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### Too many lawyers? Or should lawyers be doing other things?

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# Too many lawyers? Or should lawyers be doing other things?

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**ABSTRACT** *This paper from the Symposium/Conference at Onati on Too Many Lawyers? suggests that there are not too many lawyers, nor too much legal education. Instead we should think about what legal education is ‘good’ for (what should those with a legal education do?), including problem solving, dispute resolution and reallocation of legal services for those underserved. The paper looks at how other professions (business consulting and architecture) have reframed themselves for new conditions of work – with varying supply and demand changes in their relevant fields. The paper also discusses implications for legal education of a broader conception of what lawyers learn and do.*

## I. The problem: are there too many lawyers?

A variety of social and economic developments in the last decade or so have resulted in claims, in many countries, that there are ‘too many lawyers’ and in many countries ‘too many law students’ (see, e.g., Kritzer, 2012) (who, at great financial or opportunity costs for their educations, may train and prepare for a very complex profession, without a certain prospect of obtaining professional work, as that work is conventionally defined). These claims assume that we can measure and know what an optimal number of lawyers is, that we have certain expectations about what lawyers do or should do, and that something should be done to appropriately allocate legal education, legal services and entry into (and practice of) the legal profession (see Morgan, 2010; Green, 2012). In my view, all of these claims are problematic. Is the question whether there are too many lawyers admitted to practice or, too much legal education being offered? Is this a market question (too many lawyers will drive down fees and make the profession less profitable for those already in it), make access too difficult (supply and demand issues) or waste too many social resources on the production of law degrees without sufficient economic and social benefit? Or, is this a social or moral question – do too many lawyers drain the economy, the

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polity and the social fabric by producing conflict, increased transaction costs and turmoil, rather than serving to benefit the larger society by mediating conflict,<sup>1</sup> serving as statesmen (Kronman, 1995) or problem solvers, or ‘social glue’, rather than social repellents or irritants?

In this essay, I suggest that there is not too much legal education nor too many lawyers, if the goals of a legal profession include solving human problems and producing both peace and justice, as ‘valued-added’ forms of social goods produced by having legal knowledge. Furthermore, new challenges of inequalities, inadequate or unbalanced resources should force us to realign, re-imagine and innovate new methods of legal services delivery, which in turn should require different ways of structuring the acquisition and practice of legal knowledge and legal education, as other professions have begun to do (Awan *et al.*, 2011).

How do we measure the optimal number of lawyers (Magee, 2010)?<sup>2</sup> It is common to look at per capita ratios of lawyers to populations. So we learn that Israel and the United States have among the highest ratio of lawyers to general population [1:163 (Barak-Erez *et al.*, 2011) and 1:265 (ABA, 2008), respectively] and South Africa has one of the lowest [1:2,273 (McQuoid-Mason, 2012)].<sup>3</sup> But we know much less about whether lawyers are actually meeting the legal needs of the populations they serve and/or whether lawyers are serving an optimally productive function in society. As recently described by sociologist Rebecca Sandefur (2012), there have been few thorough legal needs studies in the United States (and many other countries) since the initial outpouring of interest in access to justice and legal needs studies in the 1970s and 1980s, though Herbert Kritzer (2010) reports on a number of state-based legal needs studies in at least half of the United States in the last twenty-five years (see, e.g., Curran, 1977; Cappelletti & Garth, 1979; Meeker *et al.*, 1985; ABA, 1994; Meeker *et al.*, 2000; Rhode, 2004). What we know from those older studies and a few newer ones is that both poor and moderate income individuals are grossly underserved by lawyers for their ‘basic’ everyday legal needs, including denials or disputes about public benefits, family law matters, legal status issues (e.g. immigration), basic property transactions (leasing and purchasing housing, now foreclosures), tax issues, neighbor and interpersonal disputes, and employment matters. Recent studies suggest that poor and moderate income individuals most often seek other ‘non-lawyers’ to help them solve ‘legal’ problems (Sandefur, 2012). Though many argue the problem is the cost and affordability of legal services, others have noted that low and moderate income individuals have either learned to use other resources or don’t understand or want legal professionals to take on their problems (Sandefur, 2012; Kritzer, 2010). My own early work in assessing when people of moderate means sought lawyers demonstrated that ordinary people did not want to conceive of themselves as having ‘problems’ (so when asked about a legal problem they had actually encountered and sought legal advice for, they could not remember or denied use of a lawyer in handling their problem) (Menkel-Meadow, 1981). For many, what we legal professionals might call a legal ‘problem’ (needing a will, buying a house, signing a lease, making a consumer complaint, getting a traffic ticket, having an ‘issue’ at work, in the family or at school),

was characterized as either a normal, if annoying, part of life, or a transaction, not a 'legal dispute' requiring legal representation or even advice.

As other students of legal needs and the use of professional legal services have noted, legal problems are 'socially constructed', both by those having the problems and those who seek to solve them (Felstiner *et al.*, 1981; Menkel-Meadow, 1985a). And now we know, in addition to such factors as case type, class, region, religious group, possibly race and gender, etc., there is also national and cultural variation in when people decide to go to lawyers (especially when there is greater access to justice, through government-supported judicare, legal aid or other social welfare or subsidy systems) (Kritzer, 1991, 2008; Genn, 1999; Genn & Paterson, 2002). The provision of legal services to those of low income in the United States has, for decades, been well below governmental subsidies in other countries (see Curran, 1977; Cappelletti & Garth, 1979; Legal Services Corporation, 1980, 2009; Meeker *et al.*, 1985; ABA, 1994; Meeker *et al.*, 2000; Rhode, 2004; Kritzer, 2010) and in the last three decades whatever government support there has been, particularly through the Legal Services Corporation funding, has been greatly diminished as annual allocation of funds for legal services has been reduced in real dollars almost threefold (the current budget allocation is close to what it was in actual dollars in the early 1980s when I first did studies of allocation of legal services to the poor) (Cohen, 2013; Menkel-Meadow & Meadow, 1983; Menkel-Meadow, 1984a; see also Abel, 1985). The United States is not alone in decreasing governmental support for legal services for those who can't afford them; recent changes in British Legal Aid have greatly reduced allocations for civil justice, as most legal aid is allocated to criminal defense, and civil problems are increasingly being referred to other processes (e.g. mediation, as discussed more fully below) (Legal Aid Act, 1988; Whitehead, 2011; Legal Services Act, 2007; Brennan, 2012).

Thus, usage of lawyers to solve some 'legal' problems is a complex social phenomenon in which the variable availability of legal services and subsidies for legal aid may structure people's expectations of how and when they can use lawyers to solve their problems. Choosing to use non-lawyers may be a fully adaptive strategy if lawyers are not sufficiently available at a 'fair' cost or at a cost that justifies the expense [consistent with findings that the same 'legal problem' (e.g. house ownership) may be handled by lawyers or not, depending on the economic value of the problem itself] (Kritzer, 1991, 2008). Whether lawyers or non-lawyers perform better, worse or the same in handling a wide variety of matters, remains a contested empirical question, requiring constant study by type of matter, and over time, with both new simplification (electronic and form documents) and simultaneously, complexification (more regulation, more complex claims and entities) of legal matters (Kritzer, 1998; Menkel-Meadow, 2012).

