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Putting the Legal Profession's Monopoly on the Practice of Law in a Global Context

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PUTTING THE LEGAL PROFESSION'S MONOPOLY ON THE PRACTICE OF LAW IN A GLOBAL CONTEXT

Laurel S. Terry*

When considering the proper scope of the U.S. legal profession's monopoly, regulators and commentators may find it useful to compare the scope of the U.S. monopoly with the legal profession monopolies found in other countries. This Article surveys what we know—and do not know—about the scope of the monopoly in countries other than the United States. The Article finds that the state of knowledge on this topic is relatively undeveloped, that the scope of the U.S. legal profession's monopoly appears to be larger than the scope of the monopoly found in some other countries, but that the “conventional wisdom” may be incorrect with respect to the scope of the legal profession's monopoly outside of the United States. It discusses some relatively new developments that may contribute to our knowledge in this area, including reports from the World Trade Organization, the European Union, and the International Bar Association. It also suggests that relatively new organizations, such as the International Conference of Legal Regulators and the International Association of Legal Ethics, might contribute to our knowledge about legal regulation around the world.

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INTRODUCTION

This contribution to the *Fordham Law Review* Colloquium, entitled *The Legal Profession's Monopoly on the Practice of Law*, places the U.S. legal profession's monopoly in a global context and compares it to the monopoly found in other countries. I chose to write about this particular topic for three reasons. First, it is increasingly likely that regulators will either be asked or will choose to benchmark their policies against policies of other countries or other professions.¹ Thus, when U.S. regulators think about the proper scope of the legal profession's monopoly, they may want to compare the U.S. legal profession's monopoly with other countries' monopolies.

I do *not* mean to say that *if* the U.S. legal profession's monopoly is larger than these other monopolies, *then* it should be changed. But it is a useful exercise to recognize any differences so that one can consider why those differences exist. Moreover, even if U.S. legal regulators do not believe in the independent value of this type of comparative benchmarking, they may need to be prepared to justify to others differences among the U.S. legal profession's monopoly and the monopolies found elsewhere.²

1. See, e.g., LAW SOC'Y OF UPPER CAN. PROF'L REGULATION COMM., REPORT TO CONVOCATION (2014), available at http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC%281%29.pdf; Darrel Pink, *Summation: International Legal Regulation*, SOC'Y REC., Spring 2013, at 38; Memorandum from the ABA Comm'n on Ethics 20/20 Working Grp. on Alt. Bus. Structures to ABA Entities, Courts, Bar Ass'ns (State, Local, Specialty and International), Law Sch., and Individuals (Apr. 5, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf (reviewing developments in other countries); Symposium, Law Soc'y of Upper Can., Alternative Business Structures (Oct. 4, 2013) (program on file with *Fordham Law Review*) (examining policies elsewhere in the world when considering the alternative business structure policy for Ontario). I have recommended that lawyer regulators perform this type of benchmarking in which they compare their regulations to lawyer regulations found in other countries and to regulations used for other professions. See Laurel Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession As "Service Providers,"* 2008 J. PROF. L. 189, 209–10.

2. See *infra* notes 3, 26–28 and accompanying text (discussing the Organisation of Economic Co-operation and Development (OECD) and European Union (EU) competition reports that include information about the scope of the monopoly in a number of countries with respect to several different professions). For another example of this type of benchmarking, see the OECD Services Trade Restrictiveness Index (STRI) project. *Towards a Services Trade Restrictiveness Index (STRI)*, ORG. ECON. COOPERATION & DEV., <http://www.oecd.org/trade/services-trade/towardsaservices-traderestrictivenessindexstri.htm> (last visited Apr. 26, 2014); see also Laurel S. Terry, *An Introduction to the Financial Action*

The second reason why I chose to examine this topic is because I have been told on numerous occasions that outside the U.S., the scope of the legal profession's monopoly is limited to courtroom work. I have doubted this "conventional wisdom," but in the absence of an article such as this one, I was not able to respond to these types of statements.

The third reason for selecting this topic is because I hope that this Article can lay the groundwork for additional research. Policymakers and stakeholders have a strong interest in learning more about lawyer regulation and differences in access or quality that may—or may not—flow from differences in the scope of the legal profession's monopoly.

Part I of this Article sets forth the conventional wisdom about the scope of the legal profession's monopoly around the world, which is that in most countries, the scope of the monopoly is limited to courtroom representation of clients. Part II notes an important caveat and observes that, within a given country, there often are disagreements about the precise scope of the legal profession's monopoly. Part III identifies sources of information that suggest that the conventional wisdom about the scope of the legal profession's monopoly may not be accurate. These sources include studies commissioned by the European Commission (EC), a report on global lawyer regulation commissioned by the International Bar Association (IBA), and legal services commitments found in the Schedules of Specific Commitments of World Trade Organization (WTO) member states. Part III.D advocates for additional research and greater consolidation of information about lawyer regulation, including information about both the scope of the legal profession's monopoly and its impact. Part IV identifies forces, outside of the actions of lawyer regulators, that may alter the scope of the legal profession's monopoly and render moot many of the issues discussed in this Article.

I. THE CONVENTIONAL WISDOM ABOUT THE SCOPE OF THE LEGAL PROFESSION'S MONOPOLY

In 2007, the Organisation for Economic Co-operation and Development (OECD) prepared a report entitled *Competitive Restrictions in the Legal Professions*.³ The United States is a member of the OECD;⁴ its

Task Force and Its 2008 Lawyer Guidance, 2010 J. PROF. LAW. 3, 7–8, 36–37 (describing the Financial Action Task Force (FATF) Mutual Evaluation process and the United States' most recent evaluation, which found the United States partially noncompliant with respect to the legal profession); *Services Trade Restrictions Database*, DEV. ECON. RES. GROUP, <http://iresearch.worldbank.org/service/trade/> (last visited Apr. 26, 2014).

3. See Organisation of Economic Co-operation and Development [OECD], *Competitive Restrictions in Legal Professions*, at 11–12, OECD Doc. DAF/COMP(2007)39 (April 27, 2009), available at <http://www.oecd.org/regreform/sectors/40080343.pdf> [hereinafter *2007 Legal Profession Report*]. The report was not issued until January 2008 and a corrected version was issued in 2009. *Id.* The difference between the original report and the 2009 report was that the 2009 report included an additional submission by the Council of Bars and Law Societies of Europe. See Email from Erica Agostinho, Asst., Org. of Econ. Co-operation & Dev., Directorate for Fin. and Enter. Affairs, Competition Div., to author (Nov. 7, 2013, 5:34 AM) (on file with *Fordham Law Review*). The 2007 OECD Legal Profession

representatives participated in the work leading up to the report.⁵ This report included the following statement about the scope of the legal profession's monopoly: "In most jurisdictions, lawyers only enjoy a monopoly over representing clients in courts. The market for legal advice remains largely open."⁶

I have heard U.S. commentators similarly observe that outside of the United States, the legal profession's monopoly is generally limited to courtroom work.⁷

As the rest of this Article will demonstrate, the conventional wisdom appears to be an overstatement. The sources cited in this Article suggest that in many countries, the legal profession *arguably* has a monopoly that is *not* limited to courtroom work and that applies to *both* litigation and transactional work.

The prior paragraph not only uses the word "arguably" but emphasizes it. Why? The conclusions in this Article are based on the limited resources that are available for learning about the monopoly rules that apply to the legal professions in other countries. The existing tools are rather primitive for learning about *any* kind of lawyer regulation issue in countries other than our own, but particularly for learning about issues related to the legal profession's monopoly. This situation is starting to change, but the state of knowledge about comparative lawyer regulation is still very basic, especially compared to other fields.⁸ Another reason why the word

report was issued after an OECD report that focused on a number of different types of professional services. See OECD, *Competition in Professional Services*, OECD Doc. DAF/CLP(2000)2, at 2 (Feb. 22, 2000), available at <http://www.oecd.org/dataoecd/35/4/1920231.pdf>.

4. *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners/> (last visited Apr. 26, 2014).

5. See 2007 *Legal Profession Report*, *supra* note 3, at 1, 287, 366. The report reflected the proceedings of a meeting held by the OECD Competition Committee in June 2007. *Id.* at 2.

6. See *id.* at 11. Although the report includes this "conventional wisdom" statement in both the executive summary and in the summary of discussion, there is also information in the report that recognizes that the legal profession's monopoly sometimes extends to legal advice. See, e.g., *id.* at 185–86 (Hungary); *id.* at 221 (Korea); *id.* at 235, 239–40 (New Zealand); *id.* at 267–68 (Turkey); *id.* at 301–02 (Brazil). The executive summary acknowledges that a lawyer's monopoly may not be limited to courtroom work:

The restrictions of competition resulting from regulation, including self-regulation, take different forms. In principle some of them may be fully justified. In the field of services provided by advocates, solicitors/barristers and attorneys, there are . . . reserved tasks: legal advice (at least in some jurisdictions), exclusive rights to appear in court coupled with compulsory legal representation.

Id. at 17–18. Despite the examples and occasional qualifications found elsewhere in the report, I believe it is fair to use this OECD report as an example of the "conventional wisdom" given the prominence of this language in the executive summary and the discussion summary.

7. Peter Ehrenhaft, who was an expert on many issues related to transnational legal practice, made this statement to me on several occasions, including in the presence of officials from the Office of the U.S. Trade Representative.

8. For examples of cooperation in other fields, see INT'L COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org/> (last visited Apr. 26, 2014); *Library of Public Documents*, INT'L ORG. SEC. COMM'NS, <http://www.iosco.org/library/> (last visited

“arguably” was emphasized in the prior paragraph was because in many countries, including the United States, the scope of the legal profession’s monopoly may be unclear or the subject of disagreement. Finally, it is worth noting that this Article only addresses the law on the books. As scholars have noted, there can be differences—sometimes striking—between the law on the books and the law in action.⁹ The issue of the scope of the legal profession’s monopoly is certainly one issue in which these differences might exist. This Article focuses on the law on the books in the hopes that learning more about differences in the legal profession’s monopoly might prove useful, especially to scholars who focus on differences between the law in action and the law on the books.

II. IN MANY COUNTRIES, THE SCOPE OF THE LEGAL PROFESSION’S MONOPOLY IS UNCLEAR

Even the most cursory examination of U.S. unauthorized practice of law (UPL) jurisprudence shows that the scope of the U.S. legal profession’s monopoly is anything but clear. It is relatively easy to describe in an inclusive sense what U.S. lawyers do. It is very difficult, however, to develop rules or principles that specify in an exclusive sense that which only lawyers may do—i.e., the scope of the legal profession’s monopoly or reserved activities.¹⁰ The definitions of the practice of law vary widely among U.S. states, but are often vague at the margins, making it difficult to know the types of activities to which a particular jurisdiction’s definition would apply.¹¹ Consider, for example, the Pennsylvania Bar Association Unauthorized Practice of Law Committee’s recent definition of UPL. This summary of the law was offered in the context of evaluating whether online legal document services, such as LegalZoom, violated the Pennsylvania statute, which makes UPL a misdemeanor:

Apr. 26, 2004). *See also* Laurel S. Terry, *Lawyers, Regulation Of*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES (James Wright ed., 2d ed. forthcoming 2015) (commenting on the nascent state of knowledge about lawyer regulation in countries other than one’s own); *infra* Part III.D.

9. *See, e.g.*, Lynn Mather & Leslie C. Levin, *Why Context Matters*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 3, 4 (Leslie C. Levin & Lynn Mather eds., 2012) (“[T]he organized bar and many law schools continue to focus their discussion of legal ethics primarily on bar rules of professional conduct. That approach, this book suggests, is a serious mistake. Those rules are extremely general, unevenly understood and enforced, and sometimes at odds with the realities of legal practice.”); Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61 (1963) (discussing how contract disputes are oftentimes settled without referring to the contractual provisions); Bill Clune, *Law In Action and Law On the Books: A Primer*, NEW LEGAL REALISM CONVERSATIONS (June 12, 2013), <http://newlegalrealism.wordpress.com/2013/06/12/law-in-action-and-law-on-the-books-a-primer/>.

10. As used in this Article, “reserved activities” refers to activities that are reserved to the legal profession on either an exclusive or shared basis. The term “reserved activities” is commonly used in the United Kingdom and addresses the same concepts as do the U.S. terms “unauthorized practice of law,” “UPL,” or “lawyer’s monopoly.”

11. *See* TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS’N, REPORT app. A (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf.

Courts have not precisely delineated “the boundaries . . . which limit the practice of law” since such “[a]n attempt to formulate a precise definition would be more likely to invite criticism than achieve clarity.” . . . Although such an exact description does not exist, one can identify those areas which are reserved for licensed attorneys at law:

Where . . . a judgment requires the abstract understanding of legal principles and a refined skill for their concrete application, the exercise of legal judgment is called for. . . . While at times the line between lay and legal judgments may be a fine one, it is nevertheless discernible. Each given case must turn on a careful analysis of the particular judgment involved and the expertise that must be brought to bear on its exercise.¹²

This language, which purports to define the scope of the lawyer’s monopoly in Pennsylvania, is anything but precise.

