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# Crisis in Legal Education or the Other Things Law Students Should be Learning and Doing

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## Crisis in Legal Education or the Other Things Law Students Should be Learning and Doing

Carrie Menkel-Meadow\*

### I. INTRODUCTION: WHAT IS A LEGAL EDUCATION GOOD FOR?

For the last few years we have been bombarded with news articles, lawsuits, conferences, and scholarly treatments of the “crisis in legal education.”<sup>1</sup> The conventional treatment of the crisis is that there are fewer jobs, at greater expense of legal education for students, so that attending law school is, instead of a great opportunity, now a terrible risk of both economic loss and personal and professional disappointment.<sup>2</sup> There are claims that the structure of the profession has so radically changed, both with the recent economic downturn and technological replacement<sup>3</sup> that we will never recover.<sup>4</sup> There are arguments, policy suggestions, and now lawsuits telling us to change our representations, recruitment materials, and promises to the next generation of law students. The legal profession is downsizing big time and we in legal education should begin to adapt, shrinking our classes and changing our curricula to reflect more up-to-date and more “vocational” material, making our students more “practice-ready.”<sup>5</sup>

In this Article, I will challenge these claims as being narrowly focused on the decrease of a certain kind of “law job”<sup>6</sup> (big law firm jobs) for certain kinds of

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\* Chancellor’s Professor of Law and Political Science, University of California Irvine Law School and A.B. Chettle, Jr. Professor of Law, Georgetown University Law Center. This Article is based on a talk delivered at the Symposium on The State and Future of Legal Education at the University of the Pacific, McGeorge School of Law on April 5, 2013. Portions of this Article appear in other sources, based on similar presentations at other conferences in the last two years. *See, e.g.*, Carrie Menkel-Meadow, *Too Many Lawyers? Or Should Lawyers be Doing Other Things?* 19 INT’L J. LEGAL PROF. 147 (2012). I thank the members of the *McGeorge Law Review* for an especially engaging and well-managed symposium in which I encountered many old friends (and made some new ones) and heard some new ideas. It was a perfect mix for a successful symposium event. Special thanks to my friend Professor Michael Vitiello for nurturing my many-years relationship with McGeorge School of Law.

1. *See, e.g.*, BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); PAUL CAMPOS, *DON’T GO TO LAW SCHOOL (UNLESS): A LAW PROFESSOR’S INSIDE GUIDE TO MAXIMIZING OPPORTUNITY AND MINIMIZING RISK* (2012); ROBIN WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* (2013); William Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013).

2. *Id.*

3. RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 1–2 (2010).

4. For an important argument that these assertions are not new and claims of “crisis” in legal education are cyclical and frequent, *see* Bryant Garth, *Crisis, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis in the Legal Profession and Legal Education*, STAN. L & POL’Y REV. (forthcoming 2013).

5. *See, e.g.*, James E. Moliterno, *The Future of Legal Education Reform*, 40 PEPP. L. REV. 423, 429–30 (2013).

6. Apologies to Karl Llewellyn. *See* Karl Llewellyn *Law Jobs in THE BRAMBLE BUSH: THE CLASSIC*

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students and instead, suggest, with my own critique of legal education,<sup>7</sup> that instead of “too many lawyers” or “too much legal education,” we should be educating law students to do other things (e.g., solve problems, as well as litigate disputes, provide services to those with inadequate access, create new organizations to deal with new problems, work productively in both the private and public sector to build collaborative institutions to address modern problems, and think synthetically, rather than only analytically). These alternatives provide not only legal justice, but social peace and creativity in solving the many challenges that our society is currently facing. It is not that there are too many lawyers, or too many law school seats, or even that there are not enough jobs, it is that those who are trained by studying law could study different things and practice or work with more appropriate knowledge bases and skills sets.<sup>8</sup> Legal education must adapt to new conditions of the profession and to the changing social conditions of our society as other professions have already begun to do. Like several of my colleagues who have taken on this challenge from a similar perspective,<sup>9</sup> I think it is not that we have too many lawyers and not enough jobs, but that we do not have enough justice or proper allocation to the kinds of things that a legal education could be directed to for the purpose of improving our social condition.

As I present my own views of what legal education should offer students (and the society in which they are embedded), I will also explore how several other professional fields have been much more adaptive to changes in economic conditions or to social needs. In my view, the state and future of legal education is not bleak—it is an opportunity for change and adaptation in legal education and the legal profession. It is also my view that there are many possible futures and changes—one size will not and should not fit all. In this Article, I will suggest that legal education and the work of those calling themselves lawyers could be and should be more broadly defined if the goals of the legal profession include solving human problems and producing peace and justice, as these are “value-added” forms of social goods produced by having legal knowledge.<sup>10</sup>

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LECTURES ON LAW AND LAW SCHOOL (2008).

7. Over the years I have made many suggestions and critiques of legal education. *See, e.g.*, Carrie Menkel-Meadow, *Taking Law and \_\_\_ Really Seriously: Before, During and After “The Law,”* 60 VAND. L. REV. 555 (2007); Carrie Menkel-Meadow, *Taking Problem-Solving Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14 (1999); Carrie Menkle-Meadow, *Narrowing the Gap By Narrowing the Field: What’s Missing From the MacCrate Report—Of Skills, Legal Science and Being A Human Being*, 69 WASH. L. REV. 593 (1994); Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995 (1993).

8. *See supra* note 7.

9. *See, e.g.*, Robin West, *supra* note 1; Deborah Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437 (2013).

10. Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 555–56 (2006).

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What legal “knowledge” should a legal education be directed to? As other scholars 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 define and solve them.<sup>11</sup> Legal issues are individual (disputes, transactions), organizational, and institutional (corporate and organizational creation, maintenance, and generative), local, national, federal (law making, law enforcing, revenue management), and international (conflict, peace, diplomatic, trade, and commercial). Layers of law-related issues and problems abound at all levels of human interaction. What legal “solutions” there are to such varied kinds of problems suggests that modern legal education may need to address different types of problems in different ways and allow our students to learn theoretically, doctrinally, creatively, and experientially to ultimately work in many different settings. The classic case and doctrinal method of study may not be appropriate for all forms of legal problem solving. It is certainly not the only “sufficient” means of a modern legal education.

At the individual level, we now know, in addition to such factors as case type, class, region, religious group, and possibly race and gender, there is also national and cultural variation affecting people’s decision to go to lawyers or to seek advice or counsel from other forms of problem-solvers (e.g., accountants, psychologists, social workers, medical professionals, insurance adjustors or advocates, therapists, coaches, brokers, agents, friends, and “fixers”).<sup>12</sup> Whether a lawyer, or some other “helper,” is chosen to solve problems is especially dependent on what solution a person seeks for their issue, how it is framed (a dispute, an event, a transaction, a “problem”), and on how much access to “justice” (and lawyers) is actually provided through private funds, government supported judicare, legal aid, or other social welfare subsidy systems.<sup>13</sup> Using a lawyer to solve particular problems will often depend on the resources available compared to the relative cost and benefits of using other professionals or self-help, and on what end state the client desires to achieve. 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;<sup>14</sup> in the last three decades

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11. William L.F. Felstiner, Richard L. Abel & Austen Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOCIETY REV.* 631, 631–32 (1980–81); Carrie Menkel-Meadow, *The Transformation of Disputes By Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, *MO. J. OF DISP. RESOL.* 25, 28 (1985).