At the organizational level, early predictions of an ever-expanding market for lawyer services in the creation of ever-increasing new private entities and increased governmental regulation (Sander & Williams, 1989) have met with current realities of technological change and the possible 'replacement' of lawyer work product by increasingly routinized computer forms and electronic documentation and communication (Susskind, 2008), as well as ever-increasing competition from non-lawyer

providers of legal services and the economic recession in general, which some argue has reduced the scope and amount of legal work (Stevens, 2012; Kritzer, 1998; compare Menkel-Meadow, 1985b). The question of whether there are too many lawyers now transcends any one jurisdiction, as scholars and practitioners consider what the ‘globalization’ of legal services means for us all – more work for more (specialized) lawyers around the globe (Gardner, Morris *et al.*, 2002) or increased competition from lawyers who are able to cross borders to practice, even as cross-border licensing to legitimate such practice remains somewhat unresolved (Terry, 1998, 2008, 2010; Silver, 2005; Sokol, 2007).

Another part of the ‘too many lawyers’ argument has to do with allocation of what kinds of lawyers to what kinds of matters. Current complaints in the United States that there are too many lawyers are mostly made by those seeking to enter the profession (or those who have newly entered in the recent economic downturn). A series of articles in the popular media (Segal, 2011a, 2011b), and now a series of lawsuits against a number of law schools arguing that they have over-claimed and misrepresented employment possibilities for graduates (Anziska, 2012; Shear, 2012),<sup>4</sup> mostly have to do with the ratio of highly paid (large law firm) jobs to the numbers of students graduating from law school with large debt (often between \$100,000 and \$150,000) who seek those highly paid (formerly up to \$160,000 per year) jobs. Ironically, in some markets, with low-tuition state schools and employment pipelines to smaller firms or government agencies, employment rates may actually be more robust (or at least not declining at the same rate as in some big city markets).

Whether there are, in fact, too many lawyers, may depend on location, type of practice and the externalities of ‘other’ factors. Are there too many lawyers in Nevada, Florida and California where the economic crisis has caused mass foreclosures? Would many homeowners benefit from lawyers to renegotiate (or mediate) their mortgages (Schneider & Fleury, 2011; State of Nevada Foreclosure Mediation Program, 2012)? How flexible are modern specialized lawyers in shifting from one form of practice (mergers and acquisitions in boom times) to another (bankruptcy in economic downturns), and from one ‘sphere’ (corporate and entity representation) to another (individual representation) (Heinz & Laumann, 1994)?<sup>5</sup> Unlike employment in less specialized fields, flexible movement from one sphere to another is not easy and is variable with both type of professional knowledge as well as professional licensing and credentialing requirements [as is the case with differences between most older professions – e.g. medicine, architecture, accounting and nursing, which require licensing, with newer professions such as engineering, computer techs and business consulting, which do not (McKenna, 2006)]. Law licensing and credentialing is even more complex as states, not the nation (in the United States), regulate entry and also vary as to whether they permit specialization certification (as does California in a number of specialties) or reciprocal bar entry from other states or countries. Thus, the claims about too many lawyers tend to conflate a number of more complex issues – are there too many law graduates or law-trained individuals for what is currently available to be ‘lawyered’ about, at rates that justify the investment in a legal education, or are lawyers misallocated both in what they want to do and what they might actually be helpful for if they could be allocated to

work in a different way.<sup>6</sup> Must all those who receive a legal education work in the same kinds of ‘legal’ jobs?

Most of the relatively rapid increase in the number of law students and lawyers in the last few decades has been attributed to the diminished exclusivity of entry barriers [in most Western and some Eastern, e.g. China and Japan (Chan, 2012), countries] to legal education (if not to full certification and bar membership) and the dramatic increase in the number of women, and the slightly less dramatic rise of minority group representation in legal education and the legal profession (Menkel-Meadow, 1989a, 1995; Kritzer, 2012).<sup>7</sup> Thus, to this author (and others), it seems deeply ironic that claims are made that there are ‘too many lawyers’, just as the legal profession becomes more diverse. This is not unrelated to the claim that there is too much litigation and too many lawsuits, just at the same time as new causes of action and increased litigation over basic human, civil and economic rights have increased access to the legal system for those who were previously denied both access and substantive claims and legal relief (Galanter, 1983, 1992, 2004). And, as others have argued, these claims have been made before, the legal profession has always been in ‘crisis’ as defined by some groups who lament what lawyers do or who they serve or how much they can monopolize their relative markets (Garth, 2012; Gans, 2012). What is an ‘optimal’ number of lawyers and legal claims and who should be available to handle those claims?<sup>8</sup>

As I will discuss more fully below, new entrants to the bar, who may diversify the practice of law, not only demographically, but substantively (Menkel-Meadow, 1987), may actually provide an opportunity for reconceiving just what it is that lawyers can, or should, do. We already know the bar is stratified and segmented and that different kinds of lawyers are ‘segregated’ in different parts of the profession, whether willingly or not (the ‘push–pull’ effect) (Menkel-Meadow, 1989b; Seron, 1996;<sup>9</sup> Wilkins, 2001). That lawyers in different segments of the bar might perform different kinds of services is well known and commonplace to us now, but the move from a more generalized conception of what lawyers do to more specialized conceptions is an opportunity to re-examine just what legal knowledge is and how it might be most effectively used to solve people’s problems.

It might be useful to separate consideration of whether there are too many lawyers from the issue of whether there are too many law students or too much legal education. The United States, Canada [and Japan (Riles with Uchida, 2009), Korea, China and in some schools, Australia] are among a few countries that treat legal education as a subject of graduate education. In most countries of the world, legal education is still a general, undergraduate or first degree, conceptualized as a good general education for a well-educated citizen who might enter any number of useful professions.<sup>10</sup> Will we soon be asking the question of whether there are too many college graduates (Steinberg, 2010)? Other (developing) countries may be having different experiences, with less work available for the highly educated as more physical or unskilled labor might still be necessary for manufacturing, infrastructural development or export businesses.<sup>11</sup> But, employment issues to one side, legal education may be a particularly useful (if properly structured) form of knowledge to impart to any educated citizen of the world, whether obtained in graduate or



undergraduate education and there may be more ‘uses’ of that legal knowledge than conventional deployment in what is considered a ‘legal’ career. Here I will contrast the much larger legal profession to the smaller and newer profession of business consulting, and the older profession of architecture and planning to see how realignments and the creation of ‘new’ knowledge and forms of expertise can expand the uses of knowledge to facilitate dramatic social, physical and economic change. Legal education could play a useful role in not only advising on and solving more problems and social issues, but could also be important in just allocations of goods, services and more dignitary human issues in an ever-changing world of commerce and human interaction, as law students, like business, architecture, engineering and science students, learn how to ‘innovate’ within their fields (Henderson, 2012; Lehrer, 2012).