The experience of the American Bar Association (ABA) Task Force on the Model Definition of the Practice of Law similarly illustrates how difficult it can be to define the scope of the legal profession’s monopoly.¹³ In 2002, the ABA Task Force circulated for comment a model definition of the practice of law.¹⁴ The Task Force withdrew its proposed model definition after it received numerous comments in response, including a comment jointly submitted by the U.S. Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC). The

12. See Pa. Bar Ass’n Unauthorized Practice of Law Comm., Formal Op. 2010-01 (2010), at 5, available at <http://www.pabar.org/public/committees/UNA01/Opinions/2010-01LglDocumentPreparation.pdf> (quoting *Dauphin Cnty. Bar Ass’n v. Mazzacaro*, 351 A.2d 229, 233 (Pa. 1976) (alterations in original) (citations omitted)). The Committee concluded, in a nonbinding opinion, that

the offering or providing [in Pennsylvania] of legal document preparation services as described herein (beyond the supply of preprinted forms selected by the consumer not the legal document preparation service), either online or at a site in Pennsylvania is the unauthorized practice of law and thus prohibited, unless such services are provided by a person who is duly licensed to practice law in Pennsylvania retained directly for the subject of the legal services.

Id. at 7. For information about the Pennsylvania Unauthorized Practice of Law Committee, see Unauthorized Practice of Law Comm., *Unauthorized Practice of Law Charter*, PA. B. ASS’N, <http://www.pabar.org/public/committees/unautpra/pubs/uplcharter.asp> (last visited Apr. 26, 2014).

13. See, e.g., *Task Force on the Model Definition of the Practice of Law*, A.B.A. CTR. PROF’L RESP., http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html (last visited Apr. 26, 2014). For an example from Australia illustrating the difficulty of defining the scope of legal practice, see Memorandum from Law Council of Australia 5 (June 1998), available at http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Explanatory_Memorandum.pdf (“[T]he Law Council’s examination of the existing statutory provisions relating to the reservation of legal work in each State and Territory showed that the provisions were not always uniform and that some of the expressions were vague and inadequate and consequently were largely unenforced.”).

14. See Task Force on the Model Definition of the Practice of Law, *Background to Report*, A.B.A. CTR. PROF’L RESPONSIBILITY (Sept. 18, 2002), available at http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/background.html (including links to the 2002 draft definition and comments about the draft definition).

FTC/DOJ comment letter raised questions about whether the proposed definition was anticompetitive.¹⁵ After the comment period closed, the ABA decided not to proceed with its proposed definition. In its place, the ABA House of Delegates adopted a resolution that recommended that each state develop a definition of the practice of law (even though the ABA had itself been unable to reach agreement on a model definition).¹⁶ In my view, this ABA Task Force experience illustrates the difficulty that exists in trying to define the scope of the U.S. legal profession's monopoly. Articles in this Colloquium, along with other scholarly articles, have similarly concluded that the scope of the U.S. legal profession's monopoly is unclear.¹⁷

The United States is not the only country where the legal profession's monopoly on the practice of law is uncertain and subject to debate. In India, for example, there has been over a decade's worth of litigation regarding the scope of its legal profession's monopoly and whether certain U.S. and U.K. law firms that performed transactional work in India were engaged in the unauthorized practice of law.¹⁸ A 2009 Bombay High Court decision held that the Indian Advocates Act covered both litigation and transactional work; therefore, those who were not licensed Indian lawyers

15. See Letter from U.S. Fed. Trade Comm'n & Dep't of Justice to the Am. Bar Ass'n Task Force on the Model Definition of the Practice of Law (Dec. 20, 2002), available at <http://www.usdoj.gov/atr/public/comments/200604.pdf> [hereinafter FTC/DOJ Comment Letter]. The lengthy comment letter concluded with this statement:

By including overly broad presumptions of conduct considered to be the practice of law, the proposed Model Definition likely will reduce competition from nonlawyers. Consumers, in turn, will likely pay higher prices and face a smaller range of service options. The Task Force makes no showing of harm to consumers from lay service providers that would justify these reductions in competition.

Id.

16. See AM. BAR ASS'N TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, STANDING COMM. ON CLIENT PROT., WASH. STATE BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 1, available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm.authcheckdam.pdf>. These recommendations stated in pertinent part:

RESOLVED, That the American Bar Association recommends that every state and territory adopt a definition of the practice of law.

FURTHER RESOLVED, That each state's and territory's definition should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity.

FURTHER RESOLVED, That each state and territory should determine who may provide services that are included within the state's or territory's definition of the practice of law and under what circumstances, based upon the potential harm and benefit to the public. The determination should include consideration of minimum qualifications, competence and accountability.

Id.

17. See, e.g., Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981). See generally Colloquium, *The Legal Profession's Monopoly on the Practice of Law*, 82 FORDHAM L. REV. 2563 (2014).

18. For a description of these cases, see Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57, 61 (2010); Laurel S. Terry, *Transnational Legal Practice (International)*, 47 INT'L LAW. 485, 491–92 (2013).

could not perform transactional work in India.¹⁹ A 2012 decision by the Madras High Court dismissed a lawsuit brought by an Indian lawyer against thirty-one foreign law firms, ruling that foreign lawyers were entitled to participate in international arbitration proceedings in India and advise clients on foreign law on a “fly in and fly out” basis.²⁰ The Madras decision has been appealed to the Supreme Court of India, which issued an interim order on July 4, 2012. Despite an argument that the 2009 Bombay decision required a contrary conclusion, the court’s interim order said that there was “no bar . . . for foreign law firms or foreign lawyers to visit India for a temporary period on a ‘fly in and fly out’ basis, for the purpose of giving legal advice on foreign law to their clients in India” or “from coming to India and conducting arbitration proceedings in disputes involving international commercial arbitration.”²¹ The court agreed, however, that neither foreign law firms nor foreign lawyers could practice in India on either the litigation or nonlitigation side unless they fulfilled the requirements of the Advocates Act and the Bar Council of India rules.²² At the time this Article was written, the proceedings in the Supreme Court of India were ongoing, so the precise boundaries of India’s legal profession monopoly were still unclear.²³

There is also uncertainty about the scope of the legal professional’s monopoly in Japan. Until recently, I believed that the scope of the Bengoshi²⁴ monopoly was limited to courtroom work (consistent with the

19. See *Lawyers Collective v. Bar Council of India*, (Dec. 16, 2009) Writ Petition No. 1526 of 1995 (Bombay H.C.) (India); Lance J. Rogers, *India Court Prohibits Foreign Law Firms from Establishing Branch Offices in India*, 26 *Laws. Man. on Prof. Conduct* (ABA/BNA) 17 (Jan. 6, 2010).

20. *Balaji v. Gov’t of India*, (Feb. 21, 2012) Writ Petition No. 5614 of 2010 (Madras H.C.) (India) ¶ 63; see also Ben Lewis, *Foreign Lawyers ‘Can Fly In, Fly Out’ of India, Court Rules*, *ASIAN LAW*, (Feb. 23, 2012), <http://www.law.com/jsp/law/international/LawArticleFriendlyIntl.jsp?id=1202543216986>.

21. See *AK Balaji Case Supreme Court Issues Notice on SLP Filed by BCI Directs RBI To Refrain from Granting Permission to Foreign Law Firms and Clarifies the Expression ‘To Practice Profession of Law,’* B. & BENCH (July 4, 2012), <http://barandbench.com/brief/2/2566/ak-balaji-case-supreme-court-issues-notice-on-slp-filed-by-bci-directs-rbi-to-refrain-from-granting-permission-to-foreign-law-firms-and-clarifies-the-expression-to-practice-profession-of-law>; J. Venkatesan, *Supreme Court Tells RBI To Bar Foreign Law Firms*, *HINDU* (July 5, 2012), <http://www.thehindu.com/news/national/article3602986.ece>.

22. See *Bar Council of India v. Balaji*, (Apr. 7, 2012) Petition for Special Leave To Appeal Nos. 17150–17154 of 2012 (India), at 2.

23. See Mihaela Papa & David B. Wilkins, *Globalization, Lawyers, and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession*, 18 *INT’L J. LEGAL PROF.* 175, 181–82 (2011). For a useful article on the contemporary Indian legal market, see Jayanth K. Krishnan, *Peel-Off Lawyers: Legal Professionals in India’s Corporate Law Firm Sector*, 9 *SOCIO-LEGAL REV.* 1 (2013). See also Carole Silver et al., *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Glocal*, 22 *GEO. J. LEGAL ETHICS* 1431 (2009).

24. “Bengoshi” is the name of certain licensed domestic legal professionals in Japan—i.e., the profession that we would most likely translate into lawyer in English. See, e.g., RUSSELL W. DOMBROW & NANCY A. MATOS, *THE ABA GUIDE TO INTERNATIONAL BAR ADMISSIONS* 73 (2012). The Japan Federation of Bar Associations (JFBA) has on its webpage unofficial English translations of its Basic Rules on the Duties of Practicing Attorneys and other laws governing lawyers, but it uses the term “attorney” rather than the

conventional wisdom cited above). In February 2013, however, I corresponded on this point with a Japanese lawyer who serves on an IBA committee with me. I was surprised to learn that there is a disagreement between the Japan Ministry of Justice and the Japan Federation of Bar Associations as to whether article 72 of Japan's Attorneys' Act limits the legal profession's monopoly to courtroom work, or whether it also includes transactional work.²⁵

Undoubtedly, there are additional examples one could point to in order to illustrate that in many places in the world, the scope of the legal profession's monopoly is unclear. These three examples, however, illustrate that even within a jurisdiction, the exact scope of a legal profession's monopoly may be difficult to determine and the subject of disagreement. The material that follows should be read in this light. This Article does not intend to assert what the scope of the monopoly is in various countries, but to illustrate that there is sufficient reason to be skeptical about the "conventional wisdom" that, in "most jurisdictions, lawyers only enjoy a monopoly over representing clients in courts."²⁶

III. INFORMATION SUGGESTS THAT THE "CONVENTIONAL WISDOM" ON THE SCOPE OF THE MONOPOLY IS INACCURATE

There are at least three sources that should lead one to question the conventional wisdom about the scope of the global legal profession's monopoly. These sources include: (1) European Union (EU) studies; (2) a report commissioned by the International Bar Association; and (3) the legal services commitments found in the Schedules of Specific Commitments filed by WTO member states. Each of these is addressed below.

Japanese terms. See *JFBA Rules and Regulations*, JAPANESE FED'N B. ASSOCIATIONS, <http://www.nichibenren.or.jp/en/about/us/regulations.html> (last visited Apr. 26, 2014); cf. JAPANESE FED'N OF BAR ASS'NS, WHITE PAPER ON ATTORNEYS 57-64 (2012), <http://www.nichibenren.or.jp/library/en/about/data/WhitePaper2012.pdf> (using the Japanese term for registered foreign lawyers, "Gaikokuho-jimu-bengoshi").

25. See Email from Kimitoshi Yabuki to author (Feb. 23, 2013) (on file with *Fordham Law Review*). This email stated in part:

In Japan, Article 72 of the Attorney Act provides the following:

No person other than an attorney or a Legal Professional Corporation may, for the purpose of obtaining compensation, engage in the business of providing legal advice or representation, handling arbitration matters, aiding in conciliation, or providing other legal services in connection with any lawsuits, non-contentious cases, or objections, requesting for re-examination, appeals and other petitions against administrative agencies, etc., or other general legal services, or acting as an intermediary in such matters; provided, however, that the foregoing shall not apply if otherwise specified in this Act or other laws.

The Ministry of Justice has interpreted that the scope of Article 72 is limited to the work involving the court room or other proceeding specified in the article while the Japan Federation of Bar Association has broader view on "other general legal services" such as contact review or other transactional work.

Id.; see also *supra* note 24 (including a link to the English translation of Japan's Attorney Act).

26. 2007 *Legal Profession Report*, *supra* note 3, at 11.

A. European Union–Related Studies

In 2003, the European Commission launched a study of competition in professional services.²⁷ The Commission focused on five issues and seven professions.²⁸ Among other things, the Commission examined the scope of each profession's monopoly and the degree to which the regulatory system prevented others from competing.²⁹ This project generated a number of documents, including a Commission report, a Commission follow-up report, and Commission staff documents that contained additional supporting material.³⁰ One staff report, for example, focused on changes that had been made in professional services regulation in EU member states since the Commission's initial report.³¹ One of the important project documents is the lengthy multipart Institut für Höhere Studien (IHS) research report commissioned by the EU, the publication of which launched the EU's multiyear study.³² Although the IHS report has been criticized,³³

27. See Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 NW. J. INT'L L. & BUS. 1, 30 (2009); *Professional Services: Overview*, EUROPEAN COMM'N, http://ec.europa.eu/competition/sectors/professional_services/overview_en.html (last updated Dec. 14, 2012).

