More simply, the *raison d’être* of transactional lawyers who facilitate business deals is “cost-saving,” or more proactively, “value-creating.”\(^{58}\)

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.”\(^{59}\) And to the extent such a transactional perspective encapsulates the Law and Entrepreneurship movement, 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.\(^{60}\)

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\(^{50}\) Lipshaw, *supra* note __, at 701.

\(^{51}\) Lipshaw, *supra* note __, at 709-10.

\(^{52}\) Jones & Lainez, *supra* note __, at 103-04 (recognizing “the doctrinal contribution” of “Gilson’s seminal work” as a foundation for transactional law clinics).


\(^{54}\) Gilson, *supra* note __, at 250-53.

\(^{55}\) Gilson, *supra* note __, at 251.

\(^{56}\) Gilson, *supra* note __, at 253.

\(^{57}\) Gilson, *supra* note __, at 255.

\(^{58}\) Gilson, *supra* note __, at 254 (stating that “the pervasive use of business lawyers . . . raises an inference that it is a cost-saving, in my terms value-creating, phenomenon”).

\(^{59}\) Lipshaw, *supra* note __, at 710 n.31 (“The thrust of this work is essentially Coaseian”).

\(^{60}\) Gilson, *supra* note __, at 294-303.
Later transactional law theorists after Gilson have largely (but not universally) adhered to the Coasean doctrinal construct that highlights the impact of transaction costs on organizational or business decisions. For instance, Schwarz focuses on the role of business lawyers in reducing regulatory costs for corporate clients. Similarly, Fleischer suggests a “friendly amendment” to Gilson’s model to emphasize how business lawyers engineer regulatory costs to their clients’ advantage. Looking specifically at venture capital communities, Okamoto stresses the value lawyers bring to entrepreneurs and investors alike by making introductions and signaling reputational quality. Bernstein applies Gilson’s paradigm to several value-enhancing roles that transactional attorneys play in Silicon Valley. 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. But 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. Therefore, the Law and Entrepreneurship movement must not be subsumed under an exclusively transactional rubric and instead must embrace an economic theory where entrepreneurship is central, unlike classical economics. Analytical tools unique to the study of entrepreneurship—namely, creative destruction—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 Encouraging Entrepreneurship

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61 From a more anthropological or philosophical perspective than Coase’s economic theory, Lipshaw takes issue with the “scientific status” afforded to Gilson’s theory and asserts that an alternate explanation for the role of transactional attorneys is the “meaning” they provide to business people consummating corporate transactions, not simply the bottom-line financial impact of cost reduction. Jeffrey M. Lipshaw, Beetles, Frogs, and Lawyers: The Scientific Demarcation Problem in the Gilson Theory of Value Creation, 46 WILAMETTE 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 “cultural or hermeneutic significance” of the role of transactional lawyers in consummating business deals).

62 Gilson, supra note __, 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. Ronald H. Coase, The Nature of the Firm, 4 ECONOMICA 386, 386-405 (1937).

63 See infra notes __ - __. 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).

64 Stephen L. Schwarz, Explaining the Value of Transactional Lawyering, 12 STAN. J.L. BUS. & FIN. 486, 506-07 (2007) (asserting that transactional lawyers’ primary value is to reduce regulatory costs, not serve as transaction cost engineers).

65 Fleischer, supra note __, at 236-37 (describing transactional attorneys as regulatory arbitrageurs).

66 Okamoto, supra note __, at 22-26 (explaining the role of transactional attorneys as reputational intermediaries).


68 Dent, supra note __, at 295-318 (arguing that business lawyers are more accurately characterized as enterprise architects than transaction cost engineers).
Other work that has influenced the Law and Entrepreneurship movement 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. More precisely, this category of research is broadly concerned with how law can (or cannot), should (or should not), encourage (or discourage) entrepreneurship.\footnote{E.g., Smith & Ueda, \textit{supra} note __, at 357 (“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, \textit{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, \textit{supra} note __, at 82 n.65 (cataloging numerous examples that “help us understand connections between law and entrepreneurship”).}