12. See *infra* note 13.

13. HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 6–8 (1999); HAZEL GENN & ALAN PATERSON, *PATHS TO JUSTICE SCOTLAND: WHAT PEOPLE IN SCOTLAND DO AND THINK ABOUT GOING TO THE LAW* 3–5 (2002); Herbert Kritzer, *Context, Context, Context: A Cross-Problem, Cross-Cultural Comparison of Compensation Seeking Behaviour* (Jun. 17, 1991) (unpublished draft) (on file with the *McGeorge Law Review*); Herbert Kritzer, *To Lawyer or Not to Lawyer: Is That the Question?* 5 *J. OF EMPIRICAL LEGAL STUDIES* 875, 876–79 (2008).

14. See *supra* note 13; LEGAL SERVICES CORPORATION, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 5–7, 11 (2009); LEGAL SERVICES CORPORATION,

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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.)<sup>15</sup> So many people cannot go to lawyers because of the expense or lack of access and others may not go because they do not understand how a lawyer might actually be useful in solving their problems. Other professionals or helpers may be cheaper or better adapted to solve a particular “problem” (home sales, community or family disputes, and even incorporation of a small business or acquisition of loan or mortgage). Increasingly, many individual legal services may be available on-line or off-shore in routinized, cheaper stock forms.<sup>16</sup>

At the corporate or organizational level, venture capitalists, bankers, investment and other brokers (real estate, entertainment and “start-up” agents) may have more multidisciplinary and more broadly based knowledge and skill sets from which clients may draw, despite claims that lawyers are the usual or best “transaction cost engineers.”<sup>17</sup>

At the national and international levels, professional negotiators, diplomats, law drafters, politicians, and government or NGO officials (many, but not all of whom, are lawyers) engage in a variety of knowledge bases and skill sets that are broader than what is typically taught in the modern law school. Indeed, as I suggest below, public policy, planning, international diplomacy, business, and other specialized schools may be more adaptive to changing curricula to meet the more fluid needs of what modern decision makers and leaders need to perform their professional roles.<sup>18</sup>

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

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*The Delivery Systems Study: A Report to the Congress and President of the United States*, 44 MODERN L. REV. 308, 308 (1980).

15. See Carrie Menkel-Meadow & Robert Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities*, 5 LAW & POL’Y Q. 238–39 (1983); Carrie Menkel-Meadow, *Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980’s*, 22 OSGOODE HALL L.J. 29, 29, 31 (1984); Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985).

16. See, e.g., LEGALZOOM, <http://www.LegalZoom.com>. (last visted Oct. 25, 2013) (on file with the *McGeorge Law Review*); Legal, JUST ANSWER, <http://www.Legal.justanswer.com> (last visited Oct. 25, 2013) (on file with the *McGeorge Law Review*).

17. See Ronald J. Gilson, *Lawyers as Transactions Cost Engineers* in PALGRAVE ENCYCLOPEDIA OF LAW & ECONOMICS 509 (1998).

18. As a progressive and justice seeking young person I only considered law school forty years ago; now after viewing curricula I wonder if I would have chosen the “non-profit” stream of one of the world’s leading business schools, e.g., Wharton School of Business at Oxford or Harvard Business School. When I was a visiting professor of law at Harvard ten years ago, I spent a good deal of my time looking at the more modern, adaptive, and internationalized curricula at the “B” school, where I was privileged to participate in classes and faculty working groups in ethics, negotiation, and organizational development.

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common law countries) and more specialized knowledge (both in subject matter expertise and process expertise), a good and more modern legal education might actually permit “lawyers” to do a variety of tasks in society that are not necessarily traditionally or conventionally called “lawyering.”

Here, I review a few examples of how legal education might better be adapted to convey legal knowledge that might be useful for solving some of today’s most pressing problems. I begin with some of the applications of legal knowledge I know best from my own experience and study (primarily legal and international negotiation and dispute resolution) and then turn to some other possible adaptations of legal knowledge. I also contrast legal expertise with how two other professions—business consulting and architecture—have adapted to changing economic conditions and increased professionalization through education by diversifying and reconstituting their services and markets. I conclude with some observations about how legal education, both in universities and in continuing education, might have to adapt for changing conceptions of what lawyers can do.

In my view, what modern legal education should prepare students for is a set of values and skills that are informed by what “legal” values and law offer to deal with what are essential human needs:

- Realization of “justice” (particularly, but not exclusively, distributive and equity notions of justice);
- General “problem solving” skills (with attention to problem definition and instrumental and multidisciplinary approaches to solution generation), including a sensitivity to:
  - Fairness (including both procedural and substantive concerns);
  - Peace (and social ordering), including effective resolution of disputes;<sup>19</sup>
  - Decision making;
  - Leadership, facilitation, and management (of people, groups, and complex information);
  - Creativity (new entities, new transactions, and new relationships);
  - Counseling and collaboration (with clients, employees, colleagues, and constituents); and
  - Governance.

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19. For my recent argument to focus on a jurisprudence of non-violence and peace, see Carrie Menkel-Meadow, *Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving*, 8 UNBOUND: HARVARD J. OF THE L. LEFT 79, 79–108 (2013).

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II. “LEGAL” KNOWLEDGE AND THE LEGAL PROFESSION: MAKING, NOT  
BREAKING THINGS

The law and the legal profession are famously organized around a variety of common tropes or ideas: cases, disputes, decisions, rights (rather than needs), contracts, agreements, rules, principles, liabilities, transaction costs, and “adversarial” processes and solutions.<sup>20</sup> Much of conventional legal education and practice is also organized around those ideas. The law is most often called in *after* the fact to seek justice when something has gone wrong or has been broken (e.g., a relationship or a contract).<sup>21</sup> Even in transaction planning and deal drafting, which are more focused on the *future*, the organizing concept is often “what can go wrong and how should we draft around that?” What if legal education was more focused on knowledge bases that focused on the *productive*—the making of new things, entities, and relationships, rather than solely on the healing or restitution of the destructive?<sup>22</sup> To what extent could we train lawyers to be more socially productive professionals? I consider this question from my own experience as a lawyer, scholar, and founder of appropriate (formerly alternative) dispute resolution to illustrate how experience can lead to the development of new ideas, tropes, and methods for reconceiving what legal knowledge is or could be.

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 litigation and class, as well as 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>23</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. These critics included Chief Justice Warren Burger of the United States Supreme Court,<sup>24</sup> the consumer empowerment movement,<sup>25</sup>

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20. Most of my career as a legal educator has been spent criticizing these tropes and ideas. *See, e.g.*, Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 842 (1984); Carrie Menkel-Meadow, *The Trouble With The Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 5–12 (1996); DEBORAH TANNEN, PH.D., *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* 3–4 (1998).

21. *See supra* note 20.

22. *See, e.g.*, Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 99 (2001); TOM KELLEY & JONATHAN LITTMAN, *THE ART OF INNOVATION* 3–4 (2001).