28. See, e.g., Terry, *supra* note 27, at 49. The 2004 Commission report focused on (1) accountancy/audit; (2) tax consultants; (3) architects; (4) engineers; (5) lawyers; (6) notaries; and (7) pharmacists. *Id.* The areas of concern were: (1) price fixing; (2) recommended prices; (3) advertising regulations; (4) entry requirements and reserved rights (i.e., monopoly rights); and (5) regulations governing business structure and multidisciplinary practices. *Id.* The 2003 IHS report focused on five professionals: engineers, architects, accountants, lawyers, and pharmacists. IAIN PATERSON ET AL., ECONOMIC IMPACT OF REGULATION IN THE FIELD OF LIBERAL PROFESSIONS IN DIFFERENT MEMBER STATES: REGULATION OF PROFESSIONAL SERVICES (pt. 1) (2003), available at http://ec.europa.eu/competition/sectors/professional_services/studies/prof_services_ihs_part_1.pdf. There were several parts to the IHS report, all of which are available by following the links from *Professional Services: Studies*, EUROPEAN COMM'N COMPETITION, http://ec.europa.eu/competition/sectors/professional_services/studies/studies.html (last updated Apr. 4, 2012).

29. See *Communication from the Commission: Report on Competition in Professional Services*, at 5, 15–16, COM (2004) 83 final (Feb. 9, 2004) [hereinafter *EU Commission Report*].

30. See *id.*; *Communication from the Commission: Professional Services—Scope for More Reform: Follow-Up to the Report on Competition in Professional Services*, COM (2005) 405 final (Sept. 5, 2005); Commission Staff Working Document, *Progress by Member States in Reviewing and Eliminating Restrictions to Competition in the Area of Professional Services*, SEC (2005) 1064 (Sept. 5, 2005) [hereinafter *EU Staff Working Document*].

31. See *EU Staff Working Document*, *supra* note 30, ¶ 28 (focusing on changes that had been made in a number of EU countries with respect to legal profession–reserved tasks, i.e., the scope of the lawyer's monopoly); see also CTR. FOR STRATEGY & EVALUATION SERVS., STUDY TO PROVIDE AN INVENTORY OF RESERVES OF ACTIVITIES LINKED TO PROFESSIONAL QUALIFICATIONS REQUIREMENTS IN 13 EU MEMBER STATES & ASSESSING THEIR ECONOMIC IMPACT 53–55 (2012), available at http://ec.europa.eu/internal_market/qualifications/docs/news/20120214-reportcorr_en.pdf (citing developments in Denmark, Poland, and the United Kingdom as examples of repeals of reserved activities within the EU legal profession).

32. See generally PATERSON ET AL., *supra* note 28. This report was issued under the auspices of the Institut für Höhere Studien (IHS), which is also known as the Institute for Advanced Studies in Vienna; as a result, this report has been referred to as the IHS report.

it is one of the few data sources available with respect to the scope of the legal profession's monopoly in the EU. The IHS report included a number of charts and tables. Reproduced below are excerpts from table 3-7 "Legal Services (Lawyers): Scope of Activities."³⁴ In this table, an "XX" means that an activity is reserved, and a single "X" means the activity is exercised but not reserved.³⁵

Table 3-7 shows that at the time of the IHS study, in eight of fifteen EU countries (highlighted in the table in black), both legal representation *and* legal advice on domestic law were reserved activities:³⁶

TABLE 3-7 LEGAL SERVICES (LAWYERS): SCOPE OF ACTIVITIES³⁷

Country	Profession	Advice domestic law
Austria	Rechtsanwalt (Lawyer)	XX
Belgium	Advocaat (Advocate)	X
Denmark	Advokat (Attorney at Law)	XX
Finland	Advocate Lawyer	X X
France	Avocat	XX
Germany	Rechtsanwalt (Attorney at law)	XX
Greece	Dikigoros (Advocate)	XX
Italy	Accocato (Lawyer)	X
Ireland	Barrister Solicitor	X
Luxembourg	Acocat (Advocate)	XX

33. See, e.g., Terry, *supra* note 27, at 73–78, 82, 85–87 (summarizing critiques of the IHS report by RBB Economics, the Council of Bars and Law Societies of Europe (CCBE), and Martin Henssler and Matthias Kilian, among others).

34. See PATERSON ET AL., *supra* note 28, at 47 tbl.3-7. Table 3-7 focused on fifteen EU member states. *Id.* The EU issued several updated reports after the EU expanded to include twenty-seven member states, but none of these documents included an updated version of this particular table. See, e.g., *EU Staff Working Document*, *supra* note 30; European Commission, DG Competition, *Stocktaking Exercise on Regulation of Professional Services: Overview of Regulation in the New EU Member States*, COMP/D3/MK/D (2004).

35. See PATERSON ET AL., *supra* note 28, at 47 tbl.3-7.

36. *Id.* In table 3-7, dark gray shading indicates that legal representation only was the exclusive right of specific professions, but not legal advice. Light gray shading indicates there was little (Sweden) or no (Finland) monopoly over representation or advice. This table had columns for: (1) advice on domestic law; (2) advice on international law; (3) advice on foreign law; (4) conveyancing of title to real estate, wills, and regulation of family matters, such as marriage contracts; (5) representation before courts; (6) representation before administrative agencies (including tax matters); (7) tax advice; (8) insolvency practice; (9) management consulting; and (10) advice and representation in patent law. *Id.*

37. *Id.* This reproduction retains the original spelling and italics found in the IHS report.

Netherlands	Advocaat (Agttorney at Law)	X
Portugal	Advogado	XX
Spain	Abogado Precursor	XX
Sweden	Advokat (Advocate/avocat)	X
United Kingdom (Engl.+Wales)	Solicitor Barrister	X X

It is certainly possible that an “XX” entry does not fully or accurately capture the state of the law in these countries with respect to the scope of the legal profession’s monopoly. Nevertheless, this table should give one pause and lead one to question whether the “conventional wisdom” about the scope of the legal profession’s monopoly is accurate.

Another source of information about reserved activities in the EU is found in the 2012 report that the EU commissioned to evaluate its lawyer mobility directives (the 2012 Panteia-Maastricht Framework Evaluation report).³⁸ The primary lawyer mobility directives are 77/249 and 98/5. The Lawyers Services Directive (77/249) has been in place since 1977 and allows EU lawyers licensed in one EU member state to provide *temporary* legal services in any other EU member state.³⁹ The Lawyers Establishment Directive (98/5) was adopted in 1998 and, with very few restrictions, it allows EU lawyers who are licensed in one EU member state to establish themselves—or practice on a *permanent* basis—in another EU member state.⁴⁰

Article 15 of the Lawyers Establishment Directive required that ten years after adoption, there would be a follow-up report regarding implementation of the directive and any recommended amendments.⁴¹ The 2012 Panteia-

38. See S.J.F.J. CLAESSENS ET AL., EVALUATION OF THE LEGAL FRAMEWORK FOR THE FREE MOVEMENT OF LAWYERS (2012), available at http://ec.europa.eu/internal_market/qualifications/docs/studies/2013-lawyers/report_en.pdf; see also Terry, *supra* note 18, at 497 n.79.

39. Council Directive 77/249/EEC, To Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services, 1977 O.J. (L 78/17) (EC). This directive has a citizenship requirement; it may only be used by EU lawyers who are also EU citizens.

40. Directive 98/5/EC, of the European Parliament and of the Council of 16 February 1998 To Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other Than That in Which the Qualification Was Obtained, 1998 O.J. (L 77/36). This directive also contains a citizenship requirement. Only EU lawyers who are also EU citizens may take advantage of this directive.

41. *Id.* art. 15 (“Ten years at the latest from the entry into force of this Directive, the Commission shall report to the European Parliament and to the Council on progress in the implementation of the Directive. After having held all the necessary consultations, it shall on that occasion present its conclusions and any amendments which could be made to the existing system.”).

Maastricht Framework Evaluation report is the resulting report; it provides a wealth of useful information including table 2.2, which sets forth “Reserved activities for lawyers” in each EU member state.⁴²

Table 2.2 provides a “yes” or “no” answer for each EU member state with respect to whether representation in court is a reserved activity and with respect to whether legal advice is a reserved activity.⁴³ The footnote accompanying the “legal advice” table heading states that “the exact extent of the monopoly varies across countries; monopolies may be shared with other professionals (e.g., tax advisors).”⁴⁴ According to table 2.2, legal advice is a reserved activity for lawyers in sixteen countries and not reserved in fourteen countries.⁴⁵ Thus, table 2.2 indicates that, in a majority of EU jurisdictions, legal advice is an exclusive or shared reserved activity.

Table 4.7 is also informative because it lists the “[t]ype(s) of professional activities that the lawyer has engaged in while being established in another EU country.”⁴⁶ Legal advice is the number one activity, with 84 percent of the responding EU lawyers who were “established” in another EU member state stating that they provided legal advice.⁴⁷ The next highest number was for drafting contracts, with 72 percent of those responding indicating that they had performed this activity.⁴⁸ In contrast, only 51 percent had engaged in “[c]ourt work/representing clients in court/before administrative authorities.”⁴⁹

The story was similar for EU lawyers who reported that they had provided temporary cross-border services authorized by Directive 77/249. The 2012 Panteia-Maastricht Framework Evaluation report found that the

most important services that lawyers have delivered are legal advice (by 83% of the lawyers) and drafting contracts (49%). Over a fifth (22%) has carried out court work or representation. Of the lawyers that have provided services in the UK, only 10% carried out court work or representation.⁵⁰

Interestingly, 2012 was a banner year for studies of EU legal professions. In addition to the 2012 Panteia-Maastricht Framework Evaluation report, another 2012 study analyzed the economic significance of the legal services

42. CLAESSENS ET AL., *supra* note 38, at 40–42 tbl.2.2. This table lists each EU member state in the far left hand column followed by three additional columns. The second column is entitled “Representation in Court,” and the third column is entitled “Legal advice.” The fourth and final column is labeled “other reserved activities” and consists of narrative material for some EU member states.

43. *Id.*

44. *Id.* at 42.

45. *Id.* There are more responses than the twenty-seven EU member states, because the table contains separate entries for Poland (“Poland—advocate” and “Poland—Legal advisor”) and separate entries for England and Wales, Scotland, and Northern Ireland. *Id.*

46. *Id.* at 138.

47. *Id.*

48. *Id.*

49. *Id.* Table 4.7 listed additional activities but these were the three most popular activities.

50. *Id.* at 129.

sector in the European Union.⁵¹ Although this study addressed the issue of reserved activities, it did not contain information regarding whether transactional legal work, as opposed to courtroom work, was a reserved activity in specific EU countries.⁵² Thus, while Decker and Yarrow's *Economic Significance* report is very useful in general, it does not provide information that is helpful for this Article.

In 2012, the lead author of the 2003 IHS study coauthored an updated report on EU professional services regulation.⁵³ Although this report addressed the topic of reserved activities, it did not specifically address the issue of whether domestic advice constituted a reserved activity for legal professionals in particular EU countries. It did, however, cite extensively and with approval to a 2012 CSES report.⁵⁴ The Centre for Strategy and Evaluation Services (CSES) report concluded that in a number of EU member states, legal profession reserved activities include advice and courtroom representation.⁵⁵ Annex H to the CSES final report provided the

51. See GEORGE YARROW & CHRISTOPHER DECKER, REGULATORY POLICY INST., ASSESSING THE ECONOMIC SIGNIFICANCE OF THE PROFESSIONAL LEGAL SERVICES SECTOR IN THE EUROPEAN UNION (2012), available at http://www.rpieurope.org/Publications/2012/RPI_study_Yarrow_D1_1348650358.pdf [hereinafter YARROW & DECKER, ASSESSING THE ECONOMIC SIGNIFICANCE].

Two years earlier, Decker and Yarrow had prepared a report on lawyer regulation for the U.K. Legal Services Board. See CHRISTOPHER DECKER & GEORGE YARROW, REGULATORY POLICY INST., UNDERSTANDING THE ECONOMIC RATIONALE FOR LEGAL SERVICES REGULATION (2010), available at http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/economic_rationale_for_Legal_Services_Regulation_Final.pdf. U.K. Legal Services Board representatives relied upon this 2010 report when making remarks about reserved activities. See ALEX ROY & CHRIS HANDFORD, LEGAL SERVS. BD., RESERVED AND UNRESERVED LAWYERS' ACTIVITIES (2011), available at http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/reserved_and_unreserved_lawyers.pdf. The report stated:

The approach of regulating legal services until the Act, as outlined by Mayson, has been one of deciding on an ad-hoc basis when and which activities should be reserved without a consistent framework for such decisions. The recent publication by Decker and Yarrow used an economic framework to attempt to explore how such a framework of analysis might be developed for legal services.

Id. at 5 (footnotes omitted). Neither the 2011 Legal Services Board remarks nor the 2010 Decker & Yarrow paper contains a country-by-country analysis of the activities reserved to lawyers in various countries.