As a baseline, scholars note the importance of property rights and the stability of the legal system as precursors for vibrant entrepreneurial communities.\footnote{Smith & Ibrahim, \textit{supra} note __, at 1550-69; Lipshaw, \textit{supra} note __, 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, \textit{The Impact of the Judiciary on Entrepreneurship: Evaluation of Pakistan’s Access to Justice Programme}, (CIRPEE Working Paper 07-27, 2007), available at http://ssrn.com/abstract=1018901 (evaluating the impact on entrepreneurship of judicial reforms that increase the predictability and efficiency of the legal system); Parker, \textit{supra} note __, at 711-14 (discussing economics literature showing that “[w]ell-protected property rights help promote entrepreneurship and innovation”).} More aggressively, law and policy can also be viewed as a proactive tool for enhancing entrepreneurship.\footnote{Viktor Mayer-Schonberger, \textit{The Law as Stimulus: The Role of Law in Fostering Innovative Entrepreneurship}, 6 J/S: J. L. & POL’Y FOR INFO. SOC’Y 153, 183-85 (2010).} 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.\footnote{See, e.g., Anupam Chandler, \textit{How Law Made Silicon Valley}, 63 EMORY L.J. 639, 647-69 (2014); Darian M. Ibrahim, \textit{Financing the Next Silicon Valley}, 87 WASH. U. L. REV. 717, 723-32 (2010); Licht, \textit{supra} note __, at 817, 850-61 (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 \textit{CREATIVITY, LAW AND ENTREPRENEURSHIP} 49, 52-60 (Shubha Ghosh & Robin Paul Malloy, eds., 2011) (describing university and government intersections with entrepreneurship); Abraham J.B. Cable, \textit{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”).} And 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.”\footnote{Smith & Ueda, \textit{supra} note __, at 364.}

Other scholarly work related to law and entrepreneurship seeks to develop “innovation law” or “innovation policy.”\footnote{Tom Nicholas, \textit{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 law and policy promotes business innovation, or technological advancement, as the primary goal for legal doctrine to serve.\footnote{Herbert Hovenkamp, \textit{Competition for Innovation}, 2012 COLUM. BUS. L. REV. 799, 800 (2012).} And for innovation law scholars, the relevant legal doctrine usually consists of a fusion of antitrust and intellectual
property law. In addition, as separate disciplines, both antitrust and intellectual property offer a wealth of analysis on how law intersects innovation, especially in high technology industries.

Hovenkamp, supra note __, at 800, 812 (observing that “[m]anaging innovation requires a fusion of policies taken from different legal disciplines, including intellectual property (IP) and antitrust law[,]” and 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)); 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).


Whereas historically antitrust law has emphasized the classical economic concerns of lower prices and higher quantities that are achieved through competitive markets in the absence of collusion, cartels, and monopolies, current antitrust scholars increasingly emphasize the harm to innovation (and thus to the economy) that can result from potential competitors being excluded from a market. Jonathan B. Baker, Exclusion as a Core Competition Concern, 78 ANTITRUST L. J. 527, 559 (2013) (remarking that “[e]xclusionary conduct is commonly relegated to the periphery in contemporary antitrust discourse, while price fixing, market division, and other forms of collusion are placed at the core of competition policy” and highlighting “the particular threat exclusion poses to economic growth”); 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 detrimental effects on innovation that parallel exclusion causes); 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 CAL. 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”).

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). In particular, lively scholarly debates on the role of patent law in entrepreneurship have raged for years.

Scholars also note that in some situations extrinsic motivation reduces the creative impulse, highlighting recent examples of large-scale volunteer cooperation in creative activities facilitated through the Internet. 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, Economics 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).

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Moreover, numerous studies examine relationships between entrepreneurship and laws in the areas of securities, early-stage investing, employment, and bankruptcy. Securities laws receive extensive attention because of the importance of access to capital for start-up entrepreneurs. 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. Employment law heavily impacts entrepreneurship in relation to flexible hiring practices, employee mobility, and non-competition agreements. There are also analyses of how bankruptcy discharge laws impact people’s willingness to launch entrepreneurial ventures that have a high risk of failure.

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 impacting an entrepreneurial ecosystem. Instead of providing another example of where law intersects entrepreneurship, though, this article seeks to contribute to an overarching analytical paradigm that uses creative destruction as the unifying principle of Law and Entrepreneurship.

III. Creative Destruction and Law

79 Ibrahim, supra note __, at 753-61.
82 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 __, 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,” thereby encouraging him to pursue entrepreneurial ventures).
This article issues the call to use creative destruction not just as the animating ethos of an economic explanation of entrepreneurship but as the organizing principle of the jurisprudence of Law and Entrepreneurship. Uniting Schumpeter’s economic theory with legal analysis reveals the jurisprudential core of Law and Entrepreneurship: those creative destructive moments in some entrepreneurial firms’ growth cycles when an innovative business model encounters legal conflict. As discussed in Part II, this central point 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 movement tends to sideline creative destructive legal conflict. Second, jurisprudential analyses typically 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 what if jurisprudential analysis were organized around an economic theory, not around a legal discipline? This article places creative destructive legal conflict at the center and organizes Law and Entrepreneurship jurisprudence around economic theory, regardless of the boundaries of traditional legal disciplines. Law and Entrepreneurship scholarship should conform to the economic theory that best explains entrepreneurship in order to accomplish a holistic and systematic, instead of scattered and piecemeal, jurisprudence of creative destruction.