Thus, the question of whether there are too many lawyers depends greatly on who is asking the question – *existing lawyers* who may want to control the market and limit entry<sup>12</sup> (see, e.g., Abel, 1988, 1989, 2003; see also Larson, 1977), *new entrants or law students* who see the current reported ratio of jobs to law graduates as declining [in the US about 30,000 jobs/annually for about 45,000 new JDs each year (Greenbaum, 2010<sup>13</sup>)], *current and potential clients* (consisting of a wide and divergent group of individuals and organizations), or the *larger society* or *scholars* who aim to assess whether lawyers are socially productive, and if so, what it is that they produce. Though many have argued that lawyers may actually impede innovation and growth of market activities (Sander & Williams, 1989; Hadfield, 2000, 2008), I suggest here that legal knowledge can and should be deployed to decrease the cost (both economic and human) of disputes and conflicts and can also be utilized for more efficient and better transaction and entity creation and management.<sup>14</sup> Thus, the question is not ‘are there too many lawyers?’, but what should lawyers productively do [with implications for how they should be educated, trained and ‘allocated’ to do good work (Gardner, Csikszentmihali *et al.*, 2002<sup>15</sup>)]?]

## II. The solution? What if lawyers did other things?

To the extent that legal education is a combination of a general education in ways of thinking and analyzing problems (a little bit different in civil and common law countries) and more specialized knowledge (both in subject matter expertise and process expertise), a legal education might actually permit ‘lawyers’ to do a variety of tasks in society. I begin with some of the applications of legal knowledge I know from my own experience and study, and then turn to some other possible adaptations of legal knowledge for other use, and contrast this to how at least two other professions – business consulting and architecture – have adapted to changing economic conditions by diversifying, and reconstituting their services and markets. I conclude with some observations about how legal education might have to adapt for changing conceptions of what lawyers do.

As someone who began her own career as a poverty lawyer, seeking to deliver both individual justice to the underserved and to engage in social change (through law reform, litigation and through community organizing and organizational representation), it was not long before I saw the inefficacy of much social change litigation

and adversarial advocacy. I will not here recount all of my personal history that led to a focus on changing the legal paradigm from one of litigation ‘victory’ to legal problem solving,<sup>16</sup> but these observations were not mine alone. Critiques of litigation in the United States began in the late 1970s and early 1980s from different sectors of the legal profession. As recounted, not uncontroversially, by many different sectors of the legal profession [Chief Justice Warren Burger of the United States Supreme Court (Burger, 1982), the consumer empowerment movement (Abel, 1982; Harrington, 1985), including deprofessionalization efforts (Schonholtz, 1985; Merry & Milner, 1993), scholars and practitioners seeking more creative and Pareto optimal solutions to complex problems (Raiffa, 1982; Fisher *et al.*, 2011) and more just or forgiving solutions to crime and victimization (Umbreit, 2000)], joined by those in economics, political science, game theory, business, labor and many other fields (Menkel-Meadow, 2000, 2009a),<sup>17</sup> arguments about both quantitative factors (too many cases clogging the system and making litigation too expensive and too time consuming) and qualitative factors (creating better solutions to problems), were used to suggest other ways for lawyers to work. From this critique the modern ‘alternative’ (now called ‘appropriate’) dispute resolution movement was born.<sup>18</sup> Even hard core social justice litigators, like Gary Bellow, were sometimes critical of the individual lawsuit (and litigation) as the best way to achieve social justice (Bellow, 1977). Cases might be won, including cases against governmental and private organizations and institutions, but adaptive officials or lawyers on the ‘other side’ would soon learn to circumvent legal rulings or change the rules themselves.

In the late 1970s and early 1980s, (some) consumer lawyers, family lawyers, employment and labor lawyers, commercial lawyers and, oddly enough, military and government lawyers began to focus on ‘other’ ways to use their legal skills. Labor law had always used mediation and arbitration as one form of dispute resolution (Menkel-Meadow, 2011a); family lawyers turned first to mediation, then to ‘collaborative law’ (Tesler, 2001); construction lawyers began to use ‘partnering’ agreements requiring pre-dispute meetings and mediation (Carr *et al.*, 1999); large-scale commercial lawyers moved toward more arbitration [especially in transnational disputes (Born, 2010)], then to mediation<sup>19</sup> and then to a series of hybrid processes, including mini-trials, med-arb and arb-med, summary jury trials and others (Menkel-Meadow *et al.*, 2011). The public sector followed with court-annexed ADR programs, including arbitration, mediation, early neutral evaluation and other hybrids, formally authorized and then sometimes required in both federal and state practice.<sup>20</sup> In the United States, the ‘ADR’ concept spread also to governmental decision making and policy formation, as trained facilitators managed complex rule and regulation drafting in ‘negotiated rule-making’ processes or ‘reg-neg’ (Harter, 1982) or what are now called ‘consensus building processes’ (Susskind *et al.*, 1999; but see Menkel-Meadow, 2011b). Even in the binary world of criminal justice (guilt/innocence; punishment or freedom) these new processes were harnessed to the reform seeking efforts of social workers, probation officers, creative judicial officials<sup>21</sup> and others who looked for ‘restorative’ justice to reintegrate offenders with their communities and to provide some restitution or emotional relief for victims (Menkel-Meadow, 2007a). This latter movement for restorative justice in criminal law also helped contribute both the



theory and practice for the development of new processes and institutions in international law [including the new field of ‘transitional justice’ (Teitel, 2002) in post-conflict settings, both between and within countries].

These developments in the legal profession were accompanied by social theory considering such issues as democratic deliberation, public participation and policy decision making. Social theorists, such as Jürgen Habermas (1985), Stuart Hampshire (2000), Jon Elster (1995) and others, explored best and second-best processes for political decision making, with some (Hampshire) focused on adversarial, Anglo-American agonistic approaches, and others suggesting that other forms of process might be better or at least more ‘robust’ in arriving at good decisions, depending on the context and type of decision made (Elster, 1995; Menkel-Meadow, 2005b). Hampshire, in acknowledging that there is unlikely to be any universal agreement about the substantive good, suggested that human beings might agree on processes so that they could live together productively and make good decisions: “The skillful management of conflict is among the highest of human skills” (Hampshire, 2000, p. 35). Legal processes, including hearings, trials, negotiation, mediation and compromises, are seen as important in maintaining the social, political and, yes, moral health of societies with competing goals and diverse populations. This social theory has been harnessed to descriptions of different kinds of skills and processes that could be and have been used by lawyers, policy makers and others who craft solutions to legal, social and political problems.

The rapid movement to these new or reconfigured processes led to an outpouring of new skills training, initially conducted outside of the traditional law schools, offered to practitioners in a variety of continuing education (including within and by courts) or privately offered professional training programs. After a first generation of general skills training in mediation, arbitration and facilitation, the new field of ‘dispute system design’ was spawned around the development of the design of structured dispute resolution programs, both within institutions and in situations of iterated dispute or transaction management (Ury *et al.*, 1988; Feinberg, 2006; Menkel-Meadow, 2009b).<sup>22</sup> An even more specialized form of process expertise and institutional design in post-conflict dispute resolution has developed alongside this new ‘profession’ in international law (Stromseth *et al.*, 2006).