52. See YARROW & DECKER, ASSESSING THE ECONOMIC SIGNIFICANCE, *supra* note 51, at 82–83. Decker and Yarrow note that these restrictions are often justified on the basis of quality, but they create a risk of adverse economic effects through unnecessarily higher prices. *Id.* Thus, the benefits and risks of these types of rules need to be balanced through an assessment of whether the effects of the restriction tend to be dominated by negative effects or positive effects. *Id.*

53. See Iain Paterson et al., *Regulation of Professional Services in EU Member States: Classification, Measurement, and Evaluation* (Servicegap Discussion Paper No. XXX, 2012), available at http://servicegap.org/images/dp19_regulation_professional%20services_paterson_brandl_sellner.pdf. This paper was developed as part of the Servicegap project, which was funded by the European Commission, Grant 244552. *Id.*

54. See, e.g., *id.* at 6–7 (citing CTR. FOR STRATEGY & EVALUATION SERVS., *supra* note 31).

55. See CTR. FOR STRATEGY & EVALUATION SERVS., *supra* note 31. For example, the CSES report stated:

underlying data upon which the report relied.⁵⁶ The CSES report includes two tables that are particularly useful for purposes of this Article. The first table provides cumulative data⁵⁷:

TABLE 2.9: THE LEGAL PROFESSION—RESERVES OF ACTIVITIES BY TASK (EU13)

Type of reserve	Legal advice (domestic /foreign law)	Conveyancing	Representation before courts	Representation before administrative agencies (including tax matters)	Tax advice	Representing clients on patent matters	Other legal services (please specify under notes)	Total
Exclusive	6	2	9	5	2	4	3	31
Shared	3	8	10	5	2	8	5	41
Total (exclusive and shared)	9	10	19	10	4	12	8	72

Note: NACE code 69 Legal and accounting activities

According to the first column in table 2.9, it is not uncommon in the European Union to have as an exclusive or shared reserved task “legal advice” on domestic or foreign law: nine EU member states had such a monopoly. Appendix E in the CSES report, which was entitled “Overview of Regulated Professions & Reserves of Activities,” included several

In some countries in the sample, those working in the legal profession have an exclusive reserve of activities to perform multiple reserved tasks. For example, in Greece, lawyers have six exclusive areas of reserved work, such as the provision of legal advice, representing clients in court and before administrative authorities, and tax advice. In the Czech Republic, lawyers have four exclusive reserves (legal advice, conveyancing, representing clients in court and before administrative authorities) and two shared reserves (tax advice and patent matters) In France, *avocats* (lawyers) have two exclusive reserved tasks, representation before the courts and the provision of legal advice. . . . In Germany, lawyers have a number of exclusive reserved tasks, namely representation before courts, representation before administrative agencies and legal advice (domestic/foreign law). In Poland, the professions of Lawyer (*Adwokat*) and Solicitor (*Radca prawny*) share four reserved tasks (legal advice, conveyancing, a right of audience in court and representing clients before administrative authorities). However, there are some distinctions between the two professions. Lawyers are able to represent clients in courts on criminal law and tax-related legal matters, whereas solicitors may not.

Id. at 20–21 (emphasis omitted).

56. See CTR. FOR STRATEGY & EVALUATION SERVS., FRAMEWORK CONTRACT FOR PROJECTS RELATING TO EVALUATION AND IMPACT ASSESSMENT ACTIVITIES OF DIRECTORATE GENERAL FOR INTERNAL MARKET AND SERVICES annex H (2012), available at http://ec.europa.eu/internal_market/qualifications/docs/news/20120214-annex_en.pdf. This lengthy document included analyses for legal professionals in thirteen member states: Czech Republic, *id.* at 3–5; Denmark, *id.* at 18; Finland, *id.* at 26; France, *id.* at 29; Germany, *id.* at 44–45; Greece, *id.* at 59–60; Italy, *id.* at 76–77; Netherlands, *id.* at 99–100; Poland, *id.* at 119–20; Portugal, *id.* at 139–40; Slovenia, *id.* at 171; Spain, *id.* at 194–95; U.K. (England and Wales), *id.* at 224–225 (solicitors and barristers); U.K. (Scotland), *id.* at 230 (advocates and mentions solicitors); U.K. (Northern Ireland), *id.* at 230 (barristers and mentions solicitors).

57. CTR. FOR STRATEGY & EVALUATION SERVS., *supra* note 31, at 21.

additional tables, including table E.13, “Attorneys—Reserves of Activities,”⁵⁸ and table E.14, “Lawyers—Reserves of Activities.”⁵⁹ Reproduced below, in part, is table E.13 for attorneys, which shows the specific countries in which “legal advice (domestic/foreign law)” was either an exclusive reserved task or a shared reserved task:

TABLE E.13 ATTORNEYS—RESERVES OF ACTIVITIES⁶⁰

Member State	Legal advice (domestic/foreign law)
CZ [Czech Republic]	X
DE [Germany]	X
DK [Denmark]	--
EL [Greece]	X
ES [Spain]	XX
FI [Finland]	--
FR [France]	X
IT [Italy]	XX
NL [Netherlands]	--
PL [Poland]	XX
PT [Portugal]	X
SI [Slovenia]	--
UK [United Kingdom]	--

While the data in the 2012 Panteia-Maastricht and CSES reports about reserved activities differs somewhat from the data in the 2003 IHS study, all of these reports indicate that in a number of EU member states, transactional advice is an activity that is reserved for lawyers (either exclusively or on a shared basis).⁶¹ Thus, these reports support this

58. *Id.* at 141.

59. *Id.* at 142.

60. *Id.* at 141 tbl.E.13. When used in tables E.13 and E.14 in the CSES report, “X” means that a given profession is subject to an exclusive reserve, “XX” means that it is subject to a shared reserve, and “--” means that a profession is unreserved. *Id.* at 139. In the author’s view, the CSES report does not clearly explain the differences between the “attorneys” covered by table E.13 and the “lawyers” covered by table E.14 or explain why the report uses separate tables for these categories. This Article quotes only table E.13 for attorneys. Table E.14 focuses on lawyers and indicates that in Spain and Portugal, “legal advice (domestic/foreign law)” is an exclusively reserved task, whereas in Poland it is a shared reserved task and in the other surveyed countries it is not reserved. *Id.* at 142.

61. Determining the scope of reserved activities in each EU member state or analyzing any differences in the data found in the IHS report and the CSES report is beyond the scope of this Article. Although it may seem counterintuitive to refer to “shared exclusive tasks,” this is the language used in the CSES report. There may be situations, for example, where two different types of regulated professionals, such as lawyers and tax advisors, share the exclusive right to provide certain types of advisory services. *See supra* note 55.

Article's thesis that the "conventional wisdom" about the scope of the legal profession's monopoly should be questioned.⁶²

B. The 2014 IBA Report on Legal Services Regulation

A report commissioned by the IBA might also lead one to question the conventional wisdom. The IBA was established in 1947 and is a global organization of international legal practitioners, bar associations, and law societies.⁶³ Since the advent of the WTO's General Agreement on Trade in Services (GATS), which is described in Part III.C, *infra*, the IBA has become actively involved in policy work related to the regulation of the legal profession.⁶⁴ For example, the IBA Bar Issues Commission now hosts a webpage that collects regulatory information, including the legal ethics codes of IBA member bars, and has issued two editions of its *Handbook About the GATS*.⁶⁵

At the urging of its International Trade in Legal Services Committee, the IBA engaged Alison Hook of Hook International Consultants to collect information about legal profession regulatory systems around the world and

62. The CSES report, like the 2012 Panteia-Maastricht Framework Evaluation report and the 2012 Yarrow & Decker report, is wide-ranging and contains a number of useful observations and data. See CLAESSENS ET AL., *supra* note 38; YARROW & DECKER, ASSESSING THE ECONOMIC SIGNIFICANCE, *supra* note 51. The CSES report may be particularly useful to regulators who wish to study the impact of distinctions between countries that use an approach in which the titles are reserved versus countries in which the underlying activities are reserved. CTR. FOR STRATEGY & EVALUATION SERVS., *supra* note 31, at 52. The distinction between title and activities may be a useful way for regulators to think about possible reforms should they decide that they want to change the scope of the legal profession's monopoly. The goal of this Article has been much more modest—simply to provide a starting point for U.S. regulators to begin considering comparative data, if they become interested, and to make sure that they do not simply rely upon the conventional wisdom about the scope of the legal profession's monopoly in other countries, as some commentators on occasion have done.

63. See *About the IBA*, INT'L B. ASS'N, http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx (last visited Apr. 26, 2014). It has a membership of more than 50,000 individual lawyers and over 200 bar associations and law societies spanning all continents. *Id.*

64. For a discussion of some of the IBA's GATS-related activities, see LAUREL S. TERRY, THE REVISED HANDBOOK ABOUT THE GATS (GENERAL AGREEMENT ON TRADE IN SERVICES) FOR INTERNATIONAL BAR ASSOCIATION MEMBER BARS 38–41 (2013) [hereinafter IBA GATS HANDBOOK], available at <http://www.ibanet.org/Document/Default.aspx?DocumentUId=9E1E0915-F3A5-4F0F-BD1C-3DAC5B2480B8>; Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875, 961, 971, 981 (2010). One of the reasons why the IBA has gotten more involved in policy work is because the WTO is interested in the views of "relevant international organizations," which it defines as "international bodies whose membership is open to the relevant bodies of at least all Members of the WTO." General Agreement on Trade in Services art. VI(5) n.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS]. With respect to legal services, there are few organizations, other than the IBA, that fit this description.

65. See *Documents on the Regulation of the Legal Profession*, INT'L B. ASS'N, http://www.ibanet.org/documents_on_the_regulation_of_the_legal_profession.aspx (last visited Apr. 26, 2014) (select tab 3: "Countries"); IBA GATS HANDBOOK, *supra* note 64.

to prepare the IBA report discussed in this Article.⁶⁶ This initiative was inspired, at least in part, by the Legal Services Inventory, which was created as part of the Asia-Pacific Economic Cooperation (APEC) Legal Services Initiative.⁶⁷ The APEC inventory focuses on a number of regulatory issues that are particularly relevant to international trade in legal services and cross-border practice. The APEC Legal Services Inventory questionnaire responses were submitted by APEC governments, collated by Iain Sanford, and posted on the APEC website.⁶⁸ Although the APEC Legal Services Inventory is a tremendous resource compared to what previously existed, there were many regulatory questions that were not included on its questionnaire.

The IBA plans to release the “IBA Global Regulation and Trade in Legal Services Report 2014” during its Ninth Annual Bar Leaders Conference, which will be held in Brussels in May 2014.⁶⁹ Subsequently, data from this report will be posted on the IBA’s website.⁷⁰ Although the IBA had not released the final version of its report by the time the edits for this Article were completed, the author had access to various drafts of the IBA report.⁷¹

66. The author has personal knowledge of these facts because she is a member of the IBA’s International Trade in Legal Services Committee. For more on the IBA report, see INT’L BAR ASS’N, INTERNATIONAL TRADE IN LEGAL SERVICES COMMITTEE REPORT TO BAR ISSUES COMMISSION (2013) (on file with *Fordham Law Review*). See generally Laurel S. Terry, *Creating an International Network of Lawyer Regulators: The 2012 International Conference of Legal Regulators*, B. EXAMINER, June 2013, at 18, available at http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2013/820213Terry.pdf.

67. See Terry, *supra* note 64, at 894–98 (providing background on the APEC Legal Services Initiative); Terry, *supra* note 18, at 493. I am aware of the relationship between the IBA report and the APEC Inventory because I was involved in the planning for both.

68. See, e.g., *APEC Legal Services Initiative: High-Level Overview*, ASIA-PAC. ECON. COOPERATION, <http://www.legalservices.apec.org/overview.html> (last visited Apr. 26, 2014). Although the United States assembled responses from almost fifty jurisdictions, its responses were submitted late. As a result, these U.S. responses were not included on the version posted on the internet.

69. See Email from Alison Hook, Hook Int’l, to author (Mar. 16, 2014, 8:49 AM) (on file with *Fordham Law Review*).

70. See, e.g., *International Trade in Legal Services*, INT’L B. ASS’N, http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Map.aspx (last visited Apr. 26, 2014); *Guide For Using the ITILS Database*, INT’L B. ASS’N, http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Committee/itils_instructions.aspx (last visited Apr. 26, 2014). At the time of publication, these websites were under construction.

71. The author’s presentation at the *Fordham Law Review* Colloquium was based on two earlier versions of the IBA report: (1) several Excel spreadsheets that the author received in Spring 2013 and (2) a draft report that was distributed in conjunction with the October 2013 IBA annual meeting in Boston. In February 2014, the IBA distributed an “extract.” INT’L BAR ASS’N, REPORT FOR THE SPECIAL FRIENDS OF SERVICES GROUP—TRADE IN LEGAL SERVICES: AN EXTRACT FROM THE IBA REGULATION AND TRADE IN LEGAL SERVICES REPORT 2014 (2014) (on file with *Fordham Law Review*); Email from Elaine Owen, Head of Bar Issues Comm’n, Int’l Bar Ass’n, to members of the IBA ITILS Comm. (Feb. 4, 2014, 6:44 AM) (on file with *Fordham Law Review*) (noting distribution of the extract). Some of the information found in the IBA extract was revised when the final report was prepared. See *infra* note 72 (citing an email from Alison Hook and a later draft of the full report). To the extent that there are discrepancies between this Article and the author’s *Fordham*

Part III.B of this Article is based on a March 16, 2014, draft of the full report that was close to final form.⁷² While the footnotes will specify the source relied upon, because its release is expected almost simultaneously with publication of this Article, the text will simply refer to the “IBA report.”