A. Entrepreneurs in Classical Economics

The transaction-based explanation of what business lawyers do arose out of classical economic theory, which posits as a fundamental tenet that supply and demand forces consistently move markets towards equilibrium. Under a classical economic analysis, transactional lawyers are indeed central because 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.

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.” For instance, “[e]ntrepreneurs are largely absent from the economic theory of [Adam] Smith—he never uses
the term….”89 Instead, Smith’s “depiction of ‘an invisible hand’ leading to market equilibrium
drew attention away from the entrepreneur’s self-consciously generative role.”90 And following
Smith’s impetus, neoclassical economists in the twentieth century “have likewise tended to
trivialize entrepreneurship in their formal models of a steady-state economy.”91

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.92 The focus turns to how scarce resources are used most productively
“thanks to market transactions that lead to equalizing marginal costs and utilities.”93 Such a view
of economics positions firms as the primary economic actors, “and the entrepreneur is nothing
more than a person owning a firm.”94

It is at best incongruous, 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 scarcely accounts for entrepreneurship. The Law and Entrepreneurship
movement must embrace a more robust vision of law’s relationship to entrepreneurship.
Specifically, a more comprehensive vision should encompass the jurisprudence of creative
destruction where entrepreneurs are primary drivers of economic activity.

B. Entrepreneurs in Creative Destructive Economics

Schumpeter disagreed that markets tend toward equilibrium and drew attention away
from Smith’s “invisible hand” metaphor.95 Instead, Schumpeter asserted that the natural state of
capitalist markets is competitive upheaval.96 Through technological progress, innovative
competitors continually threaten to overtake and destroy industry leaders.97 And when status-quo
market leaders fall and are replaced, Schumpeter termed the process creative destruction.98 He
described 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. It is what capitalism
consists in and what every capitalist concern has got to live in.”99 From the perspective of
creative destruction, economies do “not tend naturally toward stability and growth through the

89 Pozen, supra note __, at 288.
90 Pozen, supra note __, at 288.
91 Pozen, supra note __, at 288.
92 Eyal-Cohen, supra note __, at 733-34; Pozen, supra note __, at 289 (asserting that in such a world “entrepreneurs
would have nothing to offer; the concept of entrepreneurship would not even make much sense”).
93 Licht, supra note __, at 820; Thomas Arthur, The Costly Quest for Perfect Competition: Kodak and Nonstructural
prices are dictated by the equilibrium of supply and demand.”).
94 Id. at 821.
95 Eyal-Cohen, supra note __, 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”).
96 Arthur, supra note __, at 10-12.
97 Michael L. Katz & Howard A. Shelanski, “Schumpeterian” Competition and Antitrust Policy in High-Tech
Markets, 14 COMPETITION 47, __ (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 __, at 726 (noting that for Schumpeter, entrepreneurs’ “innovative new combinations
destroy the basis of the old economy”).
99 SCHUMPETER, supra note __, at __.
workings of an invisible hand, but rather...[they are] propelled forward in sudden leaps by the endogenous innovations of key entrepreneurs.”

And later scholars, especially Clayton Christenson, have added the concept of “disruptive innovation” to the entrepreneurial lexicon. Christenson contrasted “sustaining innovations” with “disruptive innovations.” He found that existing market leaders often successfully accomplish sustaining innovations, or incremental and marginal improvements on existing products. But Christenson demonstrated that start-up entrepreneurs with new technologies more frequently carry out disruptive innovations, which create new markets while destroying old ones.

From the perspectives of Schumpeter and Christenson, then, the essence of entrepreneurship is not stable business transactions. It is the dialectical 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 an economic theory that has 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 disruptions in markets, society, and law.

C. Creative Destructive Legal Conflict

Creative destruction is high stakes battle. Market leaders do not go down quietly. Rising innovators do not arrive politely. Market revolutions are bloody, whether figuratively or sometimes even literally. As such, legal conflict frequently is at the core of creative destruction because market actors look to the courts to resolve disputes.