23. For the scholarly versions and skills imperatives of my early work, *see* Carrie Menkel-Meadow, *Toward Another View of Legal Problem Solving: The Structure of Legal Negotiation*, *supra* note 20; Carrie Menkle Meadow, *Legal Negotiation: A Study of Strategies in Search of A Theory*, 1983 AM. B. FOUND. RES. J. 905 (1983).

24. Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

25. CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF*

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including deprofessionalization efforts,<sup>26</sup> scholars and practitioners seeking more creative and Pareto optimal solutions to complex problems<sup>27</sup> and more just or forgiving solutions to crime and victimization.<sup>28</sup> This diverse group was joined by those in economics, political science, game theory, business, labor and many other fields.<sup>29</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—giving birth to the modern “alternative” (now called “appropriate”) dispute resolution movement.<sup>30</sup> Even hardcore social justice litigators, like my mentor Gary Bellow, were sometimes critical of the individual lawsuit (and litigation) as the best way to achieve social justice.<sup>31</sup> In my own experience, cases might be won, including cases against big government, private organizations, and institutions, but adaptive officials or lawyers on the “other side” soon learned to circumvent legal rulings or change the rules themselves (my experience was in welfare litigation, employment discrimination, prison reform, and special education cases, both at the individual and class action and law reform levels).

In the late 1970s and early 1980s, some consumer lawyers, family lawyers, employment and labor lawyers, commercial lawyers and, oddly enough, some 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;<sup>32</sup> family lawyers turned first to mediation, then to “collaborative law;”<sup>33</sup> construction lawyers began to use “partnering” agreements requiring pre-dispute meetings and mediation;<sup>34</sup> large scale commercial lawyers moved toward more

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ALTERNATIVES TO COURT (1985); Richard L. Abel, *Introduction to THE POLITICS OF JUSTICE: THE AMERICAN EXPERIENCE I* (1982).

26. See *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF AMERICAN COMMUNITY JUSTICE* (Sally Engle Merry & Neal Milner eds., 1993); Raymond Schonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 *MEDIATION Q.* 3 (1984).

27. See HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton, ed. 3d ed. 2011).

28. See MARK S. UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH* (2001).

29. For fuller descriptions of both the legal concepts and contributions of non-legal scholars to the origins of the modern ADR movement, see Carrie Menkel-Meadow, *Chronicling The Complexification of Negotiation Theory and Practice*, 25 *NEGOTIATION J.* 415, 418 (2009); Carrie-Menkle Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 *OHIO ST. J. ON DISP. RESOL.* 1, 3 (2000).

30. I have recounted this history more completely in Carrie Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution in THE HANDBOOK OF DISPUTE RESOLUTION* 13, 14–16 (Michael L. Moffitt & Robert C. Bordone eds., 2005)

31. Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 *NLADA BRIEFCASE* 103, 107 (1977).

32. Carrie Menkel-Meadow, *The NLRA’s Legacy: Collective or Individual Dispute Resolution or Not?*, 26 *ABA LABOR & EMPLOYMENT J.* 249, 251–53 (2011).

33. See PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 3, 5 (2001).

34. See FRANK CARR, ET AL., *PARTNERING IN CONSTRUCTION: A PRACTICAL GUIDE TO PROJECT*



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arbitration (especially in transnational disputes),<sup>35</sup> then to mediation,<sup>36</sup> and then to a series of hybrid processes, including mini-trials, med-arb, arb-med, summary jury trials, and others.<sup>37</sup> 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>38</sup> In the United States, the ADR concept also spread to governmental decision making and policy formation, as trained facilitators managed complex rule- and regulation-making in “negotiated rule-making” processes or “reg-neg,”<sup>39</sup> or what are now called “consensus building processes.”<sup>40</sup> Even in the binary world of criminal justice (guilt/innocence, punishment/freedom), these new processes were harnessed to the reform seeking efforts of social workers, probation officers, creative judicial officials<sup>41</sup> and others who looked for “restorative” justice to reintegrate offenders within their communities and to provide some restitution or emotional relief for victims.<sup>42</sup> This latter movement for restorative justice in criminal law also contributed to both the theory and the practice for the development of new processes and institutions in international law (including the new field of “transitional justice” in post-conflict settings, both between and within countries<sup>43</sup>).

These developments in the legal profession were accompanied by social theory considering such issues as democratic deliberation, public participation, and policy decision making.<sup>44</sup> Social theorists such as Jurgen Habermas, Stuart

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SUCCESS 1–3 (1999).

35. See, e.g., GARY B. BORN, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING* 1 (2010).

36. 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 businesses and fields, e.g., oil and gas, employment, franchising, construction, banking, and health.

37. See CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 3–5 (2nd ed. 2011). For examples and descriptions, see generally *id.*

38. See, e.g., Civil Justice Reform Act of 1990, 28 U.S.C. § 473 (2006); Negotiated Rulemaking Act of 1990, 5 U.S.C. § 561 (2006); Administrative Dispute Resolution Act of 1990, 5 U.S.C. § 582 (2006); the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(b) (2006).

39. Philip J. Harter, *Negotiating Regulations: A Cure for the Malaise*, 71 GEO. L. J. 1, 32–35 (1982).

40. See generally THE CONSENSUS BUILDING HANDBOOK (Lawrence Susskind, Sarah Mckearan & Jennifer Thomas Larmer eds., 1999). But see Carrie Menkel-Meadow, *Scaling Up Deliberative Democracy As Dispute Resolution in Health Care Reform: A Work in Progress*, 74 LAW & CONTEMP. PROBS 1, 1–3 (2011).

41. For example, Justice Judith Kaye, who in New York, became a proponent of problem solving drug, vice, and specialized family courts that are designed to treat and recover drug users, sex workers, and families. Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*, 48 HASTINGS L. J. 851, 851, 853–60 (1997); see also GREG BERMAN AND JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM SOLVING JUSTICE* 5–7 (2005).

42. See Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. OF L. & SOC. SCI. 10.1, 10.15 (2007).

43. See generally RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2002).

44. See generally JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (1984); Jon Elster, *Strategic Uses of Argument* in KENNETH ARROW, ET. AL. *BARRIERS TO CONFLICT RESOLUTION* (1995); STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (2000); Carrie

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Hampshire, and Jon Elster explored best and second best processes for political decision making. Hampshire focused on adversarial, Anglo-American agonistic, and other approaches, suggesting that different 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.<sup>45</sup> In acknowledging that there is unlikely to be any universal agreement about the substantive good, Hampshire suggested that human beings might agree on processes so that they could live together productively and make good decisions: “[T]he skillful management of conflicts is among the highest of human skills.”<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

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. Ironically, I might add here, one soon heard that there were “too many trained mediators” and not enough cases to be mediated. This has not led, so far as I can tell, to any diminishment in the private and public offerings of mediation and arbitration training programs, which are now accompanied by many formal degree and certificate programs in these fields in law schools, as well as a few multidisciplinary programs outside of law.<sup>49</sup> As I discuss more fully below, after

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Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L. REV. 347 (2005).