Efforts to document and report on the dimensions and market share of these new professions have been largely unsuccessful, in large part because so much dispute resolution (mediation, arbitration and hybrids) is conducted in the private sphere without any requirements for reporting to public agencies in the United States (Stipanowich, 2004).<sup>23</sup> Nevertheless we know that a vast number of cases filed in the American courts are settled through one of these processes, whether in the courts themselves (through mandatory settlement conferences, court-annexed mediation or arbitration programs) or through private processes.<sup>24</sup> We also know the use of these court-annexed and private processes is on the increase in the United Kingdom [Lord Woolf reforms in England and Wales (Lord Woolf, 1996; see also Goriely *et al.*, 2002)<sup>25</sup> and increased use in Scotland too], and now in Europe, as well, through the EU’s Directive on Mediation (2008),<sup>26</sup> as well as in Australia (King *et al.*, 2009), Asia (Lee & Hwee, 2009) and South America

(Leathley, 2007). In the United States arbitration is now mandatory (and pre-emptive of litigation) in almost all consumer and employment disputes as pre-dispute assignment to arbitration is found in almost all contracts, and the practice has been sustained by the United States Supreme Court against virtually all constitutional and statutory challenges (Sternlight, 2002).<sup>27</sup> Most family courts (a matter of state, not federal law in the United States) require divorcing parents to attend mandatory mediation or conciliation programs.

As in the United States, there is much debate about whether mediation and other ADR processes really are being used successfully, whether there is lawyer resistance or client reluctance, or scholarly critique of the 'privatization of justice' (see, e.g., Genn, 2009), all while new laws, regulations, court pressures and the globalization of legal procedures push almost inexorably toward the increased use of these processes. One report in the United States projected that

employment of arbitrators, mediators and conciliators is expected to grow faster than the average for all occupations through 2018. Many individuals and businesses try to avoid litigation, which can involve lengthy delays, high costs, unwanted publicity and ill will. Arbitration and other alternatives to litigation usually are faster, less expensive, and more conclusive, spurring demand for the services of arbitrators, mediators and conciliators. Demand will also continue to increase for arbitrators, mediators and conciliators because all jurisdictions now have some type of dispute resolution program. (BLS, 2010–2011)<sup>28</sup>

Within this 'newer' area of legal expertise there are at least ten new possible sites of work:

- court ADR (mediators, arbitrators, early neutral evaluators, court counselors and administrators);
- private mediation, arbitration and other forms of dispute resolution;
- mass claim management (at both decision-making and facilitative layers, as well as in more conventional representation and advocacy);
- drafting and management of contract-based mandatory dispute programs;
- community forms of ADR (mediation and community organizing and empowerment);
- internal organizational dispute resolution (ombuds and related processes in both governmental and private organizations);
- government policy formation in facilitated consensus-building procedures;
- international diplomacy in both public and private negotiations for treaties, trade agreements and private commercial dealings;
- participation in less adversarial criminal processes at both domestic and international levels (Victim–Offender Mediation, local peacekeeping, international tribunals and commissions); and
- a variety of 'preventative' dispute resolution processes:
  - such as construction partnership;
  - dispute system design; and

- transactional mediation.

These ‘newer’ forms of dispute resolution lawyering work use both conventional litigation, dispute-based modalities of thinking and structuring work, but they also use different approaches – not just to ‘win’ a case for a client, but to effectuate the client’s goals, through the recognition of needs and interests of others who work with one’s clients, and in some cases, even the concept of ‘client’ is different than in the conventional legal paradigm. Non-partisan legal problem solving may not always involve conventional representation [remember the “lawyer for the situation” (Hazard, 1978)].<sup>29</sup> Lawyers as dispute resolution professionals or peacemakers may work within different conceptual mind-sets as well as in different work locations, e.g. NGO’s (neither governmental nor profit-based work settings with very different programmatic and organizational goals).

New forms of ADR and dispute resolution practice are also located within the counseling parts of the legal profession. Dispute system designers (a now fancy name for what many lawyers have done for decades) advise clients with iterated disputes (both within their organizations, e.g. employment disputes and outside of their organizations with clients, vendors, suppliers, etc.) about how to develop internal dispute resolution programs or more recently ‘preventative’ processes and measures for workplace relations, ethics, communication and problem solving. Some governmental and private organizations use ombuds, mediator offices, peer counselors, hotlines, as well as more formal grievance processes to handle, prevent, manage and, when necessary, resolve such disputes. Lawyers and legal adjuncts provide education and training in conflict resolution and handling, both internally within organizations and more conventionally to clients as outside counsel.

International organizations, such as the UN, World Bank, IMF, International Red Cross and others, are often not subject to traditional national or international law (because of the unique legal status of international organizations), for resolution of both internal and external disputes and thus have created their own ‘justice’ systems.<sup>30</sup> These dispute systems may be motivated by other values than litigation vindication – preventative resolution or management to insure healthy workplaces, and efficient communication of systemic issues within the organization (Sturm & Gadlin, 2007), though these processes are not without their critics as well (Edelman *et al.*, 1993).

In order to design such processes, lawyers will have to expand their knowledge of legal concepts and processes beyond those more commonly taught in law schools to include problem-solving strategies, economics, organizational development and sociology, decision making, human resources management, psychology and a variety of other topics more often taught in business management or public policy programs. Goals of such organizations may be different depending on whether they are public, private, hybrid or international in scope and purpose. Clearly, there is no single paradigm of the lawyer’s work that describes what this work entails.

At the international level, without any accurate accounting of which I am aware, dispute resolution in both its formal (the many new international tribunals which have been created in the last few decades<sup>31</sup>) and more informal fora [truth and reconciliation commissions, hybrid national courts for past atrocities, use of local indigenous

processes such as *gacaca* in Rwanda (Bolocan, 2004)] have produced literally thousands of new legal jobs in an increasingly denationalized form of lawyering (Menkel-Meadow, 2011c). As William Twining has so eloquently argued, globalization of law can mean both ‘transnational’ legal systems or ‘sub-national’ or more local legal systems (Twining, 2009), leading to a greater complexity of legal pluralism, both in substantive law and processual law, all of which may require new kinds of ‘lawyers’ or legal professionals or ‘translators’ at many different layers of law and legal institutions.<sup>32</sup>

### III. Implications for legal education

The key ideas in these new forms of ‘lawyering’ are that they operate with different concepts and modalities. While legal knowledge in the form of substantive legal knowledge, including laws, rights and regulations, as well as procedural knowledge, along with legal interpretation techniques and theories, are still important, this legal knowledge must be combined with a range of other substantive and processual forms of knowledge. Lawyers, until clinical education made some impact, have never been well trained in people management and communication skills though legal services are often personal services. Institutional design instruction has been very limited with now constitutionalized discussions of legal theory, jurisprudence and separation of powers, where those who work in the private sector might better be trained in organizational development, interpersonal relations and management strategies.

Decision making, problem solving and judgment, often implicit in the legal curriculum, must now be made more explicit, as they have been with a few new textbooks (Jackson *et al.*, 2010; Brest & Krieger, 2011) and teaching materials, and in some schools, with new courses.<sup>33</sup> Some diversification of law school types and teaching within law schools might be well advised for ‘tracks’ of emphasis to focus on different models of lawyering – public and private lawyering, dispute or litigation-based, problem solving, transactional, counseling, creative (start-ups, intellectual property, organizational design and form), social and community service, as well as others, to better reflect the diverse sites in which some legal knowledge might be of use.