But despite the prevalent link between creative destruction as a business phenomenon and creative destruction as a legal phenomenon, there is no unified jurisprudence of creative destruction. Traditionally, legal conflict involving creative destruction has simply been categorized within existing legal disciplines, sometimes falling under antitrust, sometimes intellectual property, sometimes securities, and sometimes antiquated industry regulations, among countless other areas of law. The Law and Entrepreneurship field should consolidate the dispersed examples under the organizing principle of creative destructive jurisprudence, independent of and crossing disciplinary lines.

100 Pozen, supra note __, at 291.
101 Hobbs, supra note __, at 285; Pozen, supra note __, at 291.
102 CHRISTENSON, supra note __, at __.
103 CHRISTENSON, supra note __, at __.
104 CHRISTENSON, supra note __, at __.
105 CHRISTENSON, supra note __, at __.
106 Disruptive innovation that start-up firms produce is in some tension with Schumpeter’s statements that monopolies were more likely to innovate than small firms, although Schumpeter also recognized the innovative impetus from new entrants. See, e.g., McCraw, supra note __, at 215 (describing Schumpeter’s discussion of innovation driven by new firms and existing firms).
The examples highlighted below do not fit a transactional model of Law and Entrepreneurship. The examples have nothing to do with business deals, and 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 as legal counsel, as discussed in Part IV.

In the creative destructive examples below, the legal issues strike at the heart of the entrepreneurial companies and their business models. The disputes are not merely tangential to the entrepreneurial enterprise. And the examples cut across current disciplinary lines of jurisprudence. The issues are not contained within antitrust law, intellectual property law, innovation law, securities law, or industry regulations (such as the Department of Transportation or the Federal Communications Commission). The overarching and unifying legal category is creative destructive jurisprudence. Law and Entrepreneurship, accordingly, must expand and embrace its jurisprudential core of creative destructive legal conflict.

1. Tesla

A prominent recent example of creative destructive legal conflict is Tesla, an innovative manufacturer of electric cars. Tesla sells new cars directly to consumers, whether over the Internet or from company-owned showrooms. 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. 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. In other states, Tesla has been barred from even operating a showroom because the company refuses to sell its cars through a middleman.

Tesla’s legal conflict revolves primarily around the interpretation of car dealership rules. Car dealers allege that Tesla’s direct sales business model is a form of unfair competition because traditional car manufacturers sell new cars through third-party dealerships. Tesla argues that it should be free to sell cars directly, especially because Tesla’s

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106 The examples below are merely a small sampling of creative destructive legal conflict. Additional examples in numerous industries involving a wide variety of legal disciplines could be cited. In recent times, the Internet has served as a creative destructive force in numerous industries. For example, banking laws are currently experiencing creative destructive pressures.


108 An additional hold-out to the direct sales model is liquor, where a three-tiered system of producers, wholesalers, and retailers remains the norm in most states. The pressures of disintermediation that the Internet brings has resulted in some recent changes.


110 Marcus Wohlsen, Car Dealers Are Terrified of Tesla’s Plan to Eliminate Oil Changes, WIRED (March 2014), http://www.wired.com/2014/03/car-dealers-fear-teslas-plan-end-oil-changes-forever/.


113 Id.
electric cars are so different from traditional gas-powered vehicles. Tesla likens its cars 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.” The unique design of Tesla cars allows Tesla to eschew the standard dealership model of fee-for-service maintenance. Lacking an internal combustion engine, Tesla cars have “no spark plugs, no air filters, no fuel pumps, no timing belts.” And Tesla updates the software in each car wirelessly and remotely over the Internet. The car’s software automatically detects when new parts, such as brake pads or wiper blades, are needed. When maintenance is required, Tesla offers annual flat-rate plans for service instead of charging separately for repairs. Thus, Tesla’s business model threatens the approach traditional car dealerships take to both sales and maintenance.

Tesla’s creative destructive legal conflict offers multiple lessons. It shows federalism to be a two-edged sword for entrepreneurs: federalism can burden entrepreneurs with 50 varieties of state laws but simultaneously serve as a creative force in law because states compete with each other to attract entrepreneurs. In New York, the court interpreted around legal conflicts and allowed Tesla’s new business model to move forward, but in other states the opposite result has occurred. Apart from state law battles over competition law and car dealership regulations, Tesla has also considered “a federal legal challenge based on limits to interstate commerce” and “new [federal] legislation in Congress.” Currently, though, Tesla’s strategy for creative destructive legal conflict remains a scaled, state-by-state approach to grow in states where direct sales are legal while building public pressure on other states to accommodate Tesla’s innovative business model.