45. See *supra* note 44.

46. HAMPSHIRE, *supra* note 44, at 35.

47. See *id.*

48. See generally *supra* note 44.

49. Several American law schools now specialize in the wide array of dispute resolution skills. See, e.g., *Program on Dispute Resolution*, THE OHIO STATE UNIV., MORITZ COLLEGE OF LAW, <http://moritzlaw.osu.edu/programs/adr/about.php> (on file with the *McGeorge Law Review*); *Dispute Resolution*, UNIV. OF MISSOURI, SCHOOL OF LAW, <http://law.missouri.edu/csdr> (on file with the *McGeorge Law Review*); Initiative on Mindfulness in Law and Dispute Resolution, <http://www.law.ufl.edu/academics/institutes/imldr> (on file with the *McGeorge Law Review*); *Program on Negotiation*, HARVARD LAW SCHOOL, <http://www.pon.harvard.edu> (on file with the *McGeorge Law Review*); *Certificate on Dispute Resolution*, HAMLINE UNIV., SCHOOL OF LAW, [http://law.hamline.edu/certificates/dispute\\_resolution.html](http://law.hamline.edu/certificates/dispute_resolution.html) (on file with the *McGeorge Law Review*); *Kukin Program for Conflict Resolution*, CARDOZO SCHOOL OF LAW, <http://www.cardozo.yu.edu/programs-centers/kukin-program-conflict-resolution> (on file with the *McGeorge Law Review*); *Straus Institute for Dispute Resolution*, PEPPERDINE UNIV., SCHOOL OF LAW, <http://law.pepperdine.edu/straus/> (on file with the *McGeorge Law Review*). Those examples name but a few schools that offer certificates, specializations, special degrees and now LL.M.s in these fields. *Id.* George Mason University (in Virginia), as well as a few other schools, offers both masters degrees and now a full PhD program in conflict resolution (another source of competition with lawyers). See, e.g., *The School for Conflict Analysis & Resolution*, GEORGE MASON UNIV., <http://scar.gmu.edu/> (on file with the *McGeorge Law Review*).

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a first generation of general skills training in mediation, arbitration, and facilitation, the new field of “dispute system design” was spawned. This field focused on the development of the design of structured dispute resolution programs within institutions and in situations of iterated dispute or transaction management.<sup>50</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.<sup>51</sup>

Efforts to document and report on the dimensions and market share of these new professions have been generally 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.<sup>52</sup> Nevertheless, we know that a vast number of cases filed in 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>53</sup> We also know the use of these court-annexed and private processes are increasingly being used in the

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50. See generally, e.g., Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. (2010). Two new legal texts for law school teaching are now in development for this field. See e.g., Nancy Rogers et al., *Designing Systems and Processes for Managing Disputes* (2013); WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT 1 (1988).

51. See e.g., JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 11 (2006).

52. See generally Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. OF EMPIRICAL LEGAL STUD. 843 (2004) (seeking 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)); Gillian Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. OF EMPIRICAL LEGAL STUDIES 705, 705 (2004); Carrie Menkel-Meadow, *Dispute Resolution in OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 596, 602–03 (Peter Cane & Herbert M. Kritzer eds., 2010). Like Professor Stipanowich, many of us in the ADR field have tried to gain 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. See *In Memoriam to Judge Knight*, JAMS, <http://www.jamsadr.com/knight-memoriam> (on file with the *McGeorge Law Review*); *About JAMS*, JAMS, [http://www.jamsadr.com/aboutus\\_overview](http://www.jamsadr.com/aboutus_overview) (on file with the *McGeorge Law Review*). 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 CAL. CIV. PROC. CODE §§ 640–45 (West 1976 & Supp. 2013).

53. While one often hears that only 2% of all cases filed are 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 and negotiated or mediated settlement. See Hadfield, *supra* note 52, at 708; Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 163–64 (1986).

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United Kingdom (Lord Woolf reforms in England and Wales<sup>54</sup> and increased use in Scotland too), in Europe through the EU's Directive on Mediation,<sup>55</sup> as well as in Australia,<sup>56</sup> Asia,<sup>57</sup> and South America.<sup>58</sup> In the United States (which so far stands alone in this controversial practice), arbitration is now mandatory (and pre-emptive of litigation) in almost all consumer and employment disputes because mandatory pre-dispute assignment to arbitration is found in almost all contracts. The practice has been sustained by the US Supreme Court against virtually all constitutional and statutory challenges.<sup>59</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.<sup>60</sup>

As in the United States, there is much debate in Europe and elsewhere about whether mediation and other ADR processes are successfully fulfilling their promises—both for efficiency and better justice. There are claims of lawyer resistance and client reluctance, as well as scholarly critique of the “privatization of justice.”<sup>61</sup> Nevertheless, new laws, regulations, court pressures, and the globalization of legal procedures push almost inexorably toward the increased use of these processes, thus ensuring that legal work in these “alternative” processes very likely exceeds the work in more conventionally conceived legal processes.

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54. See generally LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996); TAMARA GORIELY, RICHARD MOORHEAD & PAMELA ABRAMS, THE LAW SOCIETY AND CIVIL JUSTICE COUNCIL, MORE CIVIL JUSTICE? THE IMPACT OF THE WOOLF REFORMS ON PRE-ACTION BEHAVIOUR 183 (2002) (explaining that 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, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 355–63 (2010).

55. Council Directive 2008/52, 2001 O.J. (L 136) 3 (EC). 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 M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?* N.C. J. INTL' L. & COMM. REG. 982, 985, 999 (2011) (discussing Halsey v. Milton Keynes General NHS Trust, [2004] EWCA (Civ) 576, [2004] W.L.R. 3002, [13] (Eng.); MACHTELD DE HOON, SUSAN VERBECK, THE NEW JUDGE: THE JUDGE AS CONFLICT MANAGER 7–8 (Tilburg U. Legal Stud., No. 002, 2011), available at <http://ssrn.com/abstract=2001971> (on file with the *McGeorge Law Review*).

56. David B. Wexler, *Forward to* MICHAEL KING, ARIE FREIBERG, BECKY BATAGOL & ROSS HYAMS, NON-ADVERSARIAL JUSTICE x (2009).

57. See, e.g., JOEL LEE ET AL., AN ASIAN PERSPECTIVE ON MEDIATION 4–5 (2009).

58. See generally CHRISTIAN LEATHLEY, INTERNATIONAL DISPUTE RESOLUTION IN LATIN AMERICA: AN INSTITUTIONAL OVERVIEW (2007).

59. Jean Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 831 (2002); *AT&T Mobility, LLC. v. Concepcion*, 131 S. Ct. 1740, 1744; *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (preventing the use of class actions in arbitration under the Federal Arbitration Act, holding that contractual provisions to arbitrate supersede, under the FAA, any claims of procedural unfairness and right to trial or other forms of dispute resolution beyond those “agreed to” by the parties).