The IBA report addresses many more issues than does the APEC Legal Services Inventory and is much more comprehensive.⁷³ For each of the covered jurisdictions, the fifth question addresses the scope of the legal profession’s monopoly in that particular jurisdiction:

“Are there certain activities that are ‘reserved’ to those who are licensed to practise law in the jurisdiction?”⁷⁴

The IBA report also includes additional information to help put the answers to this fifth question in context. For example, it includes information about the title—in the local language—of the regulated legal profession being discussed and whether there is legislation governing the legal sector or the practice of law.⁷⁵ It also indicates whether a lawyer needs a license to practice law and, if so, how often that license must be renewed.⁷⁶

An examination of the IBA report calls into question the conventional wisdom about the scope of the legal profession’s monopoly. For example, the IBA report provides information on reserved activities in ten countries in Central and South America (Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, Panama, Paraguay, Peru, and Venezuela). For each of these countries, it indicates that both legal advice and legal representation are reserved activities.⁷⁷ This situation is reportedly different in Jamaica, the

presentation slides, this Article contains the more recent and accurate information about the IBA report.

72. See INT’L BAR ASS’N, IBA [DRAFT] GLOBAL REGULATION AND TRADE IN LEGAL SERVICES REPORT 2014 (forthcoming May 2014) (on file with *Fordham Law Review*); Email from Alison Hook, *supra* note 69 (explaining that the attached draft, which was titled March 16, 2014, was close to final, but that there might be pagination changes because of changes to the introduction and perhaps some additional edits). Due to the frequency with which this Article cites the draft report, reference to specific pages will be to “ms.” numbers.

73. The IBA report contains information that responds to thirty-nine different questions. Compare INT’L BAR ASS’N, *supra* note 72, ms. 25–31 (Australia), with APEC Legal Services Initiative, *supra* note 68.

74. See INT’L BAR ASS’N, *supra* note 72, ms. 25 (Australia) (Question 5).

75. See *id.* (Australia) (Questions 1–2).

76. *Id.* (Australia) (Question 3).

77. *Id.* ms. 16 (Argentina); *id.* ms. 91 (Brazil); *id.* ms. 167 (Chile); *id.* ms. 172–73 (Colombia); *id.* ms. 178 (Costa Rica); *id.* ms. 358 (Mexico); *id.* ms. 405 (Panama); *id.* ms. 409 (Paraguay); *id.* ms. 412 (Peru); *id.* ms. 862 (Venezuela). With the exception of Colombia, all of these entries indicate that only lawyers from the specified country have rights of audience in court and can provide advice on the law of the specified country. The entry for Colombia states that the “exercise of the legal profession is reserved to licensed lawyers” with the exception of arbitrators in international arbitration and certain other types of arbitration; individuals handling their own small claims if under a specified amount; and Judges of Peace. *Id.* at ms. 172–72.

The structure of Part III.B of the Article reflects the approach used in early drafts of the IBA report, in which information was found in a number of different Excel charts, which were organized by regions of the world. See *supra* note 71. The web version of the IBA

only Caribbean country included in the IBA report, where representation is the sole reserved activity.⁷⁸

Although the Latin American data is the most dramatic, the IBA report shows that, elsewhere in the world, both advice and courtroom representation are reserved activities. For example, the IBA report includes information for European countries including the EU member states, Iceland, Norway, and Switzerland,⁷⁹ and also for Turkey.⁸⁰ Consistent with the EU studies cited in the prior section of this Article, the IBA report indicates that advice is a reserved activity in a number of European countries.⁸¹ In a similar vein, the IBA report indicates that in Australia, Canada, and New Zealand, reserved activities include both legal advice and courtroom work.⁸²

The IBA report includes information for a number of jurisdictions in Asia and in a number of these, the monopoly extends beyond representation in court. For example, certain types of legal advice are reserved activities in

report likely will allow one to search using some but not all of the regional divisions found in this Article. *See supra* note 70.

78. INT'L BAR ASS'N, *supra* note 72, ms. 295 (“Representation in court is reserved to Jamaican and other English-speaking Caribbean qualified lawyers.”).

79. *Id.* ms. 63 (Austria); *id.* ms. 84 (Belgium); *id.* ms. 103 (Bulgaria); *id.* ms. 182 (Czech Republic); *id.* ms. 194 (Denmark); *id.* ms. 204–05 (Estonia); *id.* ms. 211 (Finland); *id.* ms. 216–17 (France); *id.* ms. 228 (Germany); *id.* ms. 234 (Greece); *id.* ms. 249 (Hungary); *id.* ms. 256 (Iceland); *id.* ms. 270 (Ireland); *id.* ms. 283 (Italy); *id.* ms. 318 (Latvia); *id.* ms. 329 (Liechtenstein); *id.* ms. 333 (Luxembourg); *id.* ms. 350–51 (Malta); *id.* ms. 371 (Netherlands); *id.* ms. 388 (Norway); *id.* ms. 416 (Poland); *id.* ms. 422 (Portugal); *id.* ms. 437 (Romania); *id.* ms. 454 (Slovakia); *id.* ms. 459–60 (Slovenia); *id.* ms. 468 (Spain); *id.* ms. 481 (Sweden); *id.* ms. 488 (Switzerland); *id.* ms. 540 (United Kingdom (England and Wales)); *id.* ms. 547–48 (United Kingdom (Northern Ireland)); *id.* ms. 553 (United Kingdom (Scotland)).

80. In Turkey, legal advice is a reserved activity. *See id.* ms. 514 (“Under Article 35 of the Attorneyship Law, the following activities are reserved to Turkish attorneys enrolled with bar associations: Providing opinions in legal matters; litigating and defending the rights of real persons and legal entities before courts . . .”).

81. *Compare, e.g., id.* ms. 84 (Belgium) (“Pleading and filing briefs of arguments before any court before the Courts is an activity reserved for fully qualified Belgian lawyers.”), *with id.* ms. 228 (Germany) (“German Rechtsanwälte have exclusive rights to represent clients in German Courts and provide all purpose general legal advice.”). The entry for Germany also indicates that some of these reserved tasks are shared with other legal professionals and that bankruptcy administration is unreserved. *Id.*

82. *See id.* ms. 26 (Australia) (Question 5) (“Appearing in court or advising on the law of any of Australia’s jurisdictions.”). There are separate entries for each Australian state and territory. The Canadian entry is not entirely clear, but certainly suggests that legal advice is a reserved activity. It states, “The scope of reserved practice is the law of the province of qualification and Canadian Federal law.” *Id.* ms. 110 (Canada) (Question 5). There are separate entries for each Canadian province and territory. *Id.* ms. 114–66. The New Zealand entry states, “Yes, only lawyers who hold practising certificates are able to carry out work in the reserved areas of work. These are set out in [section] 6 of the Lawyers and Conveyancers Act.” *Id.* ms. 377–78. The IBA report included entries for U.S. jurisdictions, but I have not analyzed them in this Article. For information on U.S. state UPL laws, see INT'L BAR ASS'N, *supra* note 72; AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., 2012 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_report_final.authcheckdam.pdf.

Hong Kong, the Republic of Korea, and Taiwan.⁸³ The entry for Japan is less explicit, but could be read to mean that legal advice is also a reserved activity in Japan.⁸⁴ The IBA report does not clearly indicate whether advice is a reserved activity in India and Pakistan,⁸⁵ although the Indian case law cited earlier makes it clear that some of the courts and the Bar Council of India have taken that position.⁸⁶ In Malaysia and Brunei Darussalam, but not Thailand, activities other than representation are reserved activities.⁸⁷ In eight of the surveyed Central Asian countries, representation is listed as the only reserved activity,⁸⁸ but it is noteworthy that there is at least one jurisdiction in which legal advice appears to be a reserved activity and that, for a number of other Central Asia jurisdictions, the IBA report data is unclear.⁸⁹

83. INT'L BAR ASS'N, *supra* note 72 ms. 239 (Hong Kong) (only Hong Kong solicitors and barristers “may practise or give advice on Hong Kong law”); *id.* ms. 431 (Korea) (“Only Korean lawyers have rights of audience in court and can provide advice on the law of Korea.”); *id.* ms. 498 (Taiwan) (“Only Taiwanese lawyers have rights of audience in court and can provide advice on Taiwanese law.”).

84. *Id.* ms. 294 (Japan) (“Lawyers (Bengoshi) are granted by the Attorneys Act, the exclusive right to provide legal services unless explicitly stated to the contrary. This includes the unrestricted right to appear in all courts in Japan. The law also defines unauthorized practice of law as a criminal activity.”); *see also supra* notes 24–25 and accompanying text (discussing disagreements in Japan about the scope of the monopoly).

85. *See* INT'L BAR ASS'N, *supra* note 72 ms. 266 (India) (“The practice of any law in India is reserved to Indian Advocates.”), *id.* ms. 400 (Pakistan) (“Section 22 of the Act provides that ‘no person shall be entitled to practice the profession of law unless he is an Advocate.’ Advocates of the Supreme Court may appear in any court or tribunal in Pakistan . . .”).

86. As noted earlier in the Article, India treats certain kinds of transactional work as reserved activities. *See supra* notes 19–23 and accompanying text.

87. *Id.* ms. 342 (Malaysia) (Question 5) (“West Malaysia, Advocates and solicitors have reserved rights in advocacy and litigation, the preparation of documents or instruments relating to immovable property, trusts, probate, company formation or incorporation, issuing of proceedings and personal injury (“Reserved Activities”). The title of ‘Advocate and Solicitor’ is also protected and anyone misrepresenting themselves as such is subject to a criminal penalty.”); *id.* ms. 97 (Brunei Darussalam) (noting that reserved activities include representation and additional activities such as acts related to probate, real property, and the formation of corporations). In contrast to Malaysia and Brunei Darussalam, it appears that in the Southeast Asian country of Thailand, only representation is a reserved activity. *Id.* ms. 508 (Thailand) (Question 5) (“Only licensed lawyers can ‘appear in court, prepare a plaint or an answer, appellate plaint or appellate answer for both Court of Appeal and the Supreme Court, motion, petition or statements incidental to court proceedings on behalf of another person’ ([section] 33 of the Thailand Lawyers Act). Outside of the courts, anyone can provide legal advice in Thailand but only as unregulated legal consultants or advisors.”).

88. Representation was the only reserved activity listed for Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, and Ukraine. *Id.* ms. 224 (Georgia); *id.* ms. 305 (Kazakhstan); *id.* ms. 313–14 (Kyrgyzstan); *id.* ms. 362–63 (Moldova); *id.* ms. 444 (Russia); *id.* ms. 535 (Ukraine). Belarus was listed as having a divided profession in which representation was reserved to advocates, although both advocates and “legal advisers” were able to provide certain types of advice. *Id.* ms. 79. The entry for Sri Lanka indicates that the reserved tasks are limited to representation but conveyancing may be undertaken pursuant to a separate license. *Id.* ms. 473.

89. For a number of the Central Asia entries in the IBA report, it was either difficult to determine from the report language whether legal advice was a reserved activity or the IBA report explicitly stated that the law was unclear. The answers for three jurisdictions (Armenia, Azerbaijan, and Turkmenistan) either listed “advice” activities as part of the

The IBA report also includes information on the Middle East and Africa, and some of this data is also inconsistent with the “conventional wisdom” found in the OECD report. For example, the IBA report identifies some jurisdictions in which certain kinds of transactional work, as well as representation are reserved activities,⁹⁰ some jurisdictions in which only courtroom representation is a reserved activity,⁹¹ and some jurisdictions for which it is difficult to determine the scope of the reserved activity.⁹²

In sum, the IBA report suggests that the conventional wisdom about the scope of the legal profession’s monopoly may be wrong and that, in a number of jurisdictions, reserved activities include not only representational or courtroom work, but also “advice” or transactional work. Although the IBA report likely is not the definitive guide to the scope of the legal profession’s monopoly in any given country,⁹³ it is a tremendous resource. The information it provides and the resources it cites will be extremely useful to lawyers trying to navigate a foreign legal system.

“practice of law” but did not clearly label them as reserved activities or did not clearly indicate whether advice was reserved. *Id.* ms. 21 (Armenia); *id.* ms. 70–71 (Azerbaijan); *id.* ms. 523 (Turkmenistan). For example, the entry for Armenia states:

The practice of law is defined in the Law on Advocacy to include: 1) consultation, including consulting clients on their rights and obligations, activities of the judicial system in respect to the rights of the client, as well as studying documents, preparing other documents of legal nature; 2) representation, including court representation; 3) defence in criminal cases 4) legal support to witnesses in the manner prescribed by law. Article 5 of the Law on Advocacy, states that “defence in criminal cases shall be carried out solely by an advocate.

Id. ms. 21. The answer for Azerbaijan listed “advice” type of activities but only referred to representation in connection with the monopoly. *Id.* ms. 70–71. The entry for Turkmenistan stated that “The ‘Law on licensing of some kinds of activity’ of 16 June 1999 requires those providing legal assistance to legal and juridical persons’ [sic] to be licensed.” *Id.* ms. 523. The IBA report explicitly stated that the scope of reserved activities in Tajikistan and Uzbekistan was unclear. *Id.* ms. 502, 859.

90. The IBA report indicated that Israel, Oman, and Qatar define the practice of law to include representation *and* the provision of legal opinions and the drafting of contracts. *Id.* ms. 277 (Israel); *id.* ms. 395 (Oman); *id.* ms. 427 (Qatar). Nigeria’s reserved activities include representation and activities related to probate and real property. *Id.* ms. 383.