A key component of Tesla’s legal strategy involves social media, lobbying, and community mobilization among Tesla supporters, even to the point of cultivating a somewhat cult-like following. Tesla’s CEO has often taken to Twitter and other forms of social media to further Tesla’s legal arguments, and the company’s website includes numerous points of engagement for its supporters to help further Tesla’s legal advocacy. The company’s lobbying expenses have also consistently increased.

Tesla’s example of creative destructive legal conflict, along with many other examples, show that the Law and Entrepreneurship field must expand to provide a systematic account of creative destructive legal strategy. The heart of Tesla’s creative destructive business model and legal strategy has little to do with business transactions and is not contained within a distinct legal discipline. As discussed in Part IV, disruption framers who advise creative destructive entrepreneurs need unique skills that should be cultivated from a comprehensive framework of creative destructive legal conflict throughout history.

2. 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 schedule a pickup electronically. 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.

From a business perspective, Uber’s successful results are undeniable. After operating less than four years in New York, there are already more cars affiliated with Uber than taxi cabs on the streets of New York City.121 In Uber’s most recent investment round, the company was valued at $41 billion, making it the highest-valued venture-backed company in the US by a margin of some $30 billion.122 Uber has won all kinds of awards and recognition in the entrepreneurial community,123 and though Uber is more prominent than its competitors, it is far from alone in the electronic ride-hailing market.124 Outside of ride-hailing, other companies in the so-called “sharing economy” are also challenging legal rules with their innovative business models, such as car-sharing firms like FlightCar and RelayRides,125 and home-sharing platforms like AirBnB.126

From a legal perspective, 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.”127 But 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.”128 Indeed, as regulators have grappled with how to handle Uber’s business model, traditional taxi cab services have also resisted Uber’s arrival and actively defend their turf through litigation.


121 Melkorka Licea, Elizabeth Ruby & Rebecca Harshbarger, More Uber Cars Than Yellow Taxis on the Road in NYC, NEW YORK POST (March 2015), http://nypost.com/2015/03/17/more-uber-cars-than-yellow-taxis-on-the-road-in-nyc/.
123 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 (February 2015), http://techcrunch.com/2015/02/05/uber-wins-the-2014-crunchie-for-best-overall-startup/.
124 Lyft and Sidecar are Uber’s most prominent competitors in the US, while Hailo and Gett are strong competitors internationally.
125 Companies like FlightCar and RelayRides 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 violate transportation laws, airport rules, and licensing requirements.
126 AirBnB and VacationRentals provide an Internet platform for individuals to rent real estate, generally for short stays. Competitors (such as hotels) and regulators (such as agencies that enforce hotel regulations) have challenged the peer-to-peer sharing business model on grounds that it violates occupancy rules.
128 Id.
And the litigation involves numerous legal disciplines.\textsuperscript{129} For instance, traditional taxi and limousine companies that see Uber as a competitive threat allege that Uber is engaged in unfair competition as an unlicensed taxi company\textsuperscript{130} that avoids expenses such as medallion fees, which can be in the hundreds of thousands of dollars for each licensed taxi cab.\textsuperscript{131} Additionally, state and local government regulators challenge Uber’s compliance with a host of transportation and taxi regulations, such as insurance coverage minimums, driver background checks, and vehicle safety inspections.\textsuperscript{132} 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.\textsuperscript{133} In France, Uber’s litigation is a constitutional law question.\textsuperscript{134} And Uber has been barred from operating, at one time or another, in several European countries, South Korea, India, and Thailand.\textsuperscript{135}

Uber’s strategy has consistently been to enter new markets without asking for regulatory approval or permission.\textsuperscript{136} By the time legal challenges from competitors or regulators come, Uber aims to already be established in the market with a loyal cadre of drivers and passengers. As such, a vital part of Uber’s legal strategy 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 \textit{ex post}, not \textit{ex ante}.