A basic grounding (say one or two years) in basic legal knowledge (public and private law, legal reasoning, jurisprudence, legal history), legal ethics and legal skills (research, writing, communication, interviewing, counseling, planning, negotiation, drafting, etc.) might then lead to more specialized and interdisciplinary advanced work including business- or socially-based subjects (see, e.g., Menkel-Meadow, 1999, 2007b).<sup>34</sup> Or, Americans could move to a more generalized first degree in law (as is common in most parts of the world), with more specialized training and different subjects in graduate law programs [as is happening with the increasingly globalized and specialized LLM (Acello, 2012)].<sup>35</sup>

Law schools could choose either to integrate complex intellectual and substantive learning with skills needed for the practice of law (and those skills might vary depending on what kind of law practice<sup>36</sup>) or law schools might choose (like medical schools) to separate the foundational intellectual, conceptual and substantive study from the

more practical ‘applied’ or clinical problem-solving skills in service to clients. Different schools might make different choices as some have already tried to do with shortened programs (Michigan and the University of Dayton’s two-and-a-half-year programs, Southwestern’s intensive two-year program) or longer programs (joint degree programs with business and policy schools or joint graduate programs in other substantive fields for those more inclined to academic or more substantively specialized work, e.g. science/technology and the law).

In legal education the debate about whether there is a ‘core’ all must study (‘thinking like a lawyer’ in private and public law subjects) or whether legal education can be segmented at earlier stages of study has been with us since law study first began at the University of Bologna centuries ago. The debate continues on many continents now as legal educators consider whether to diversify forms of legal education (digital, distance, ‘transsystemic’ or transnational, general, more specialized) or ‘converge’ on a more uniform American-graduate school model of legal education, which assumes a core course of study [in both method (Socratic and clinical) and substance (required courses at least in the first year)] for all who call themselves lawyers. While some continue to believe in the importance of the ‘core’ aspects of ‘thinking’ (or ‘behaving’) like a lawyer as a jurisprudential or ‘law-jobs’ (Llewellyn, 1930) matter, others are ready to concede that lawyers might be trained in a variety of different ways. Others might think that a general education might be particularly important where lawyers need the flexibility to ‘re-train’ and move from one specialty to another over a life time of economic, technological and social change.

#### **IV. Comparing legal work with other professions: entrepreneurship, new problem solving, and adaptations in professional practice**

Here I briefly explore how two other professions, one newer profession (business consulting) and an older one (architecture), have or are beginning to adapt professional ideas, service delivery and forms of practice to changes in economics, demographics, legal environments and other social changes.

In a recent history of the development of the modern business consulting profession, Christopher McKenna describes the far more flexible and adaptive model of the ‘new’ business consultant with several different strands of expertise (McKenna, 2006). Like lawyers, business consultants are ‘knowledge brokers’. Like lawyers, there is a tension in the profession of management consulting about whether to husband knowledge and skills loyally within a single institution (the law firm, the large company, the particular governmental agency, the advocacy organization or ‘cause’) or whether to build and trade on expertise by moving around and sharing ‘accumulated’ knowledge and best practices. With different rules about confidentiality, but perhaps stronger market incentives to compete and/or replicate what others do, business consultants in the twentieth century emerged from several different traditions – auditing, financial services, capital markets and investments, economic forecasting and advising, and computer technology (Arthur Andersen).

McKenna chronicles different conceptual goals of several different founders of the field including James McKinsey, Martin Bower, Edwin Booz, George



Armstrong, Thomas Watson and others, and illustrates their different adaptations to different regulatory conditions from the 1930s onwards (Glass-Steagall Banking Act of 1933; Securities Act of 1933 to Sarbanes-Oxley and more recent fluctuations in regulation and deregulation of market-based enterprises). Business consulting was originally born out of the separation of banking from investing and separation of the older accounting profession from internal business consulting, but as prescient entrepreneurs left big corporations to trade on their own knowledge of best practices, organizational design and decision strategies for diversification, mergers, acquisitions and divestment strategies, their accumulated knowledge and ability to move from one organization to another permitted an 'outside' consultancy practice to emerge.

While McKenna and other business historians note that the brokering of information by outsiders often resulted in a remarkable similarity in management strategies both across and within industries, organizational change was easier to design and implement with the advice of skilled outside experts. Thus, both legal developments (changes in the regulatory climate) and economic forces (and market incentives) have produced a greater flexibility and ability to change paradigms, concepts and practices. Of course, current critiques (including McKenna's) of management consulting is that there can be 'too quick' shifts of paradigms with bandwagon effects [Six Sigma (Pande & Holpp, 2001), Seven Habits (Covey, 1989), Corporate Excellence (Peters & Waterman, 1982)] that can produce such failures as Enron (Jeffrey Skilling was a 'master' at business consulting and 'out of the box thinking') and group think and corporate conformity. The Enron scandal brought a quick end to the Andersen firm which had so skillfully (pun absolutely intended) recombined business consulting with audit functions after the regulatory climate changed.

At the peak of the economic boom, lawyers actually feared competition from the consulting industry and attempted regulation of the most creative efforts to add legal consulting to the ever-expanding portfolio of multi-national business consulting firms which had begun to offer 'one stop shopping' for consulting services for the world's largest companies.<sup>37</sup> The current economic recession seems to have (temporarily) dampened that effort<sup>38</sup> but the adaptability of the business consulting industry is still instructive for the more troubled and slower-to-adapt legal profession. Specialization and difference of strategies actually helped to expand the market of business consultants as some, using their prior expertise (e.g. engineer Arthur Little), went 'deep' into consulting with one kind of industry; others (accountants) chose to accumulate more general knowledge and instead develop consulting themes around organizational structures, management protocols and investment strategies, including compliance consulting (which lawyers took up as a specialty after business consultants). A third strand of consulting focused on government contracting, leading to a whole segment of the profession anchored to 'the beltway bandits', consultants to federal agencies in Washington, DC (remarkably resilient, even in times of economic downturns). Indeed, it could be said that the business consulting profession 'invented' the public-private partnerships of the 1980s and 1990s as deregulation allowed combinations of organizations to take on many of the projects of the state, thereby assuring a relatively stable, if not growing source of business (Guttman & Wilner, 1976).<sup>39</sup> Other business consultants specialized in the non-profit



(hospitals, NGOs, universities and religious, cultural, and charitable organizations) sector, with a variety of different 'tax-exempt' issues.

When the American market for business consulting seemed somewhat 'saturated' in the 1970s and 1980s, the 'profession' was exported to Europe and Asia (and American business schools saw a boom in foreign MBA students, demonstrating the symbiotic but ultimately complex, relationship between professional schools' need for tuition revenue and the danger of elimination of one market source for professional work).<sup>40</sup>

Thus, market conditions affected different industries differentially, but those in business consulting actually could profit from change in either direction. Though some suggest that lawyers can do the same (transfer from 'm and a' to bankruptcy and corporate reorganizations) there has been less evidence of this where large firms try to keep lawyers from all parts of the specialties in their ranks. Litigation patterns (and moves to cheaper in-house counsel from more expensive firm lawyers) seem to be highly correlated with economic cycles. As lawyers as corporate counselors, compliance monitors, tax advisers and now organizational and investment strategists (especially with that all powerful JD-MBA joint degree<sup>41</sup>) compete with management consultants (with complex internal ethical rules and discipline muddying the waters) it remains to be seen who will win the competition for new forms of complex corporate and organizational work, but my money is on the more flexible, adaptive and entrepreneurial business consultants.<sup>42</sup> In some countries (first Australia, now the UK) restrictions on non-lawyer investments in law firms have been lifted so that the 'market forces' of capital investments can be brought into law firms to finance and perhaps spur change. How much 'multi-disciplinary' practice will emerge remains unknown. Multi-national business models applied to lawyering have brought us the modern development of 'outsourcing' legal services to India, another form of business judgment that threatens American (but grows Indian) legal employment (Ballakrishnen, 2012).