91. There were six jurisdictions listed in which representation was the only reserved activity: the Democratic Republic of the Congo, Kuwait, Sudan, Tunisia, United Arab Emirates (Abu Dhabi), and United Arab Emirates (Dubai). *Id.* ms. 190 (the Democratic Republic of the Congo); *id.* ms. 309 (Kuwait); *id.* ms. 477 (Sudan); *id.* ms. 513 (Tunisia); *id.* ms. 526 (United Arab Emirates (Abu Dhabi)); *id.* ms. 530 (United Arab Emirates (Dubai)).

92. The IBA report entries for eight jurisdictions—Algeria, Bahrain, Egypt, Jordan, Lebanon, Morocco, Saudi Arabia, and Syria—were ambiguous but did not rule out “advice” as a reserved activity. *Id.* ms. 11 (Algeria); *id.* ms. 200 (Egypt); *id.* ms. 300 (Jordan); *id.* ms. 325 (Lebanon); *id.* ms. 367 (Morocco); *id.* ms. 450 (Saudi Arabia); *id.* ms. 493 (Syria). For example, the entry for Bahrain stated, “According to the Legal Profession Act, only Bahraini advocates have the right to appear before courts and tribunals, in front of police, administrative and judicial committees. Non-lawyers are prohibited from giving legal advice or performing any legal act.” *Id.* ms. 74.

93. Although I have pointed out areas in which the IBA report is not entirely clear, in my view, regulators and stakeholders owe an enormous debt of gratitude to Alison Hook and the IBA. The scope of the project she undertook is mind-boggling. The IBA report she produced, while not perfect, is a gigantic leap forward and provides a concrete framework for further discussion, clarification, and understanding.

C. *World Trade Organization Data Relevant to the Lawyer's Monopoly*

Documents filed by governments with the WTO provide a third source of information relevant to the lawyer's monopoly. Similar to the EU studies and the IBA report, these WTO documents lead me to question the accuracy of the conventional wisdom regarding the legal profession's monopoly. Although this argument is somewhat technical, it is a point worth considering, because the documents in question have been filed by governments and because the documents contain provisions with which the filing government intends to comply (or be subject to sanctions). These documents do not provide definitive answers to the scope of the legal profession's monopoly, but they suggest that a number of countries define transactional legal work as reserved legal activities.

More than 155 countries, including the United States, are WTO member states.⁹⁴ All WTO member states are parties to the GATS, which was one of several agreements annexed to the 1994 agreement that established the WTO.⁹⁵ The GATS was the first global agreement to apply to services, as opposed to goods, and it includes legal services.⁹⁶

With one small exception,⁹⁷ legal services in all WTO member states are subject to certain basic obligations set forth in the GATS.⁹⁸ There is, for example, a transparency obligation that applies to all services in all WTO member states.⁹⁹ There is a most favored nation provision that prohibits a WTO member state from favoring one WTO member state over another WTO member state unless they are part of the same economic integration unit, such as the North American Free Trade Agreement (NAFTA).¹⁰⁰

In addition to the basic obligations required by the GATS, WTO member states may *elect* to be bound by *additional* obligations. At the time each country joined the WTO, that country completed a document called its Schedule of Specific Commitments. Each country's Schedule of Specific Commitments sets forth those service sectors for which that country agreed

94. See *Members and Observers of the WTO*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm (last visited Apr. 26, 2014).

95. See Terry, *supra* note 64, at 900–01.

96. *Id.* at 882.

97. At the time countries joined the WTO, they could opt-out of the most favored nation provision by filing an exemption. Very few countries filed exemptions that covered legal services. See Council for Trade in Servs., *Legal Services: Background Note by the Secretariat*, S/C/W/318 (June 14, 2010), ¶¶ 68–70 [hereinafter 2010 WTO Legal Services Note] (noting that five countries have most favored nation (MFN) exemptions for legal services and five others have MFN exemptions for professional services).

98. The General Agreement on Trade in Services is contained in Annex 1B to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. See GATS, *supra* note 64, Annex 1B; see also IBA GATS HANDBOOK, *supra* note 64, at 7–8.

99. GATS, *supra* note 64, art. III.

100. *Id.* art. II. This provision thus functions as an equal-protection type of provision as between WTO member states.

to assume additional obligations.¹⁰¹ A country could list all or part of a particular service sector on its GATS Schedule of Specific Commitments.

A 2010 background note on legal services prepared by the WTO Secretariat indicated that seventy-six WTO member states (including the United States) have chosen to assume additional obligations regarding legal services.¹⁰² This document contains useful information about the types of legal services commitments undertaken by WTO member states. In order to *fully* understand this WTO background note, one should be familiar with the United Nations Central Product Classification (CPC) system, which many countries used to express their GATS commitments.¹⁰³ But even if one does not understand the CPC system, it is still possible to understand many of the conclusions found in the 2010 WTO background note.

The 2010 background note reported that for at least some modes of supply,¹⁰⁴ almost seventy WTO members had included advisory-

101. The additional obligations include the market access provisions in article XVI, the national treatment provisions in article XVII, and certain domestic regulation provisions found in article VI. In the current Doha Round of trade negotiations, WTO members are negotiating possible changes to their Schedules of Specific Commitments that would further liberalize international trade. See IBA GATS HANDBOOK, *supra* note 64, at 29–32.

102. See 2010 WTO Legal Services Note, *supra* note 97, at 14 (“A total of 76 Members have taken commitments in Legal Services. Only 13 Members have used the classification contained in W/120, referring to CPC 861, without any modifications. Three Members have made commitments on ‘Legal Services’ without any reference to the CPC.” The supporting footnote states: “Separate schedules exist for Aruba and the Netherlands Antilles, bringing the number of schedules with commitments to 78.” *Id.* at 14 n.28. It is worth noting, however, that even though many countries included legal services on their Schedules of Specific Commitments, these legal services commitments are subject to the limitations contained in the “market access” and “national treatment” columns on each WTO member’s Schedule of Specific Commitments. See GATS, *supra* note 64, arts. XVI–XVII.

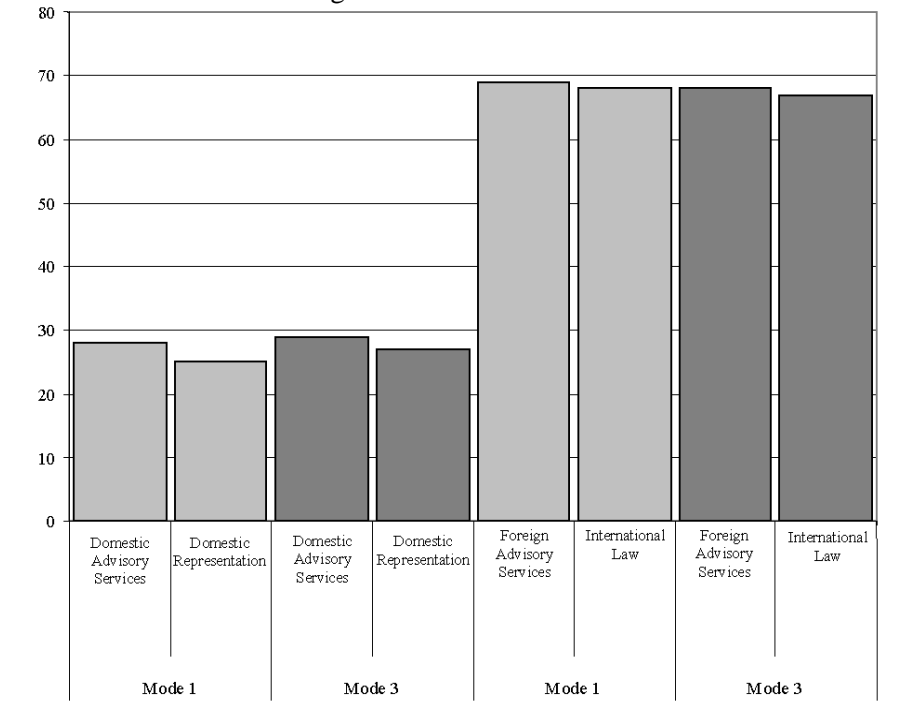
103. An early draft of this Article included a section that addressed WTO member states’ CPC commitments. In the interests of space and clarity, I have omitted that discussion. For those familiar with the CPC system, the current CPC legal services classification is 861, which is a subset of section 8, which includes business services, and division 6, which includes professional services. There are four classes of legal services (8611, 8612, 8613, and 8619). The 8611 class has two subclasses (CPC 86111 and 86119). At least three of the four classes include advisory services. The 2010 WTO Legal Services Note, *supra* note 97, at 10, observed that 13 WTO member states expressed their commitments by referring to CPC 861, without any modifications, which means that they made commitments for advisory work as well as courtroom representation. A number of the more detailed four-digit CPC commitments also included advisory work. To see a summary of the commitment language, including the CPC codes, see the “predefined reports” that the WTO generated for the original WTO member states. *Legal Services Commitments of Other Countries During the 1994 GATS Uruguay Round*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/policy/gats_international_agreements/uruguay.html (last visited Apr. 26, 2014).

104. The GATS identifies four different “Modes of Supply” by which a service may be delivered. See GATS, *supra* note 64, art. I(2). WTO member states list their commitments on their Schedules of Specific Commitments according to the four “modes of supply” set forth in article I(2).

In Mode 1, or Cross-Border Supply, the service itself crosses the border. Thus, Mode 1 is involved whenever foreign lawyers create a legal product or advice, which is then sent from outside the country to clients inside the country; this delivery may occur by means of mail, telephone, or electronically. Mode 2, or Consumption Abroad, involves the purchase abroad by a country’s citizens of the services of foreign lawyers. Mode 3, or

consultancy services on home country law as part of their legal services commitments.¹⁰⁵ Approximately sixty WTO member states had “scheduled” legal services for both advisory-consultancy services on home country law and international law but excluding host country (domestic) law.¹⁰⁶ Between twenty-five and thirty countries made commitments for transactional or litigation work in domestic (host country) law.¹⁰⁷

The 2010 Background Note included this graph, which provides a useful visual overview of WTO legal services commitments¹⁰⁸:



Commercial Presence, involves a foreign entity’s establishment of a permanent presence in a country, such as a foreign branch office of a law firm. Mode 4, or the Presence of Natural Persons, addresses the situation in which the foreign lawyers themselves enter a country in order to offer legal services. This is frequently, but not necessarily, linked to Mode 3 since, if a law firm wishes to establish an office abroad, it will also often wish to staff the office with at least some lawyers from the home country. See IBA GATS HANDBOOK, *supra* note 64, at 21–22.

105. See, e.g., 2010 WTO Legal Services Note, *supra* note 97, ¶ 50 (“The largest number of commitments exists in advisory services in home country law, where 69 Members made at least partial commitments for cross-border supply, and 68 for commercial presence (see Chart 5).”). Annex III of the 2010 WTO Legal Services Note categorizes the commitments of each WTO member state. *Id.*

106. *Id.* ¶ 49 (“The most common departure from the classification in W/120 and the CPC is the limitation of the commitments to advisory/consultancy services on home country (i.e. foreign) law, and international law, to the exclusion of services in host country (i.e. domestic) law. Some 60 schedules contain variants of such scheduling.”).

107. *Id.* ¶ 51 (“Twenty-eight Members scheduled commitments on advisory services in host country law for cross-border supply, and 29 for commercial presence. Slightly fewer commitments still have been made for representation services in host country-law, with 25 commitments for Mode 1 and 27 for Mode 3.”).

108. *Id.* at 15. In this Article, the text caption for the X axis has been rotated to make it easier to read.

This summary of WTO Member State commitments suggests that almost seventy governments chose to treat legal advisory work as well as representational work as regulated “legal services.” Let me be clear: I am *not* asserting that the definition of legal services used in a country’s WTO Schedule of Specific Commitments sets forth the scope of the legal profession’s monopoly in that country. It does not. Nevertheless, in the absence of other information, a country’s Schedule of Specific Commitments provides a tantalizing glimpse into the mindset of that country and how it defines regulated legal services. I found it useful to ask myself the following question: “Does the collective data in the WTO Schedules of Specific Commitments make it more likely or less likely that the conventional wisdom is accurate?” I found that the WTO Schedules gave me reason to doubt the accuracy of the statement that in “most jurisdictions, lawyers only enjoy a monopoly over representing clients in courts.”

*D. What Can One Learn from the Existing Resources
and the Need for Better Data?*

This Article has identified several sources that can be used to try to determine whether the conventional wisdom is correct with respect to the scope of the legal profession’s monopoly in countries outside of the United States. Three follow-up questions that one might ask are: (1) What other sources of information might exist? (2) What lessons, if any, can one learn from the existing data? (3) Might there be a basis in fact for the conventional wisdom, even though the sources cited in this Article seem to point in a different direction?

In response to the first question, it is worth noting that some of the sources that one might expect to contain information about the scope of the legal profession’s monopoly do not contain such data. For example, in 2012, the ABA published a very useful book that explains the rules for becoming a fully admitted lawyer in jurisdictions around the world.¹⁰⁹ Each chapter focuses on a different country and is written by lawyers who are familiar with that country, with overall editing provided by ABA Section of International Law members Russell Dombrow and Nancy Matos. Although it would have been natural for this book to spell out the tasks reserved for a particular kind of lawyer in a particular jurisdiction when specifying what it took to qualify as that type of lawyer, the chapters do not address this topic directly. In my view, the Dombrow and Matos book illustrates the point that lawyers often take for granted the scope of the legal profession’s monopoly in their own country and thus do not set forth that basic information when explaining their system to someone else.