Uber’s legal strategy appears to be working, though not without significant continuing opposition.\textsuperscript{137} Gradually regulatory bodies are accommodating Uber’s business model, with the California Public Utilities Commission having been the first.\textsuperscript{138} Colorado was the first to legislatively provide for a “transportation network company,” such as Uber and its competitors,

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{129} 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, classification of drivers as employees or independent contractors, and improper handling of driver tips, among other legal disputes. See, e.g., Dan Levine & Edwin Chan, \textit{Uber, Lyft Rebuffed in Bids to Deem Drivers Independent Contractors}, \textit{Reuters} (March 2015), http://www.reuters.com/article/2015/03/12/lyft-drivers-idUSL1N0WD2T520150312.
\item\textsuperscript{130} \textit{United Indep. Taxi Drivers v. Uber Tech.}, 2013 WL 3545872 (Cal. Super. 2013).
\item\textsuperscript{138} Anthony Ha, \textit{California Regulator Passes First Ridesharing Rules}, \textit{Tech Crunch} (September 2013), http://techcrunch.com/2013/09/19/cpuc-ridesharing-regulations/.
\end{itemize}
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even though initially Colorado regulators resisted Uber’s business model. And other jurisdictions continue to make similar adjustments to eliminate gray areas in the law and affirmatively regulate Uber’s business model.

Uber’s approach to creative destructive legal strategy demonstrates additional reasons why a unified jurisprudence of creative destructive legal conflict would be beneficial. Lawyers who specialize in discrete areas of law, such as antitrust or regulatory advocacy, are valuable in Uber’s situation, but 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 than doctrinal advocacy. Public relations, social media, and lobbying are at least as necessary as technical legal acumen, as further explored in Part IV.

3. 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. Self-driving cars may be legal under existing transportation laws, even without laws specially tailored to automated driving. In fact, “Google’s fleet of autonomous cars secretly drove more than 100,000 miles” before state regulations were enacted to specifically address driverless cars. But Google wanted 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 will 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.” 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.

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

145 Efrati, supra note __.
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 city, despite Uber’s proactive efforts, after 18 months of fruitless discussions and negotiations with city officials, Uber launched illegally anyway to force regulatory action). Tying these diverse examples together, Part IV describes how disruption framers would benefit from systematic jurisprudential analysis of different types of creative destructive legal strategies across history to facilitate comparisons and inspire effective counseling in future creative destructive situations.

4. Crowdfunding Laws

A separate example of creative destructive legal conflict borrows elements from Uber’s strategy and elements from Google’s self-driving cars approach. Recent laws on equity crowdfunding arose after crowdfunding entrepreneurs first tried the Uber way of pursuing business growth and worrying about legal violations later. In equity crowdfunding, the Uber strategy failed because equity crowdfunding sites that flaunted securities laws were shut down through federal and state cease-and-desist orders. As a result of the failure, an effort more similar to Google’s self-driving cars strategy was applied, but with an even broader advocacy base and much more visible social media presence. The efforts to pass crowdfunding legislation encompassed a wide variety of constituencies advocating on behalf of an emerging industry. 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.

The grass-roots movement that resulted in the CROWDFUND Act is an example of how Law and Entrepreneurship is broader than transactional law, and broader than any particular legal discipline (securities law in the case of equity crowdfunding). 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 systematic analysis of different creative destructive examples will inform the necessary skill set of disruption framers.

150 [Name and citation removed for anonymity]
151 Id.
5. Charles River Bridge

Though the previous examples showcased recent entrepreneurial innovations, creative destructive legal conflict is not new. The Charles River Bridge case of 1837 could be viewed as a foundational historical case of creative destructive jurisprudence.152 In 1785, the Massachusetts legislature authorized a company to build a bridge and collect tolls for passage over the Charles River in Boston under a 70-year charter, after which time the bridge would become the property of Massachusetts.153 But 27 years before the end of the charter, the legislature authorized a separate company to build a second bridge a few hundred feet from the first bridge.154 The second bridge became the property of Massachusetts after only six years, and was henceforth toll free for public use.155 The second bridge, being some 45 years more modern than the first bridge, and free to use, “entirely destroyed” the value of the legislature’s charter for the first bridge over the remaining 21 years of the 70-year charter.156

The owners of the first bridge alleged a constitutional law violation.157 In particular, the plaintiffs argued that the second charter “was an act impairing the obligations of a contract, and therefore, repugnant to the constitution of the United States.”158 But the Supreme Court held in favor of the legislature’s actions and allowed the second bridge to put the first bridge out of business, without compensation to the owners of the first bridge.159

Beyond the holding (and beyond the doctrinal takeaways for constitutional law, contract law, antitrust law, property law, and states’ rights), the Court’s language provides an important historical backdrop for creative destructive jurisprudence. The Court asserted that

\[ \text{[t]he object and the end of all government is, to promote the happiness and prosperity of the community…;} \text{and in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary both for travel and trade; and are essential to the comfort, convenience and prosperity of the people. A state ought never to be presumed to surrender…its power of improvement and public accommodation.} \]^{160}