60. See Peter Salem, *Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAMILY COURT REV. 371 (2009).

61. See, e.g., HAZEL GENN, JUDGING CIVIL JUSTICE: THE HAMLIN LECTURES (2009).

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One report in the United States projected that:

[E]mployment 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.<sup>62</sup>

Clearly the use of arbitrators and mediators has increased in high stakes matters like the BP oil spill,<sup>63</sup> the September 11th Victims Compensation Fund,<sup>64</sup> other major class actions, and in the use of court adjuncts as special masters, designers, and implementers of other mass tort, mass disasters, and similar claims.<sup>65</sup>

Just within this one “newer” area of legal expertise there are nearly 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;

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62. OCCUPATION OUTLOOK HANDBOOK, BUREAU OF LABOR STATISTICS 256 (2011), available at <http://www.bls.gov/oco/ocos272.htm> (on file with the *McGeorge Law Review*) (projecting a 14% growth rate from 2008–2018 in the employment of arbitrators, mediators, and conciliators).

63. Kim Murphy, *Mediator Takes Reins on Gulp Oil Spill Claims* L.A. TIMES (Aug. 19, 2010), <http://articles.latimes.com/2010/aug/19/nation/la-na-oil-spill-claims-20100819> (on file with the *McGeorge Law Review*).

64. Both of these were initially headed by mediator Kenneth Feinberg who has now been replaced by other directors, but in which dozens of other lawyers and staff have been employed to resolve compensation claims in mass disasters. See KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 1 (2006).

65. No one would suggest that a newly minted lawyer could move directly into jobs such as these, but many of the mass claims facilities do in fact employ legions of younger lawyers and staff in administrative, and involve lawyering (if not decisional or facilitative) tasks. I have participated as a mediator or arbitrator in many of these cases in the United States. See, e.g., Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOYOLA L.A. L. REV. 513, 513–14 (1998). Many recent tragedies have led to the development of more informal (and faster) systems of compensation (e.g., the Sandy Hook shooting, Hurricanes Sandy and Katrina, the Boston Marathon Bombing, and even the Penn State football sex abuse scandals), which demonstrates the need for different kinds of design, planning, *legal knowledge*, and skills.

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- 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 use both conventional litigation, dispute-based modalities of thinking and structuring work. But they also use different models, paradigms, and approaches for considering the purpose of the work—not just to win a case for a client, but to effectuate the client’s goals. This is done 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.<sup>66</sup> Non-partisan legal problem solving may not always involve conventional representation (remember the “lawyer for the situation”).<sup>67</sup> Lawyers as dispute resolution professionals or peacemakers may work within different conceptual mindsets as well as in different work locations, e.g., NGOs (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 advising and 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. More recently these designers instruct clients on “preventative” processes and measures for workplace relations, ethics, communication, and problem solving. Some governmental and private organizations use ombuds, mediator offices, peer

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66. As a scholar of legal ethics I have long argued that the American conception of the lawyer’s role(s) is far too narrow and almost exclusively litigation and adversarial based. *See, e.g.,* Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering As Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631, 638–39 (1997); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 785–87 (1999).

67. GEOFFREY HAZARD, *ETHICS IN LEGAL PRACTICE* (1980) (discussing Louis Brandeis’ claim regarding representation of both creditors and debtors in bankruptcy).

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counselors, and 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 many others, are often not subject to law, either domestic or international, for resolution of both internal and external disputes and thus have created their own “justice” systems within their organizations.<sup>68</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.<sup>69</sup> (Though these processes are not without their critics as well.<sup>70</sup>)

As discussed more fully below, in order to advise about and design such processes, lawyers will have to expand their knowledge of legal concepts and processes beyond those more commonly taught in law schools. This expansion must include problem solving strategies, economics, organizational development, psychology, decision-making, human resources management, 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>71</sup>) and more informal forms (truth and reconciliation commissions, hybrid national courts for past atrocities,

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68. See, e.g., JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAWMAKERS* (2006). These international organizations increasingly employ individuals with multinational legal education credentials and experience, as well as non-lawyers. This is an especially good employment site for those without national bar licensure.

69. Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 1 J. DISP. RESOL. 1, 8–9 (2007).

70. Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 497 (1993).

71. E.g., 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.). See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 3, 5–6 (1996); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1160–61 (2007); Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2029 (2004).

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and use of local indigenous processes, such as *gacaca* in Rwanda)<sup>72</sup> has produced literally thousands of new legal jobs in an increasingly denationalized form of lawyering.<sup>73</sup> As William Twining has so eloquently argued, globalization of law can mean both “transnational” legal systems, or “sub-national” local legal systems,<sup>74</sup> which leads to a greater complexity of legal pluralism in substantive and processual law. All of these systems may require new kinds of “lawyers” or legal professionals or “translators” at many different layers of law and legal institutions.<sup>75</sup>

Here, I have used my own expertise in one field to demonstrate the growth of new kinds of legal work that have developed in the last few decades. Other forms of legal work and creative new occupations can be similarly imagined and described for other legally-related specialties. Consider public-private partnerships for infrastructure, education, medical care, land use, environmental work, science and technology partnerships, entertainment and intellectual property, social services, poverty reduction, housing creation, organizational management, to name but a few domains requiring some legally-related expertise combined with other subject matter expertise. Also consider the much touted new phrase of “multi-platform” media presentation formats that entertainment creators and lawyers have to deal with, expanding the kinds of knowledge and expertise that are required to bring “content” to market in many new contractual forms. Creativity in both private spheres (developing new entities, organizations, and contractual arrangements) and public spheres (legislative innovations, enforcement of new laws, incentives for particular legal outcomes, and persuasion and lobbying) require different kinds of courses and experiential settings in which to apply new ideas. New forms of legal work demand new conceptualizations of our field, both as legal educators (courses, formats for teaching)<sup>76</sup> and as practitioners (opportunities for internships, new practice formats, tensions between deep specialization and resiliency, flexibility and change). The organizing concepts and “tropes” of legal education may have to be broadened to include new and different borders and boundaries. Consider how law and economics changed the vocabulary and liability standards in torts and contracts a few decades ago,<sup>77</sup> and how the science of cognitive psychology is

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72. See generally Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. OF DISP. RESOL. 355 (2004).

73. See Carrie Menkel-Meadow, *Why and How to Study “Transnational” Law*, 1 U.C. IRVINE L. REV. 97, 100, 106 (2011) [hereinafter *Why and How*].

74. WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE 6–7 (2009).

75. With respect to different kinds of legal educations, see, e.g., Peter L. Strauss, *Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?*, 56 J. OF LEGAL EDUC. 161, 163 (2006).

76. See, e.g., EDWARD RUBIN, INTRODUCTION TO LEGAL EDUCATION IN THE DIGITAL AGE 1–3 (2012).

77. See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007).



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now doing the same for decision making in law and elsewhere.<sup>78</sup> Other professions have perhaps been earlier to come to these realizations.

III. COMPARING LEGAL WORK WITH BUSINESS CONSULTING AND  
ARCHITECTURE: ENTREPRENEURSHIP, RECONCEPTUALIZATION, AND  
ADAPTATIONS IN PROFESSIONAL PRACTICE

It is instructive to contrast the development of the legal profession and the current controversy about what lawyers should be doing with one newer profession—business consulting, and another just as old—architecture. In a recent history of the development of the modern profession of business consulting, Christopher McKenna describes the far more flexible and adaptive model of the modern business consultant with several different strands of expertise.<sup>79</sup> 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 whether to build and trade on expertise by moving around and sharing “accumulated” knowledge and best practices.<sup>80</sup> 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, capital markets and investments, economic forecasting and advising, and computer technology (e.g., Arthur Andersen).<sup>81</sup> 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 de-regulation of market based enterprises).<sup>82</sup>

Business consulting was originally born out of the separation of banking from investing and the separation of the older accounting profession from internal business consulting. 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

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78. DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2013).