In addition to the Dombrow and Matos book, one might think that the APEC Legal Services Inventory, which was cited earlier, would contain information about the scope of the legal profession’s monopoly in APEC

109. THE ABA GUIDE TO INTERNATIONAL BAR ADMISSIONS (Russell W. Dombrow & Nancy A. Matos eds., 2012).

member economies. Unfortunately, it does not. The APEC Legal Services Inventory focuses on the practice rights of lawyers who are “foreign,” or not fully licensed in a jurisdiction. Accordingly, it focuses on temporary practice rights (also known as fly in, fly out or FIFO) and on the ability of foreign lawyers or firms to obtain and practice Home Law pursuant to a limited license, such as a foreign legal consultant or FLC license. It does not address the scope of the legal profession’s monopoly.

A third source that one might expect to contain this information is the IBA webpage that collects “Documents on the Regulation of the Legal Profession.”¹¹⁰ Although the IBA seems committed to adding content to this webpage, this webpage does not yet include information on the scope of the legal profession’s monopoly.

A final source one might consult is the Directory of Regulators that was distributed in conjunction with the first International Conference of Legal Regulators, which was held in London in September 2012.¹¹¹ This directory collected information supplied by a number of the jurisdictions that attended the London conference. The conference organizers provided a template and asked each jurisdiction to submit the requested information. Not all conference attendees complied, but the documents that were submitted are quite useful. None of the template questions, however, addresses the scope of reserved activities in the jurisdiction.

As these examples might suggest, the tools that are available to conduct lawyer regulation research in jurisdictions other than one’s own are still very primitive. Amazingly, until the publication of the IBA report discussed in the prior section, there was no consolidated source that listed the local title that a particular jurisdiction uses for its regulated lawyers (e.g., solicitors, barristers, or avocats), and even after the report’s publication, it may be difficult to identify those who regulate the admissions, conduct, and discipline stages for this particular type of lawyer.¹¹² Nor is there—yet—a single location where one can locate

110. See *supra* note 62.

111. See Terry, *supra* note 66, at 22.

112. Some of this information exists for EU lawyers through the definition sections in the lawyer directives and through the summary of discipline contact points. See, e.g., Directive 98/5/EC, *supra* note 40, art. 1; COUNCIL OF BARS AND LAW SOCIETIES OF EUR., SUMMARY OF DISCIPLINARY PROCEEDINGS & CONTACT POINTS IN THE EU AND EEA MEMBER STATES (2011), available at http://www.cbbe.org/fileadmin/user_upload/NTCdocument/Table_discipline_Ma1_1335781934.pdf. In the United States, the ABA, the National Organization of Bar Counsel, and the National Conference of Bar Examiners have aggregated this type of information.

Outside of the U.S. and the EU, however, this type of information is very difficult to locate. The 2014 IBA report comes the closest to providing this type of information. This is some of the first information that I recommended that an international network of legal regulators should aggregate. See, e.g., Laurel S. Terry, *Preserving the Rule of Law in the 21st Century: The Importance of Infrastructure and the Need To Create a Global Lawyer Regulatory Umbrella Organization*, 2012 MICH. ST. L. REV. 735. Although some of my thinking has evolved since I wrote this *Michigan State Law Review* article, I continue to believe that one of the first steps of such a network should be to assemble this type of information. See Laurel S. Terry, *Building a Global “Umbrella” Organization for Lawyer Regulators*, PENN ST. (July 13, 2012), available at <http://www.personal.psu.edu/faculty/>

lawyer regulations from different countries; however, the IBA report that is scheduled to be released in May 2014 will include some of this information.

As these examples illustrate, the available knowledge about lawyer regulation around the world is still very basic. The good news, however, is that this situation seems to be changing at a fast rate. Lawyer regulations from a number of countries are now available on the internet—sometimes in English.¹¹³ In some cases, these regulations are available in commercial databases such as Westlaw or LexisNexis. In the course of implementing changes to U.K. lawyer regulation, the U.K. Solicitors Regulation Authority has generated a number of useful documents not only about U.K. lawyer regulation, but about lawyer regulation in other countries.¹¹⁴ Several of these resources did not exist five years ago. I am optimistic that the creation of an international network for lawyer regulators¹¹⁵ and the 2010 establishment of the International Association of Legal Ethics¹¹⁶ will provide forums to aggregate information about lawyer regulation, including information about the scope of the legal profession's monopoly around the world.

The information that already exists has served to highlight two very different approaches to the issue of the scope of the legal profession's monopoly. Some countries create a monopoly for a particular title. Under this approach, it is the *title* that is reserved and only individuals who complete certain requirements may use that designated "lawyer" title. This is the approach used in some Scandinavian countries, for example.¹¹⁷

[l/s/1st3/presentations%20for%20webpage/Laurel_Terry_Banff_final.pdf](#) (providing further information, including resources that contain information about the titles of lawyers and those who regulate them).

113. See, e.g., *Links of Interest*, A.B.A. CTR. PROF'L RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html#Foreign (last visited Apr. 26, 2014); *JFBA Rules and Regulations*, *supra* note 24; *National Code of Conduct*, COUNCIL BARS & L. SOC'YS EUR., <http://www.ccbe.eu/index.php?id=107&L=0> (last visited Apr. 26, 2014). Some countries even provide copies of their rules in languages other than their own. See, e.g., *JFBA Rules and Regulations*, *supra* note 24; *Rules and Regulations*, ADVOKAT SAMFUNDET, <http://www.advokatsamfundet.dk/Service/English/Rules.aspx> (last visited Apr. 26, 2014).

114. See, e.g., *Professions Approved by the SRA for Registered Foreign Lawyer (RFL) Status*, SOLIC. REG. AUTH., <http://www.sra.org.uk/sra/regulatory-framework/professions-approved-by-SRA-for-RFL-status.page> (last updated July 12, 2013).

115. See Terry, *supra* note 66 (describing the creation of this network).

116. See, e.g., *History of IAOLE*, INT'L ASS'N LEGAL ETHICS, <http://www.stanford.edu/group/lawlibrary/cgi-bin/iaole/wordpress/> (last visited Apr. 26, 2014); *Mission Statement*, INT'L ASS'N LEGAL ETHICS, <http://www.stanford.edu/group/lawlibrary/cgi-bin/iaole/wordpress/mission-2/> (last visited Apr. 26, 2014).

117. For example, according to a 2012 report, in Sweden, neither advice nor representation is a reserved activity. See, e.g., CLAESSENS ET AL., *supra* note 38, at 41. The professional title of "advokat," however, is reserved to those who are members of the Swedish Bar Association. See *About Us*, SWEDISH B. ASS'N, <http://www.advokatsamfundet.se/Advokatsamfundet-engelska/About-us/> (last visited Apr. 26, 2014). Membership in the Swedish Bar Association requires legal training. See Charter of the Swedish Bar Association § 3 (2010) (listing the qualifications for admission of new members), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/en_sweden_charterpd1_1188890074.pdf. Advokat is the title of the Swedish lawyer entitled to use the EU lawyer mobility directives. See Council Directive 77/249/EEC, *supra* note 39, art. 1(2); Directive 98/5/EC,

In other countries, however, the *activities*, rather than the title, are reserved. In other words, the monopoly is defined by the activities in which an individual is engaged, rather than by the *title* the individual uses. This is the approach used in the United States, where states attempt to define the unauthorized practice of law.¹¹⁸ Some jurisdictions, such as England and Wales, may use a combination approach in which the title is reserved, but there is also a narrow range of activities that are reserved to one using that title. While these distinctions may seem obvious, a comparative analysis may make it easier for regulators and other stakeholders to consider the advantages and disadvantages of the differing approaches.

Although some of the existing data may help regulators and others better understand some of the available policy choices, the lack of information about comparative lawyer regulation in general, and the scope of the monopoly in particular, means that there is limited data available that addresses issues related to the quality of, and access to, legal services. Professor Deborah Rhode, for example, has asked whether it is fair to conclude that countries with a narrow legal profession monopoly do not have any greater consumer protection problems than countries with a very large space for legal profession-reserved activities.¹¹⁹

There has been some discussion about the relationship between the legal profession's monopoly and quality and access issues, but in my view, this is still a very difficult question to answer, because there is relatively sparse information and some of the existing analysis has been criticized. For example, the 2003 IHS study concluded that there had been no compromise in the quality of services provided to professional services clients in relatively less regulated countries.¹²⁰ The IHS analysis has been heavily criticized, however.¹²¹ Indeed, the OECD Competition Committee Roundtable participants may have been aware of this criticism when they addressed the issue of the relationship between regulation and quality. The 2007 OECD legal services report cited earlier stated:

The IHS Report reaches the conclusion that “the lower regulation strategies which work in one Member State might be made to work in another, without decreasing the quality of professional services, and for

supra note 40, art. 1(2); *see also supra* note 62 for a discussion of the distinction between reservation of activities and reservation of titles.

118. *See supra* note 82 (citing the ABA 2012 UPL survey).

119. Professor Rhode posed this question to the author before and during the Fordham Colloquium.

120. *See* Terry, *supra* note 27, at 37–38.

121. *Id.* at 72–79 (citing, *inter alia*, the Henssler/Kilian, RBB Economics and Van den Bergh, and Montangie studies). My prior article was critical of the IHS report insofar as it recommended significant changes on the basis of what looked like a very broad-brush review. The IHS report looked at fifteen countries, five to six professions, and five major issues, each of which had subissues. The questionnaires on which it relied provided little opportunity for regulators to explain the justifications for their rules. *Id.*

the ultimate benefit of the consumer.” However, this conclusion may be too strong, for three reasons.¹²²

It is also noteworthy that, despite the IHS’s conclusion, at least one relatively deregulated country has increased its legal profession’s monopoly because of concerns about the quality of representation provided by nonlawyers.¹²³ In short, although there is some information available that links regulation to quality, there appears to be very little reliable empirical evidence that examines the relationship between the lawyer’s monopoly and issues of quality and access.¹²⁴

In addition to asking what other sources are available to determine the scope of the legal profession’s monopoly and what type of qualitative information is available, one might ask why the conventional wisdom evolved as it did. As noted earlier, the conventional wisdom may reflect a reality not captured by the law on the books.¹²⁵ Alternatively or additionally, the conventional wisdom may turn out to be rooted in truth.¹²⁶ For example, it might reflect the fact that U.S. lawyers focused on providing transactional—rather than purely litigation—services and serving as problem solvers for clients before it was commonly done in some other jurisdictions.¹²⁷

122. See 2007 *Legal Profession Report*, *supra* note 3, at 27 (quoting PATERSON ET AL., *supra* note 28, at 6). The OECD report elaborated upon these three reasons, noting that: (1) the assumption that higher turnover equals higher profit could be incorrect, (2) the report does not fully control the risk of spurious correlation, and (3) the report assumes a reasonable homogeneity of quality of professional services across EU member states. *Id.* at 27. Although the OECD report said it had three critiques, it offered a fourth observation, which was that the IHS study presented only a very broad picture of regulation, including self-regulation, and did not sufficiently take account of different effects of different forms of regulation in different professions across different member states, each of which has its own peculiarities. *Id.*

123. See, e.g., CTR. FOR STRATEGY & EVALUATION SERVS., *supra* note 31, at 20 (discussing the efforts in Finland to create reserved activities for representation, which do not currently exist); CLAESSENS ET AL., *supra* note 38, at 294 (discussing Finland).

124. A source that might be worth examining in the future is the Consumer Protection Index (CPI). See Paterson et al., *supra* note 53, at 12. The CPI measures the level of specific regulations and instruments of quality control for every relevant profession in every country. Its broad scope, however, may make it subject to some of the same criticisms that were leveled against the 2003 IHS report. See also CTR. FOR STRATEGY & EVALUATION SERVS., STUDY TO PROVIDE AN INVENTORY OF RESERVES OF ACTIVITIES LINKED TO PROFESSIONAL QUALIFICATIONS REQUIREMENTS IN 13 EU MEMBER STATES & ASSESSING THEIR ECONOMIC IMPACT (Executive Summary) 11 (2012), available at http://ec.europa.eu/internal_market/qualifications/docs/news/20120214-summary_en.pdf (“The qualitative research suggests that some national authorities have anecdotal evidence about the negative impacts on market size and structure of reserves of activities. However, there are only limited proven impacts resulting from the quantitative analysis.”).

125. See *supra* note 9 and accompanying text.

126. See, e.g., Barbara O. Rennard et al., *Chicken Soup Inhibits Neutrophil Chemotaxis In Vitro*, 118 CHEST J. 1150 (2000) (finding that chicken soup has substances with beneficial medical effects).

127. See, e.g., David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 422–24, 427, 432–34 (1994) (contrasting the European and U.S. “Cravathism” styles of lawyering and discussing the impact of U.S. firms in Europe).

In sum, despite the advances that have been made, there is still little knowledge regarding the scope of the legal profession's monopoly and how it affects the quality of, and access to, legal services. There is enough information available, however, to question the assertion that, outside of the United States, the legal profession's monopoly is limited to courtroom work.