The Court thus positioned itself strongly and unequivocally on the side of societal and technological progress. In ruling against the owners of the first bridge, the Court acknowledged that “the rights of private property are sacredly guarded,” but cautioned that “we must not forget, that the community also have rights” that must be protected for the sake of “the happiness and well-being of every citizen.”161

Charles River Bridge should form a historical pillar for the Law and Entrepreneurship field. In the context of government-granted charters for public utilities, the Court (and thus

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153 Id. at 420.
154 Id. at 420, 447.
155 Id. at 420, 447.
156 Id. at 420, 537.
157 Id. at 420, 537.
158 Id.
159 Id.
160 Id. at 420, 423.
161 Id. at 422.
litigators, not transactional attorneys) resolved the issue of whether new technologies (a new bridge) from a competing company would be allowed into the market, even at the cost of putting the status-quo market leader (the company operating the old bridge) out of business. Thus, there is a creative destructive thread running through *Charles River Bridge*. And that thread should be traced systematically through historical and contemporary jurisprudence, without regard to legal disciplinary lines such as antitrust, contract, or constitutional law. The strands are currently frayed among numerous legal disciplines precisely because a disciplinary approach obscures the organizing and unifying principle of creative destructive legal conflict. Intertwining the strands would help disruption framers advise creative destructive entrepreneurs more comprehensively and effectively, as discussed in Part IV.

6. Netflix

Creative destructive legal conflict also arises when the innovative challenger uses the courts offensively. In the previous examples (such as the Tesla, Uber, and Charles River Bridge cases), the status-quo market leader was suing an innovative competitor to defend its perch. But Netflix’s claims against Blockbuster illustrate the opposite situation.

Netflix created an innovative business model that destroyed Blockbuster. Netflix relied on new technology (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 across the country and in many parts of the world. It was vintage creative destruction.

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. Immediately after Netflix was issued a patent on its Internet business model, it sued Blockbuster for patent infringement. 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 where customers are not charged late fees.

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 entrepreneurs using litigation against market leaders should be organized around the central theme of creative destruction, regardless of legal discipline. As Part IV describes, constructing a


163 Id.


166 Id.; Hoffman, *supra* note __.
full panorama of creative destructive legal conflict should yield a cohesive strategic roadmap for
disruption framers to use in advising entrepreneurs.

7. Napster

The innovative entrepreneur is not always victorious in creative destructive legal conflict. Napster is a famous example of an innovative business model that courts quashed after industry leaders objected.167 Napster allowed individuals to upload music to the Internet and share it with others, a practice known as peer-to-peer file sharing.168 But the music industry successfully argued that Napster’s business model violated copyright law.169 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.170

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 each legal discipline, from the perspective of a disruption framer counseling entrepreneurs, the unifying theme of the cases is creative destruction, independent of legal disciplines.

IV. Recommendations

Without a systematic jurisprudence of creative destruction, 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 the economic theory of creative destruction. And the existence of numerous examples of creative destructive legal conflict throughout history shows the need for a comprehensive and systematic theoretical model of creative destructive jurisprudence. 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.

And 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 where lawyers can be viewed as passive servants of business clients, a necessary evil whose

value-add is cost reduction. Such a view is not only incomplete; it is also more hum-drum than inspirational and more scrivener than visionary.

But what if Law and Entrepreneurship reimagined the lawyer’s role? Can the lawyer’s role in entrepreneurship be conceived of as similar to the lawyer’s role in democratic government? From the perspective of democracy, lawyers are viewed as active principals, not passive agents. The founding fathers’ framing of the nation through the Constitution is viewed as a revolutionary and visionary act. Could disruption framers occupy a similar place in the business world with respect to how society confronts the challenges of creative destruction that results in legal conflict?

Approaching Law and Entrepreneurship from the perspective of creative destructive jurisprudence gives rise to two primary recommendations. The first involves delineating the jurisprudence of creative destructive legal conflict. The second relates to the role 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 destruction in the courts. 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. Within the broad category of creative destructive jurisprudence, different types of creative destructive legal conflict can be identified and analyzed. Commonalities in legal strategy can be identified 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), contract rights versus property rights, formal/licensed market participants versus informal/black market actors, or doctrinal distinctions such as intellectual property law versus securities law. But the metrics could also track non-legal criteria, such as creative destructive litigation involving entrepreneurial firms headed by women versus those headed by men, or those led by one racial group (or sexual orientation) versus those led by another. Additionally, the metrics could break down by business category, such as telecommunications versus construction. Or they could be examined by characteristics of the entrepreneurial firm, such as start-ups with less than one-year

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171 See infra Part II. Smith & Ueda, supra note __, at 364.
of operational history versus more established entrepreneurial firms, or creative destructive legal conflict between two public companies, two private companies, or one public and one private company, or venture-backed firms involved in creative destructive legal conflict versus non-venture-backed firms.