Adapting to these developments in more specialized forms of business consulting, business schools have modified their curricula more often and more flexibly than law schools. Pioneering such innovations as shortened 'Executive MBA' degrees and courses held in international or field-specific locations, most business schools now offer courses of varied (not only semester, year or quarterly) schedules, cooperative work by students, co-taught courses, problem-oriented courses and even a 'case method' first used at Harvard Business School that attempts to make business education rigorous and practical decision-based at the same time. Business schools rarely 'require' as large a core curriculum as law (or medicine), recognizing that a 'business' discipline actually requires many different kinds of specialized expertise. Though some might attribute this to the lack of a core discipline, and others suggest that business education has never required a license or formal schooling, the better business schools have been good 'incubators' of both new ideas for business management and for creating social networks. Perhaps because business is by definition 'entrepreneurial', so has business education been more entrepreneurial or adaptive to change.

As another point of contrast, a new movement in the older profession of architecture has attempted to reframe the ‘doing’ of architecture by renaming the field as one of ‘spatial agency’ (Awan *et al.*, 2011; <http://www.spatialagency.net>). By reconceiving the purpose of designing the use of physical space to include redesign of old spaces, to encourage more collaboration between ‘professional designers’ and ‘users’ of space, to solve problems of density in new urbanization, increased demographic diversification of common users and relations of space to each other (habitation, food production and storage, childcare), and to work together to ‘make policy, as well as stuff’, a world-wide collaborative of architects and planners, working through a website to share ideas and projects, has attempted to reframe the work of its ‘profession’. Having posted a number of actual projects and designs for new and old spaces and suggestions for physical space issues, the ‘group’ now seeks to document its work, through websites, books and shared projects to expand the conception of what it means to be an architect or planner. Though this very politicized reconception of a profession broadens the conception of what it means to be an architect, it also seeks some ‘deprofessionalization’ of its expertise (a move that lawyers know well from the 1960s/1970s de-legalization movement in the early days of consumer activism) to increase participation by those professionally trained and those with other skills and experiences, as well as end users of the physical space and designs – those who are ‘socially embedded in the built (or non-built) environment’.

As the present economic recession has decreased new building (in some, but not all parts of the world), the need for redesign of old spaces to solve new physical, social and economic problems has increased the possibilities of ‘new’ forms of architecture and design solutions. In a discipline that does require some licensing and credentialing, as well as training and education, new institutions and forms of education and collaboration have been designed to foster this kind of ‘collaborative’ work in the design field.

Some of the younger generation of lawyers and recent graduates have begun some forms of new entrepreneurial activity to launch new sectors of legal or quasi-legal practice. There are the new ‘social entrepreneurs’ who offer legal services for start-ups, multi-national enterprises, new media and new ‘micro-enterprises’, hoping to combine profitable work with social good (Bornstein, 2007).

At the level of community lawyering for the underserved population, new ideas to create small new ‘incubator’ law firms loosely linked across the country with like-minded practitioners in different regions in contiguous specialties (e.g. immigration, family relations, criminal law, small business, social welfare, civil rights, consumer law, rights advocacy and community legal education) are emerging.<sup>43</sup> Some of the work to create and support new incubator community law practices is located within law schools (clinics, externships, mandated skills training) and others depend on fellowships from large law firms or other private sources or foundations, committed individuals and other institutions. The Open Society Institute in the United States, for example, has supported a wide variety of innovative lawyering projects, some focused on individual service with social change models and others focused on new forms of legal services delivery. If ‘necessity is the mother of invention’, in this case there are two potentially overlapping ‘necessities’ – service for the

underserved desperately needing legal services and lawyers desperately seeking gainful and useful employment. Though others have suggested that older, now retired and very skilled lawyers might usefully serve the underserved (Galanter, 1999), there is little evidence that this has occurred or fully satisfied the needs of the underserved. But the ‘old and in the way’ might both train and facilitate entrance into the profession of the ‘new with no place to go’.

Enterprising students and young lawyers seek training for themselves and new sets of clients to explore other ways to organize for legal and social benefits and to work together. NIMBY land disputes (not in my backyard) still exist and may be pursued through conventional lawsuits, but communities and profit-seekers also get together more often to explore shared interests of job creation, tax revenues, provision of social services and meeting of community needs through processes that are more collaborative (as in ‘spatial agency’ architecture) (Podziba, 2012). Mass disasters (Katrina, BP Spill, September 11) create needs for faster-than-the-legal-system can provide solutions and creative legal actors have been active in pursuing a variety of new ways to deal with those needs. ‘New’ lawyers have been instrumental in mediating all sorts of workplace reorganizations, including immigrant day labor sites and collaborative collective bargaining processes, in both union and non-union settings, especially in times of reduction in force recessions (Menkel-Meadow, 2011a) and organizational dispute resolution. Creation of new ‘legal intelligence’ and expert systems, such as the creation of legal computer programs, is not totally new in law but more interactive applications (as in case settlements, consumer dispute resolution, etc.) permit some computer-assisted legal information to be disseminated to solve both individual and group legal issues.

All of this requires new paradigms of legal thought and training, as well as practice, but by looking for new solutions to difficult social and legal problems in these troubled times, there may be opportunities for new sites of legal work. If architects are ‘spatial agents’, my colleague Sameer Ashar says lawyers should conceive of themselves as ‘relational agents’, or as we dispute resolution theorists like to call ourselves, ‘social and legal relationship engineers’ or ‘process architects’ (pick your own favorite comparative professional metaphor!).

## V. Policy implications and some concluding thoughts

Here are some of my observations about the relationship of legal knowledge, legal paradigms and legal education to the question about whether we have too many lawyers. First, law study may be an entry ‘portal’ into a large number of other kinds of work – business, politics (either as a candidate or in the new profession of political consulting), policy work, government (non- or quasi-legal work), NGO advocacy in both legal and non-legal settings, community, labor or other interest group organizing work,<sup>44</sup> creative work (start-ups of many kinds, including scientific, educational, economic and entertainment), real estate work, education (teaching others about the law, whether lay people or other law students), deal making and social entrepreneurship, and peace work (whether legal mediation or non-legal international or domestic). With some knowledge of the law all of these jobs and others we cannot even

imagine at the moment are likely to be performed with a better sense of justice, equity, logic and rule-based accountability.<sup>45</sup>

Second, if there are ‘too’ many or just ‘many’ lawyers, maybe some reallocation might actually provide for some better distribution of lawyers to those who are currently underserved. If the legal profession were subject to regular market forces, an oversupply of lawyers should lead to a lowering of price and to reallocation of services. How market efficient and sensitive the legal profession is continues to elude many of us, though judging from the radio advertising I am hearing in my community (the greater Los Angeles–Orange County area) there are price flexibility and new services (mortgage renegotiation) being offered to the general public. It is probably time for a new study of small firm practice and adjustments to the current economic climate in a variety of different legal markets. The economic recession may not just eliminate jobs, it might restructure them and shift them to other sectors.