79. *See generally* CHRISTOPHER MCKENNA, THE WORLD'S NEWEST PROFESSION: MANAGEMENT CONSULTING IN THE TWENTIETH CENTURY (2006).

80. *See id.*

81. *See id.*

82. *See id.*

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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 business and 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 are that paradigms can shift too quickly with bandwagon effects (Six Sigma,<sup>83</sup> Seven Habits,<sup>84</sup> Corporate Excellence<sup>85</sup>) 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. Consider how legal creations (e.g., “the golden parachute” and stock option compensation packages) also moved from particular outside expertise in law firms to become corporate norms and boilerplate provisions in many corporate transactions.<sup>86</sup>

At the peak of the economic boom, lawyers actually feared competition from the consulting industry. They attempted regulation of the creative efforts to add legal consulting to the ever expanding portfolio of multinational business consulting firms, which had begun to offer “one stop shopping” for consulting services for the world’s largest companies.<sup>87</sup> The current economic recession seems to have (temporarily) dampened that effort, 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

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83. See PETER PANDE & LARRY HOLPP, WHAT IS SIX SIGMA? 2–3 (2001).

84. STEVEN COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE: RESTORING THE CHARACTER ETHIC 23 (1989).

85. See generally THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA’S BEST-RUN COMPANIES (1982).

86. See John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CALIF. L. REV. 1301, 1303–05 (2001) (presenting an empirical study of law firm variation in drafting clauses and defense strategies in mergers and acquisitions).

87. My law school devoted a large part of its annual retreat one year to discuss the impact of this growing “multidisciplinary 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 multidisciplinary practice to prevent even more competition for lawyers by accountants and business consultants, which was 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. See RICHARD L. ABEL, THE LEGAL PROFESSION IN ENGLAND AND WALES 3 (1988).

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expertise (e.g., engineer Arthur Little), went “deep” into consulting with one kind of industry.<sup>88</sup> Others (accountants) chose to accumulate more general knowledge and instead develop consulting themes around organizational structures, management protocols, and investment strategies. Those themes included compliance consulting (which lawyers took up as a specialty after business consultants).<sup>89</sup> A third strand of consulting focused on government contracting, which has led to a whole segment of the profession anchored to “the beltway bandits,” consultants to federal agencies in Washington, D.C. (remarkably resilient, even in times of economic downturns).<sup>90</sup> 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.<sup>91</sup> Other business consultants specialized in the non-profit sector (hospitals, NGOs, universities, and religious, cultural, and charitable organizations), 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. 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>92</sup>

Thus, market conditions affected various industries differentially, but those in business consulting actually could profit from change (whether upticks or downturns) in either direction. Though some suggest that lawyers can do the same (e.g., transfer from mergers and acquisitions to bankruptcy and corporate reorganizations), there has been less evidence of this where large firms try to maintain lawyers from all 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 acting as corporate counselors, compliance monitors, tax advisers, and now organizational and investment strategists (especially with that all powerful J.D.-M.B.A. joint degree)<sup>93</sup> compete with management consultants (with complex internal ethical

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88. *See generally*, MCKENNA, *supra* note 79.

89. *Id.*

90. *Id.*

91. Called “the shadow government” by some. *See* DANIEL GUTTMAN & BARRY WILNER, *THE SHADOW GOVERNMENT: THE GOVERNMENT’S MULTI-BILLION-DOLLAR GIVEAWAY OF ITS DECISION-MAKING POWERS TO PRIVATE MANAGEMENT CONSULTANTS, “EXPERTS,” AND THINK TANKS* 3–5 (1976).

92. 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 multinational work.

93. One suggested solution to the “too many lawyers or too much legal education” problem, of course, is to suggest more specialized education (e.g., law and engineering, law and business, law and planning) through

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rules 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. 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.<sup>94</sup> How much “multi-disciplinary” practice will emerge remains unknown. Multinational 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.<sup>95</sup>

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.”<sup>96</sup> 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 by reconceptualizing the use of physical space to include redesign of old spaces; by encouraging more collaboration between “professional designers” and “users” of space; by solving 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 by working together to “make policy, as well as stuff.”<sup>97</sup> 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.<sup>98</sup> Though this very politicized re-conception of a profession broadens the notion of what it means to be an architect, it also seeks some “deprofessionalization” of its expertise 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.”<sup>99</sup> This is a move

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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.

94. Jennifer Smith, *Law Firms Split over Nonlawyers*, WALL ST. J. (April 1, 2012), <http://online.wsj.com/article/SB10001424052702304750404577317761468323458.html> (on file with the *McGeorge Law Review*).

95. See Swethaa Ballakrishnen, *‘I Love My American Job’: Professional Prestige in the Indian Outsourcing Industry and Global Consequences of an Expanding Legal Profession*, 19 INT’L J. LEGAL PROF. 379 (2013).

96. See NISHAT AWAN, TATJANA SCHNEIDER, & JEREMY TILL, SPATIAL AGENCY: OTHER WAYS OF DOING ARCHITECTURE 26 (2011); *About*, SPATIAL AGENCY, <http://www.spatialagency.net> (on file with the *McGeorge Law Review*).

97. See Awan, *supra* note 96, at 29–33.

98. See generally *id.*; *About*, SPATIAL AGENCY, <http://www.spatialagency.net> (on file with the *McGeorge Law Review*).

99. See Awan, *supra* note 96, at 29–33.

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that lawyers know well from the 1960s and 1970s de-legalization movement in the early days of consumer activism.

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 can (and some would argue, has) increased the possibilities of “new” forms of architecture and design solutions. In a discipline that does require some licensing, credentialing, 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.

What do these brief examples have to tell us about how legal education, legal problem solving, and the legal profession can be altered so that lawyers too might adapt to changed conditions to make “more productive” use of their expertise? Some of the younger generation who are unemployed, underemployed, or unhappy with conventional legal practice have begun forms of new entrepreneurial activity to launch new sectors of legal or quasi-legal practice. This is done by combining law and business or organizational advice and counsel for new kinds of clients. There are the new “social entrepreneurs” (both domestic and international) who offer legal services for start-ups, multi-national enterprises, new media, and new “micro-enterprises,” hoping to combine profitable work with social good.<sup>100</sup>

At the level of community lawyering, especially within the underserved population, new ideas to create small “incubator” law firms have emerged. Such organizations are 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). These firms are forming within some (new and innovative) law schools or in heavily over-lawyered but client-underserved metropolitan or rural areas.<sup>101</sup> Some of the work to create and support new incubator community law practices is located within law schools (clinics, externships, mandated skills training). Others depend on fellowships (e.g., Skadden Public Interest Fellowship) from large law firms, other private

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100. DAVID BORNSTEIN, *HOW TO CHANGE THE WORLD 1* (2007).