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 businesses encounter. Creative destructive jurisprudence can be construed broadly or narrowly. In its narrow sense, it includes situations when the actual existence or legality of a business or business model is at issue. In a broader sense, creative destructive jurisprudence encompasses all legal conflict that an innovative business encounters along a creative destructive path.

Out of these observations, Law and Entrepreneurship scholars should construct a more robust jurisprudential theory and develop paradigms that guide entrepreneurs, judges, and legislatures 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 counsel 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. Like storytellers, disruption framers mold a legal narrative around ground-breaking ideas. 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. Consequently, law schools should include broader training for lawyers to view Law and Entrepreneurship as more than a transactional discipline.

Such an approach 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

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172 Steven H. Hobbs, *Entrepreneurship and Law: Accessing the Power of the Creative Impulse*, 4 Entrepreneurial Bus. L.J. 1, __ (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 Amer. 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 skills to advise entrepreneurs in those areas).
part of a creative destructive legal strategy, as several of the examples in 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). Creative destructive entrepreneurs need more than transactional law guidance. A disruption framer paradigm enhances transactional and strategic planning 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 not only possible or likely, it may also even be welcomed or intended as part of a creative destructive legal strategy.

Cross-disciplinary training is particularly vital for disruption framers. Where the transaction cost engineer framework calls for cross-disciplinary training in finance and accounting, a disruption framer paradigm encourages a wider set of cross-disciplinary skills. 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.

Business schools should also incorporate the view of lawyers as disruption framers into business coursework. The transactional model has permeated the business world to such a degree that business people often default to viewing lawyers as transaction costs. But companies that intertwine legal counsel with business strategy can develop competitive advantages, so deploying lawyers as disruption framers can positively impact an entrepreneurial firm’s bottom line.

In law school clinics, the transaction-based paradigm is so ingrained that entrepreneurship law clinics typically disclaim litigation services from the outset. A disruption framer paradigm, though, can help open entrepreneurship law clinics to a broader range of services, including general litigation and policy advocacy on behalf of entrepreneurs. In some cases, creative destructive legal conflict in its narrowest sense 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). Nonetheless, even outside of the narrowest type of creative destructive legal conflict, an increased awareness that entrepreneurs benefit from litigation assistance could still help reduce the lawyer-centric silos that typically separate transactional advice from litigation advocacy. For example, some recent clinical efforts strive to

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173 Gilson, supra note , at 303-05.
175 See supra Part II.A.
176 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 (last visited May 28, 2015).
help small businesses in litigation against patent trolls. And helping entrepreneurs through litigation can also complement the social justice mission that clinics often pursue.

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.

V. 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 creative destructive jurisprudential analysis to disparate legal disciplines. All creative destructive legal conflict should be viewed as part of a larger whole unified through a coherent economic theory. Under a creative destructive model, the role of lawyers as disruption framers is central and transformative. Just as the framers of the US Constitution were lawyers who created the framework for democracy, so disruption framers are lawyers who create the framework for capitalist entrepreneurship.

What is missing is a systematic jurisprudence of creative destructive legal conflict that gives content and contour to the role and identity of disruption framers. Such a systematic jurisprudence would identify norms and help delineate paths of successful and unsuccessful creative destructive legal conflict. It would arm disruption framers with historical patterns, non-legal tools, and legal precedent to develop comprehensive legal strategies for advising entrepreneurs. The organizing principle of Law and Entrepreneurship jurisprudence should be the defining crucible of entrepreneurship: creative destruction.

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178 Jones & Lainez, supra note __, at 89 (observing that “true to their social justice underpinnings, transactional clinics often serve a social justice mission”). For example, though not an entrepreneurship clinic, the Community Development and Economic Justice Clinic at New York University School of Law 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.” Clinics, NYU LAW CMTY. DEV. & ECON. JUSTICE CLINIC, http://www.law.nyu.edu/academics/clinics/semester/commdevэкономjustice (last visited May 28, 2015). In addition, though the Institute for Justice Clinic on Entrepreneurship at the University of Chicago Law School is a transactional clinic, its sponsoring organization, the Institute for Justice, pursues libertarian litigation “to enhance entrepreneurial opportunities and to strike down arbitrary and unconstitutional laws that stifle honest enterprise.” 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).