Third, perhaps if ‘too’ many lawyers are trained in the same way there might be some competition or reconfiguration of how legal education is delivered. Though I am a bit of a skeptic on this front as a faculty member of a brand new law school that promised to be different and is rapidly conforming to a conventional American ‘elite’ and conformist model, some schools are offering more diversified legal education with the hope of making more ‘practice-ready’ lawyers or training lawyers to do different things. Perhaps it is time to return to the ill-fated Reed Report on legal education (Reed, 1921) and recognize that American legal education might be diversified, sectorized and specialized (Tamanaha, 2012).

Fourth, some might use law study to change the way we think about the world – conventionally arguing for new or different laws, or, as has been my hope, to rethink law school as a school for social, political, economic and legal problem solving where, in the words of my ‘other’ law school (Georgetown), “law is the means, justice is the end”.<sup>46</sup> Entrepreneurial (socially, legally and economically) new lawyers might just adapt, reconfigure and reconceive the work that lawyers do and see that there is more that people with legal education can do, not just for personal gain, but for the global society in which we live. With other ways to practice law (more conflict resolution, more diversity of the individual and organizational client base, with different forms of practice, and more sites and locations of legal issues, some policy-based, some law-making, some transactional, some dispute resolving), there should be both more and different work for those who call themselves lawyers. The question then might be, not ‘are there too many lawyers?’, but are lawyers being socially productive and what are they doing? There is no one ‘right’ way to practice law, as there most certainly is no one way to achieve social justice (Sen, 2009). If clients were asked what they wanted lawyers for would we have different answers to the question of whether there are too many lawyers and what they should do with their legal knowledge?

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## Notes

- [1] Alexis de Tocqueville’s claim that lawyers in America (as the social ‘aristocracy’) mediated class conflict and conflict between the people and the government and served to ensure useful and productive management of conflict, while raising important issues of critique of the polity and its governance, through litigation and statesmanship (1835, Ch. XVI).
- [2] For one view, Stephen P. Magee argues that lawyers are rent seekers and foster too many lawsuits and too much inefficient regulation, preventing more “positive facilitative effects” for a less regulated and litigated about economy.
- [3] David McQuoid-Mason notes that these measures are all relative as South Africa’s per capita ratio is much higher than other nations in Africa, e.g. Kenya where the ratio is 1:10,000.
- [4] Although the lawsuit against New York Law School was recently dismissed (Lattman, 2012), other suits remain pending against such schools as Thomas Jefferson, University of San Francisco and Southwestern Law School (all of these in California).
- [5] John Heinz and Edward Laumann have demonstrated two non-substitutionary ‘hemispheres’ of the bar – lawyers serving corporate interests and those serving individuals (Heinz & Laumann, 1994).
- [6] Scholars have demonstrated that lawyers are ‘stickily’ allocated to their work by their own choices and market forces; lawyers who train to be (and are paid accordingly) sophisticated corporate lawyers who specialize in highly complex matters are not likely to be ‘reallocated’ to different tasks at different rates of pay – many would prefer to be under- or unemployed than shift work location, both for economic and status-based reasons (see, e.g., Hadfield, 2000).
- [7] Other scholars have reported on the rapid influx into the profession in the United States of returning veterans, first from WWII and then from Viet Nam (see, e.g., Morgan, 2010).
- [8] The addition of new substantive claims for consumer rights, anti-discrimination laws, human rights, social, political, economic, racial, gender and other forms of equality and equity were also accompanied by claims for greater diversification of the profession so that claimants might have lawyers who literally ‘felt’ and represented their ‘pain’ and experience.
- [9] Carroll Seron found women more likely to be in solo or part-time, ‘local’ work.
- [10] There might even be a new market for legal education in the United States for law training for those who specifically don’t want to be lawyers – there are a few undergraduate programs in ‘law and society’ or criminology now – but one could imagine a graduate school of law study intended for those who do not want to ‘practice’ law but want to know about law to enter government, public policy, administration, journalism or business careers.
- [11] I am personally skeptical of these claims. Almost any kind of work (regardless of how it is compensated), is better performed by those with education [ask your local waiter or barista (as opposed to barrister) if you are a middle-class well-educated person].
- [12] This is Richard Abel’s long-standing argument about “the professional project” as being one of market control.
- [13] These are reported as ‘pre-recession’ (2008) figures. The ABA report of law school placement for 2011 by law school is even more dismal. My top-ranking law school (Georgetown) had a placement rate of just over 60% for its 2011 graduates. See ABA Report of 2011 Law Placement, available at: [www.taxlawblog.com](http://www.taxlawblog.com).
- [14] For earlier arguments that lawyers can and should be efficient ‘transaction cost engineers’ and productive transaction managers, see for example Gilson (1984) and Gilson and Mnookin (1994, 1995), Mnookin *et al.* (2000) and Peppet (2004).



- [15] Howard Gardner, Mihaly Csikszentmihalyi and William Damon (2002) compare the ethically integrated profession of genetics with the ethically questionable profession of modern journalism where profit and personal ego now dominate other professional goals of information gathering and dissemination. Consider where the legal profession belongs in this taxonomy.
- [16] For the scholarly versions and skills imperatives of my early work, see Menkel-Meadow (1983, 1984b).
- [17] In the cited articles, I provide fuller descriptions of both the legal concepts and contributions of non-legal scholars to the origins of the modern ADR movement.
- [18] For a more complete recount of this history, see Menkel-Meadow (2005a).
- [19] The Center for Public Resources, founded in 1979, became a think tank and promoter of ADR for use in commercial large-scale disputing and eventually created and managed not only new processes, but developed industry protocols for dispute resolution in a variety of different substantive businesses and fields, e.g. oil and gas, employment, franchising, construction, banking, health, etc.
- [20] See, e.g., Civil Justice Reform Act (1990); Administrative Dispute Resolution Act (1990, 1996); and Alternative Dispute Resolution Act (1998).
- [21] For example, Justice Judith Kaye, who, in New York, became a proponent of problem-solving courts designed to treat and help with the recovery of drug users, sex workers, and families in drug, vice and specialized family courts (see, e.g., Kaye, 1997; Berman & Feinblatt, 2005).
- [22] Two new legal texts for law school teaching are now in development for this field, by Rogers, Bordone, Sander and McEwen (Wolters Kluwer, 2013) and by Bingham, Martinez and Smith (Oxford, forthcoming).
- [23] Thomas Stipanowich sought to report on statistics and usage of mediation and arbitration processes in public settings (courts) and private settings (reporting on some limited data available from the American Arbitration Association and similar organizations, and reporting on some few studies of ADR usage in both settings). Like Professor Stipanowich, many of us in the ADR field have tried to get access to a variety of data sources on ADR usage. Over ten years ago I served on the Advisory Board of a major national research institution seeking to document the effects of the 'privatization' of the judiciary, as increasing numbers of judges left the bench for more lucrative private mediation and arbitration positions. JAMS (Judicial Mediation and Arbitration Services), one of the leading private ADR providers in the United States (originally founded by a retiring California state judge) refused to release any data on their case load, third party neutral fees, etc. claiming that what their clients most valued was 'private' dispute resolution. [In California, litigants can use 'rent-a-judges' who are former judges who may render (arbitral) decisions with the full force of law that even includes an appellate process, but promises privacy (see California Code of Civil Procedure §§638–645; see also Hadfield, 2004; Menkel-Meadow, 2010).]
- [24] While one often hears that only 2% of all cases filed are actually tried, therefore over 90% of cases are settled in some fashion, we know that actually the settlement rate is much lower. Many cases (perhaps as much as another 20–30% of cases) are terminated in ways other than full adjudication (motions or summary judgments) or negotiated or mediated settlement (see Kritzer, 1986; Hadfield, 2004).
- [25] New studies in the UK reveal that the Woolf reforms have actually 'front-loaded' and increased expenses in the early stages of civil litigation (Lord Justice Jackson, 2010).
- [26] Some have opined that the use of mediation in mandatory settings might be a violation of Article 6 of the European Convention on Human Rights. See Jacqueline Nolan-Haley (2012) discussing *Halsey v. Milton Keynes General NHS Trust* (2004) (see also de Hoon & Verbeck, 2011).
- [27] See most recently *AT&T Mobility v. Concepcion* (2011).
- [28] The United States Bureau of Labor Statistics projected a 14% growth rate from 2008 to 2018 in the employment of arbitrators, mediators and conciliators.
- [29] Geoffrey Hazard discusses Louis Brandeis' work in 'representation' of both creditors and debtors in bankruptcy.
- [30] These international organizations increasingly employ individuals with multi-national legal education credentials and experience, as well as non-lawyers. This is an especially good employment site for those without national bar licensure.