101. Such incubator ideas have emerged at CUNY (Community Resource Network, New York) and my own new law school (University of California, Irvine). *See, e.g.*, Symposium Proposal, Joseph Boniwell & Emma Rosenberg, U.C. Irvine Public Interest Advocates, to author (2012) (on file with the *McGeorge Law Review*). 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. It also focuses 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. 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 year-long clinics, with mandated skills training to prepare students for practice. Those students are now called “practice ready” law graduates.

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sources, or financial and professional training support from 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 over the years.<sup>102</sup> Some focused on individual service with social change models while others focused on new forms of legal services delivery. To ring a very trite bell “necessity may be the mother of invention,” and 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,<sup>103</sup> there is little evidence that this has occurred or has fully satisfied the needs of the underserved. But the “old and in the way” might train and facilitate entrance into the profession of the “new with no place to go.”<sup>104</sup>

Following the trend toward other forms of legal dispute resolution discussed above, enterprising students and young lawyers seek training and education of themselves and new sets of clients (conventional unions, neighbourhood groups, religious groups, social action groups, and workplaces) to explore other ways to organize for legal and social benefits and to work together. Not In My Backyard (NIMBY) land disputes still exist and may be pursued through conventional lawsuits, but communities and profit-seekers also get together more often (and not without controversy) 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) and both legal and social in nature.<sup>105</sup> Mass disasters (Katrina, Sandy Hook shooting, Hurricane Sandy, BP Spill, and 9/11) create the need for “faster than the legal system can provide” solutions. Law students, young lawyers, and creative legal actors have been active in pursuing a variety of new ways to deal with those needs by developing alternative victim compensation schemes.

Larger workplaces (many with recession-based reductions in force) and new technologies may require fresh forms of job sharing, on-the-job learning, new legal statuses, and “third ways” through the adversarial thicket of workplace organization and law. “New” lawyers have been instrumental in mediating workplace reorganizations (including immigrant day labor sites), collaborating collective bargaining processes (in both union and non-union settings), and arranging organizational dispute resolution.<sup>106</sup> In one innovative course at

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102. See *United States*, OPEN SOCIETY FOUNDATIONS, <http://www.opensocietyfoundations.org/regions/united-states> (last visited Sept. 7, 2013) (on file with the *McGeorge Law Review*).

103. See generally Marc Galanter, “Old and In the Way”: *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081 (1999).

104. *Id.*

105. See, e.g., Alejandro E. Comacho, Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation, 78 BROOKLYN L. REV. 355, 356 (2013); see Awan, *supra* note 96.

106. See generally Carrie Menkel-Meadow, *The NLRA’s Legacy: Collective or Individual Dispute*

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Georgetown, my colleague Tanina Rostain leads a seminar of students in developing new computer programs and platforms to provide simple legal advice on common legal matters to those who may not have easy access to lawyers or who need more information before making legal decisions or seeking a particular kind of lawyer. The result combines legal expertise with a more interactive form of technology.<sup>107</sup> Creation of new “legal intelligence” and expert systems 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.<sup>108</sup>

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 and differently constructed topics for legal education. 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!).

#### IV. IMPLICATIONS FOR LEGAL EDUCATION: WHAT LAW STUDENTS AND LAWYERS SHOULD LEARN

The key ideas in these new forms of “lawyering” are that they operate with different assumptions, concepts, and modalities. While substantive legal knowledge (including laws, rights and regulations), procedural legal knowledge, and legal interpretation techniques and theories are still important, this traditional knowledge should 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, even 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 in the public sector; while those who work in the private sector might better be trained in organizational development, interpersonal relations, psychology, sociology, and management strategies, as well as economics and finance.<sup>109</sup>

Decision-making, problem-solving, and judgment, which are often implicit in the legal curriculum, must now be made more explicit, as they have been with a

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*Resolution or Not?* 26 ABA J. OF LAB. & EMP. L. 249 (2011).

107. Karen Sloan, *Legal Education Goes High-Tech*, NAT'L L. J., June 4, 2012, at 14.

108. See generally ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION (Mohamed S. Abdel et al., eds. 2012).

109. Ed Rubin's conception of a different law school conceptual structure entailed separate tracks for those seeking public and private lawyering work. See generally Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609 (2007).

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few new textbooks,<sup>110</sup> teaching materials, and new courses in some schools.<sup>111</sup> As has been argued by many of us for decades (now even more urgently) some diversification of teaching within law schools might be well-advised. “Tracks” of emphasis should focus on different models of lawyering: public and private, dispute- or litigation-based, problem-solving, transactional, counseling, creative (start-ups, intellectual property, organizational design and form), social, and community service to better reflect the diverse sites in which some legal knowledge might be of use.

As I and others have long argued, a basic grounding of one or two years in some necessary 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 both more specialized and interdisciplinary advanced work including both business or socially-based subjects.<sup>112</sup> Others have suggested that our curricula should conform to the demonstrated cognitive and interpersonal skills which are correlated with lawyer effectiveness, such as analysis, research and information gathering, planning and organization, negotiation and conflict resolution skills, business relations, and collaboration and communication skills.<sup>113</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).<sup>114</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 the type of law practiced<sup>115</sup>). Or, law schools might

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110. See generally Paul Brest & Linda Hamilton Krieger, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS* (2010); HOWELL E. JACKSON ET AL., *ANALYTICAL METHODS FOR LAWYERS* (2nd ed. 2010).

111. See, e.g., 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. *Problem Solving Workshop*, HARVARD LAW SCHOOL (Dec. 21, 2009), <http://www.law.harvard.edu/academics/registrar/winter-term/problem-solving-workshop.html> (on file with the *McGeorge Law Review*).

112. See, e.g., Carrie Menkel-Meadow, *Taking Law and \_\_\_\_\_ Really Seriously: Before, During and After “The Law,”* 60 VAND. L. REV. 555 (2007); Carrie Menkel-Meadow, *Taking Problem-Solving Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14 (1999). 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.

113. See Marjorie M. Schultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 LAW & SOC. INQUIRY 620, 620–22 (2011); MARJORIE M. SCHULTZ & SHELDON ZEDECK, *IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING* (2008) (on file with the *McGeorge Law Review*); Henderson, *supra* note 2, at 498–99.

114. Richard Acello, *Are LLMs Losing? Law Schools Say Students Gain from Advanced Degrees*, ABA J. (Apr. 1, 2012), [http://www.abajournal.com/magazine/article/are\\_llms\\_losing\\_law\\_schools\\_say\\_students\\_gain\\_from\\_advanced\\_degrees/](http://www.abajournal.com/magazine/article/are_llms_losing_law_schools_say_students_gain_from_advanced_degrees/) (on file with the *McGeorge Law Review*).