IV. GLOBAL PRESSURES ON THE SCOPE OF THE LEGAL PROFESSION'S MONOPOLY

Much of the discussion during the *Fordham Law Review's* Colloquium on *The Legal Profession's Monopoly on the Practice of Law* and the resulting articles have focused on policy issues related to the scope of the U.S. legal profession's monopoly.¹²⁸ Additional commentators have suggested that changing the present scope of the monopoly would help achieve certain desired regulatory and policy objectives.¹²⁹ This Article has not weighed in on that policy debate, but instead has staked out a very modest goal related to the accuracy of the conventional wisdom about the scope of the legal profession's monopoly elsewhere in the world.

This Article would be remiss, however, if it failed to note that the type of analysis recommended here may become moot as a result of governmental pressure, market developments, or both. As noted earlier, the EU continues to be actively interested in issues related to the scope of the legal profession's monopoly.¹³⁰ The scope of the monopoly has also been a topic

128. See generally Colloquium, *The Legal Profession's Monopoly on the Practice of Law*, 82 FORDHAM L. REV. 2563 (2014).

129. See, e.g., Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008); see also AM. BAR ASS'N TASK FORCE ON THE FUTURE OF LEGAL EDUC., REPORT AND RECOMMENDATIONS 3 (2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf. The ABA Task Force recommended,

To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services. The current misdistribution of legal services and common lack of access to legal advice of any kind requires innovative and aggressive remediation.

AM. BAR ASS'N TASK FORCE ON THE FUTURE OF LEGAL EDUC., *supra*, at 3; *New York's Top Judge on Non-lawyer Legal Assistance*, ST. B. MICH. BLOG (March 13, 2014), <http://sbmblog.typepad.com/sbm-blog/2014/03/new-yorks-top-judge-on-non-lawyer-legal-assistance.html#sthash.Gb5IDLjv.dpuf>; see also Laurel S. Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685 (2012) (urging U.S. jurisdictions to identify in writing the objectives that they want to achieve through their system of lawyer regulation); Laurel S. Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22 PROF'L LAW. 1 (2013).

130. Paterson summarized as follows some of the recent EU developments:

of interest to antitrust regulators and others in jurisdictions such as Australia, Canada, Ireland, Scotland, and the United Kingdom.¹³¹ This has also been true in the United States.¹³² For example, the previously cited 2002 FTC/DOJ opposition to the ABA's proposed model definition of the practice of law pointed out that "[w]hile the bill for an attorney to draft a will and trust can easily run into the hundreds of dollars or higher, retail software is available that permits the consumer to draft a will for less than \$100."¹³³ This letter also noted that a 1999 study "found that the public did not suffer significantly greater losses from title defects in states where lay persons examined title, drafted mortgage documents, and supervised closings."¹³⁴ For more than a decade, through both Republican and Democratic administrations, the DOJ has issued a number of letters to state bar associations and supreme courts suggesting that proposed rules might violate the antitrust laws.¹³⁵ In the future, the U.S. legal profession may see increased pressure on the scope of its monopoly by antitrust regulators.

In addition to the pressure that might come from governmental antitrust entities, there are other forces that may affect the scope of the U.S. legal

In a Communication on April 2011 the European Commission referred to the need to "review the scope of regulated professions" and "carry out further assessments on reserved activities." In its conclusions from March 2011, the Competitiveness Council recognised that unjustified or disproportionate requirements reserving access to certain service activities to service providers holding particular qualifications can constitute a major barrier to the effective functioning of the Single Market and welcomed the Commission's intention to further assess this issue.

Paterson et al., *supra* note 53, at 6.

131. See Terry, *supra* note 27, at 3–10 (discussing antitrust initiatives); Terry, *supra* note 18, at 487–489 (discussing the Troika); Laurel S. Terry, *Trends in Global and Canadian Lawyer Regulation*, 76 SASK. L. REV. 145, 155–56 (2013) (discussing Canadian trends).

132. See, e.g., *Comments to States and Other Organizations*, U.S. DEP'T JUST., <http://www.justice.gov/atr/public/comments/comments-states.html> (last visited Apr. 26, 2014). The DOJ has sent a number of comment letters related to the scope of the legal profession's monopoly, including objections to proposed definitions of the practice of law, UPL opinions, and rules or legislation that would require a lawyer's participation at a real estate closing. See *id.* DOJ comment letters have been sent to: the Georgia State Bar (2003); the Hawaii State Judiciary (2008); the Hawaii Supreme Court (2009); the Indiana State Bar Association (2003); the Kansas Bar Association (2005); the Kentucky Bar Association (1997 and 1999); the Massachusetts State Bar Association (2004); the Massachusetts House of Representatives (2004); the Montana Supreme Court (2009); the New York State Assembly (2006 and 2007); the North Carolina State Bar (2001 and 2002); the Rhode Island Senate and House of Representatives (2002 and 2003); the Virginia Supreme Court (1997); and the Wisconsin Supreme Court (2007 and 2008). *Id.* The DOJ has filed an amicus brief in Kentucky in support of nonlawyer participation in real estate title insurance. Brief for the United States of America As Amicus Curiae Supporting Petitioners, *Countrywide Home Loans v. Ky. Bar Ass'n*, 113 S.W.3d 105 (Ky. 2003) (No. 2000-SC-000207-KB). The DOJ has also sued to enjoin laws that required lawyers, rather than title insurance companies, to certify real estate titles. See *United States v. Allen Cnty. Ind. Bar Ass'n*, Civ. No. F-79-0042, 1980 WL 1937 (N.D. Ind. Oct. 7, 1980); see also *United States v. N.Y. Cnty. Lawyers' Ass'n*, No. 80 Civ. 6129(LBS), 1981 WL 2150 (S.D.N.Y. Oct. 14, 1981).

133. See FTC/DOJ Comment Letter, *supra* note 15, at 10 n.24.

134. *Id.* at 13 n.35.

135. See *supra* note 132.

profession's monopoly. In a 2012 article in the *Fordham Law Review*, my coauthors and I identified some of the global challenges to lawyer regulation, including questions about *who* should regulate legal services, *what* is regulated (e.g., individuals or entities; people or services), *when* regulation should occur, *where* regulation should occur (and issues about how to adapt a geography-based regulatory system to a virtual world), *why* regulation should occur, and *how* regulation should occur.¹³⁶ Many of these forces have the potential to lead to changes in the scope of the U.S. legal profession's monopoly.

Third, there are powerful market forces interested in providing legal services of one type or another, even if they are not interested in the "practice of law," which is reserved to U.S. lawyers.¹³⁷ I became convinced during the U.S. multidisciplinary practice (MDP) debates¹³⁸ in the 1990s that if one encounters a well-motivated, well-financed nonlawyer, it is virtually impossible to define or defend a definition of the lawyer's monopoly that includes activities outside the courtroom. In my view, it is impossible to come up with a definition of the practice of law that one can apply in transactional settings that is not overbroad, can be applied consistently and fairly to prosecute nonlawyers who engage in UPL, and will withstand a challenge from motivated, well-financed nonlawyers. UPL rules in the United States have been most successfully defended when the defendants are relatively weak and powerless. If the defendants are well financed and well defended, those seeking to enforce the legal profession's monopoly may lose.¹³⁹ This is relevant because one could write entire articles about the potential competition that the U.S. legal profession may face from well-financed competitors such as LegalZoom, Rocket Lawyer, Pangea3, Novus, and compliance companies such as Promontory Financial, among others, which collectively provide services in both the individual client market and the corporate client market.¹⁴⁰ Ray Campbell has

136. See Laurel S. Terry, Steve Mark & Tahlia Gordon, *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 *FORDHAM L. REV.* 2661 (2012).

137. See, e.g., Martha Neil, *Investors Spent \$458M on Legal Startups in 2013; Will 2014 Be Another Big Year?*, A.B.A. J. (Feb. 14, 2014), http://www.abajournal.com/news/article/will_2014_investment_in_legal_startups_hit_500m.

138. The MDP debates refer to the discussion surrounding the work of the ABA Commission on Multidisciplinary Practice (MDP). For additional information, see *Commission on Multidisciplinary Practice*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html (last visited Apr. 26, 2014) (providing links to articles regarding the debate).

139. See, e.g., *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956 (5th Cir. 1999) (vacating the lower court's injunction against Quicken Family Lawyer software after the Texas legislature intervened and passed section 81.101, which stated that the "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney" (quoting TEX. GOV'T CODE ANN. § 81.101 (West 1998) (alternations in original)).

140. See generally Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 *FORDHAM L. REV.* 3067 (2014); John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 *FORDHAM L. REV.* 2995 (2014);

explained how the theory of disruptive innovation might apply to legal services.¹⁴¹ As Campbell noted, disruptive innovators disrupt an industry because they find ways to serve previously unserved clients, or they provide goods or services at a lower cost to overserved clients who are paying for more product than they want or need.¹⁴² After getting their foot in the door with these underserved or overserved markets, disruptive innovators tend to migrate upmarket into more valuable niches, ultimately leading to direct competition with, and defeat of, the incumbents.¹⁴³ In light of the studies documenting the large unserved legal needs in the United States and the potential size of the legal services market,¹⁴⁴ U.S. lawyers need to be cognizant of the fact that they may not have the power to control the scope of the legal profession's monopoly, but they may have to react to developments and changes in a dynamic legal services marketplace. Thus, while I recommend additional research on the scope of the legal profession's monopoly around the world, I recognize that market factors may change the need for and context of this research.

CONCLUSION

Comparative research can be a useful tool when approaching regulatory issues. Thus, whenever regulators consider the issue of the proper scope of the U.S. legal profession's monopoly, I recommend that they examine the scope of the legal profession's monopoly in other countries and consider why and whether the U.S. monopoly should be broader or narrower than the monopolies found elsewhere. Unfortunately, this is much easier said than

Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611 (2014); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041 (2014); Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing To Protect Consumers*, 82 FORDHAM L. REV. 2683 (2014).

141. Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & BUS. 1 (2012).

142. *Id.* at 11–14.

143. *Id.* at 18–20.

144. See, e.g., Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82 FORDHAM L. REV. 2841, 2841–42 & n.5 (2014) (citing SUPREME COURT OF GA. EQUAL JUSTICE COMM'N, CIVIL LEGAL NEEDS OF LOW AND MODERATE INCOME HOUSEHOLDS IN GEORGIA: A REPORT DRAWN FROM THE 2007/2008 GEORGIA LEGAL NEEDS STUDY 27 (2009); DEBORAH RHODE, ACCESS TO JUSTICE 3 (2004)); AM. BAR ASS'N TASK FORCE ON THE FUTURE OF LEGAL EDUC., *supra* note 129, at 3; LegalZoom.com, Inc., Registration Statement (Form S-1) (May 10, 2012) (“In 2011, nine out of ten of our surveyed customers said they would recommend LegalZoom to their friends and family, our customers placed approximately 490,000 orders and more than 20 percent of new California limited liability companies were formed using our online legal platform. . . . According to the U.S. Census Bureau, in 2009, there were approximately 26 million businesses with fewer than ten employees. We estimate that in 2010, approximately two million new businesses were formed in the United States. According to the U.S. Bureau of Economic Analysis, legal services in the United States in 2010 represented a \$266 billion market. We estimate that in 2011 approximately \$97 billion of legal services were provided to small businesses and consumers, based on a study conducted on our behalf by L.E.K. Consulting LLC. Despite the enormous amount spent on legal services, we believe that small businesses and consumers have not been adequately served by the options traditionally available to them.”).

done in light of the current state of comparative research on lawyer regulation topics.

While it certainly appears to be true that the United States has one of the more expansive definitions of the scope of the legal profession's monopoly, it is also true that the conventional wisdom may be inaccurate with respect to the scope of the legal profession's monopoly elsewhere in the world. It does not appear to be accurate to assert, as a 2007 OECD report did, that in "most jurisdictions, lawyers only enjoy a monopoly over representing clients in courts" and that "[t]he market for legal advice remains largely open."¹⁴⁵ As this Article has demonstrated, there are a number of studies or reports that, while not definitive, strongly suggest that in a number of jurisdictions, transactional work or "advice" is also a "reserved" legal activity.¹⁴⁶ While the goals of this Article are modest, I hope that it can serve as a building block for future work related to the scope of the legal profession's monopoly and its impact on access issues and on issues related to the quality of legal services.

Accordingly, the first takeaway point of this Article is that there is a need for greater research on lawyer regulation around the world, including issues related to the scope of the legal profession's monopoly and the impact of that monopoly on issues related to the quality of services and access to justice. The second takeaway point is that readers need to be aware that events may overtake these research efforts and render moot questions about the scope of the legal profession's monopoly since it may be the market rather than regulators who resolve this issue. Lawyers in the United States must be prepared for increased competition from nonlawyer providers and for a regulatory system in which "lawyer" is a reserved title rather than a set of reserved activities. In order to survive in this type of competitive marketplace, U.S. lawyers will need to make sure that they—and their title—are adding value to clients.

145. See *2007 Legal Profession Report*, *supra* note 3, at 11; *supra* note 6 and accompanying text.

146. See *supra* Part III.A–C (discussing the EU report, IBA report, and WTO documents).