- [31] For example, International Criminal Court for Former Yugoslavia, Rwanda, International Criminal Court, the Dispute Settlement Body – Appellate of the World Trade Organization, the European Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, The Tribunal(s) of the Law of the Sea, not to mention the expansion of the private international arbitral tribunals which administer the private international civil justice system (the ICC, the LCIA, CIETAC, the Cairo Arbitration Tribunal, etc.) (Dezalay & Garth, 1996; see, e.g., also Ahdieh, 2004; Berman, 2007).
- [32] With different kinds of legal educations, see e.g. Strauss (2006).
- [33] For example, Harvard's first year Problem Solving Workshop, a prior Harvard course in Analytic Methods for Lawyers, involving instruction in statistics, accounting, asset valuation, economics, game theory and decision making.
- [34] Edward Rubin, as a new Dean, sought, unsuccessfully, to have Vanderbilt Law School reconfigured with two tracks – one for public lawyers and the other for private-business market-based lawyers with virtually two different curricula.
- [35] In the last few years I have taught specialized courses in International Dispute Resolution, Consensus Building, Conflict Resolution and Mediation, and Dispute System Design in law schools (some open to other kinds of students who are not lawyers) in Australia, Singapore, the UK, Israel, Switzerland, Central America, South America (Argentina, Paraguay and Brazil), China and Canada; this is not counting several programs run by American law schools or other sponsoring agencies abroad but which include many American students within their regular legal studies programs.
- [36] Many American law schools now tout their ability to train 'practice-ready' graduates, but what kind of practice may actually remain stratified (elite schools to corporate law firms and public interest; local schools to small firms, prosecutor or government offices) or at least specialized. One strategy for legal education marketing in this time of economic uncertainty for lawyers is law schools explicitly advertising for specialized practice areas. Others proclaim the rigor and excellence of their general legal education.
- [37] My law school devoted a large part of its annual retreat one year to discussing the impact of this growing 'multi-disciplinary practice' on the job market and the legal education of our students. At the same time, the American Bar Association scurried to make rules prohibiting some aspects of multi-disciplinary practice to prevent even more competition for lawyers by accountants and business consultants, just another stage in the professional monopolization project. In England some of these issues had appeared earlier in competition for conveyancing work and the slow removal of the distinction between barristers and solicitors for rights of audience in courts.
- [38] And post-Enron legislation in the United States now formally restricts certain combinations of services under one roof.
- [39] Called by some 'the shadow government'.
- [40] Legal education may be going through a similar process as many law schools (especially the bigger and more prestigious ones, like Harvard and my Georgetown home) derive revenue from increasingly large foreign LLM classes, but which may diminish the need for American lawyers abroad or those doing multi-national work.
- [41] One suggested solution to the 'are there too many lawyers' problem, of course, is to suggest more specialized education (law and engineering, law and business, law and planning) through joint or dual degrees or, as is emerging in countries where law is a first degree, more secondary legal degrees with greater specialization. I do not know of any studies yet documenting whether second or specialized degrees in fact enhance employment possibilities.
- [42] Other readers of this paper have reminded me of the resiliency of lawyers to invent new forms of legal actions ('big' litigation for 'big' law firms, new causes of action for public interest and now human rights lawyers) and new partnerships, perhaps with business consultants and others, to continue to provide and expand legal services in new domains. Lawyers, like business consultants, have been highly adaptable to new market conditions, often creating their own new services and markets. And remember, of course, lawyers dominate many legislatures so their ability to create new laws and new employment remains strong.

- [43] Such incubator ideas have emerged at CUNY (Community Resource Network, New York) and my own new (University of California, Irvine) law school (see, e.g., Boniwell & Rosenberg, 2012), as a consortium of law schools seeks to expand this network. One of my students is active in creating a national website called Just Leap (Justice Through Legal Entrepreneurship and Access to Partnering), which hopes to digitally link experienced lawyers with younger ones for mentoring, advising and collaboration on cases, focusing on sharing resources, knowledge, training and advice, with the hope of adding 'new blood' in groups of young lawyers to serve those who need access to legal services. Designers of the website hope to establish 'crowd-sourcing' forms of information sharing and partnerships with older lawyers and younger lawyers forming start-ups in their communities, not unlike some of the efforts in the Spatial Agency website. Thank you Edgar Aguilosocho for your groundbreaking work. Washington and Lee Law School in Virginia has begun an innovative program in which third-year students all serve in yearlong clinics, with mandated skills training to prepare students for practice, now called 'practice-ready' law graduates.
- [44] Remember President Obama began as a community organizer in Chicago before he went to law school, worked as a civil rights lawyer and then ran for office.
- [45] Note I said 'likely to be' not are .... Many lawyers and many with legal education do not necessarily perform their work admirably or with logic and justice, just because they have a legal education.
- [46] Quotation on Law Library building, attributed to law student, but mostly likely derived from German legal jurisprudent, Rudolf von Jhering's *Der Zweck im Recht* (Law as the Means, 1913).

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- Civil Justice Reform Act of 1990 (US)
- Council Directive 2008/52/EC of 22 May 2008 [on certain aspects of mediation in civil and commercial matters]
- Legal Aid Act 1988 (UK)
- Legal Services Act 2007 (UK)
- Negotiated Rulemaking Act of 1990 (US)

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