115. Many American law schools now tout their ability to train “practice-ready” graduates, but what kind



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choose (like medical schools) to separate the foundational intellectual, conceptual, and substantive study from the more practical “applied” or clinical problemsolving skills that service clients, institutions, lawmaking, interpretation and enforcement. Different schools might make different choices; for example, some schools have already tried shortened programs (Michigan and the University of Dayton’s two and a half year programs, Southwestern’s intensive two year program), others have implemented 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” that 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; this model 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. Some continue to believe in the importance of the “core” aspects of “thinking” like a lawyer as a philosophical, jurisprudential, or “law-jobs”<sup>116</sup> matter. Others are ready to concede that lawyers might be trained in a variety of different ways to perform different services for a more complex set of modern needs. (Compare this to medical specialization and the use of increased “para-professionals” in a variety of medical fields.) Others might think that a general education might be particularly important where lawyers require the flexibility to “re-train” and move from one specialty to another over a lifetime of economic, technological, and social change, while keeping a “basic” knowledge of legal principles and disciplinary structures.

We could supplement a core curriculum with a whole host of constantly moving substantive speciality courses in new subjects of legal need, some of which may still be unimaginable to some of us, e.g., food safety law, privacy in an age of surveillance, technology law, internet law, space law, animal rights, artificial intelligence law, peace law, online dispute resolution, online legal counselling, end of life decisionmaking, etc. Alternatively, or in addition, we could use the last year of law school to be problem focused—putting students

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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.

116. Karl Llewellyn, *Law Jobs in THE BRAMBLE BUSH: THE CLASSIC LECTURES ON LAW AND LAW SCHOOL* (2008).

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together to solve particular problems in a multi-disciplinary seminar (perhaps with other kinds of students in other professional schools)—issues like hunger (local and international), food safety, homelessness, immigration, mortgage financing, educational financing, poverty (at all relevant levels: local, state, national and transnational), conflicts (also at all levels: family, institutional, workplace, international, political party), budget allocations, regional plans, housing policy, transportation networks, resource allocation, water, land, air, climate change, crime, gangs, cyber war, hacking, just to name a few. Note, these are broader problems to be solved than the now common “capstone,” and conventional advanced legal seminar on a particular legal issue.

My students at UCI have recently developed a new program (now for some academic credit) called the Global Justice Summit, a multiparty negotiation in which students attempt to design and draft a new constitution for a variety of new countries and other entities. The purpose of this exercise is to teach collaboration skills, drafting, creativity, the development of new “rights” (e.g., environmental), and recognition of human needs. It is an exercise that produces a positive “product” rather than a winner and loser in conventional moot court exercises. Since 2011, we have successfully drafted three distinct constitutions for both reconciliation and separation of different “nationalities” from each other, while learning how to create new entities and to affirmatively consider governance structures by studying the old and assimilating that into the new. My students hope to expand this program to other law schools in the coming years. This is an example of “constructive” legal education; but I am also proud (and honored) to report that this was a “bottom up” effort of students who wished to create their own learning and then seek guidance about how they might best learn both the skills and the substance of what they needed to know.

I have also recently participated in a new and innovative program, founded by Georgetown Law Center and twenty-four other law faculties from different parts of the world (in its own detached space in London). The program brings students together from different legal systems to comparatively study all courses for either one year or one semester. This study occurs through the eyes of both civil and common law (and Shari ‘a or other legal systems) with the pedagogical theory that knowledge of how other legal systems “solve” legal problems will broaden lawyers’ understandings of how to frame and deal with modern transnational border crossing issues of commerce, human rights, and other legal issues.<sup>117</sup> In addition to this more diverse substantive (and processual) form of learning, students form social networks that have already led to multinational legal work projects across continents, legal systems, and law schools. This, as one type of “globalized” legal education, is one way of unpacking and repacking the knowledge needed by lawyers in an increasingly globalized legal world, while also teaching more diversified legal solutions to a wide variety of

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117. See generally *Why and How*, *supra* note 73.

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problems. Perhaps even the core concepts and tropes of law are undergoing change—are “cases” the essential matter of law or is it now more likely to be “contracts” or agreements? Are we better off studying the cases that went wrong or looking at the deals, relationships, negotiations, or political/legal/business decisions and choices that have succeeded? Should we look at “best case studies” (more like business schools), rather than “failed cases” as appear in our textbooks of mostly appellate decisions?

## V. SOME CONCLUDING THOUGHTS

Here are some of my observations about the relationship of the need for “new” legal knowledge and the so-called crisis in legal education. First, law study could be an entry “portal” into a large number of other kinds of work—business, politics (either as a candidate, official, constituent, lobbyist, staff member or even in the new profession of (lawyer needing) 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>118</sup> organizational leadership, 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), which is hardly exclusive of all the possible jobs and tasks that someone with a law degree might perform. 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>119</sup>

Second, if some think that there are “too” many lawyers for our currently available jobs, maybe some reallocation might actually provide for some better distribution of lawyers to those who are currently underserved. Or, the many lawyers might “re-deploy” their legal skills in different, more socially useful ways. If the legal profession were subject to regular market forces, an oversupply of lawyers should lead to a lowering of price of services and to a 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 is 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. I see a

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118. Note that 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.

119. Note, I said “likely to be” not “are.” Many lawyers do not necessarily perform their work admirably or with logic and justice, just because they have a legal education.

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slight uptick in the number of legal graduates who are engaged in community organizing in such areas as immigration, housing rights, medical care, and labor. That is an example of a different orientation to law and social change that might more explicitly be taught in law schools (as it is now taught in some business, social work, and public policy schools).

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 I am 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<sup>120</sup> and recognize that American legal education might be diversified, sectorized, and specialized.<sup>121</sup> Some might study law to practice, others to train their minds in “legal thought” (logic, order, inductive and deductive reasoning), others as an overlay on some other field (science, economics, business), and others just to become educated citizens of their countries or the world.

Fourth, some might use law study to change the way we think about the world by conventionally arguing for new or different laws. Or, as has been my hope, they reconsider 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>122</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.<sup>123</sup> As one who began her own studies of law to seek justice (and later, peace), we clearly have a need for students to deal with the remaining distributional injustices and unnecessary wars in the world. Legal education could do more to teach peace to law students and the rest of the world, and to teach new and different skills (meeting management, facilitation, convening, collaborating, community organizing, legislative drafting, and, yes, even

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120. ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921) (suggesting the development of a greater number of types of law schools for different student bodies, including night schools, day schools, more academic schools, and more practical schools).

121. See generally BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (Univ. Chicago Press ed. 2012).

122. This is a quotation on the Law Library building that is attributed to a law student, but mostly likely derived from legal jurist R. von Jhering. See R. Von Jhering, *Law as Means to an End* in M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 880–81 (8th ed. 2008).

123. A recent study shows that over the long run the lawyers with the greatest satisfaction about their careers are those who find social value (rather than income and prestige) in their work. See David L. Chambers, *Satisfaction in the Practice of Law: Findings From a Long-Term Study of Attorneys' Careers* (U. of Mich. L. School Pub. Law and Legal Theory Research Series, Working Paper No. 330, 2013), available at <http://ssrn.com/abstract=2274162> (on file with the *McGeorge Law Review*).

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effective political lobbying and different forms of client communication). There is no one “right” way to practice or learn law as there most certainly is no one way to achieve social justice.<sup>124</sup>

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124. *See* AMARTYA SEN, *THE IDEA OF JUSTICE* 10–11 (2009).