

## Doing Good Instead of Doing Well? What Lawyers Could be Doing in a World of “Too Many” Lawyers

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### Abstract

This paper explores some of the misalignment in the legal profession in terms of allocation to particular parts of the profession. The paper suggests that there are not “too many lawyers,” but that lawyers could and should be doing other things, beyond conventional forms of legal representation, both for access to justice, and for transformations of the legal system and human problem solving. Lawyers can perform different roles in dispute resolution (mediating, arbitrating, negotiating, as well as litigating), including performing design functions for organizations and other sites of iterated disputes, advising individuals and entities about how to handle and “manage” conflict in order to actually reduce the need for conventional legal services. The paper explores issues of what constitutes “legal knowledge and expertise” and how such knowledge might be deployed to solve complex social and legal problems outside of conventional legal professional boundaries. Contrasts are made with other areas of expertise and the restructuring of professional knowledge in other fields such as business consulting and architecture. The paper concludes by suggesting that lawyers and legal educators need to proactively reframe what is considered to be legal work and legal education for new ways of legal and human problem solving to be studied and learned.

### Key words

Legal profession; social problem solving; legal knowledge; legal education; comparative professions

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**Resumen**

Este artículo analiza algunos desajustes en la distribución de determinadas partes de la abogacía. Se sugiere que no hay "demasiados abogados", sino que los abogados podrían y deberían estar haciendo otras cosas, más allá de los sistemas convencionales de representación legal, tanto en el acceso a la justicia, como en las transformaciones del sistema jurídico y la resolución de conflictos humanos. Los abogados pueden asumir diferentes papeles en la resolución de conflictos (mediación, arbitraje, negociación, o defensa jurídica), incluyendo el diseño de funciones para organizaciones y otras instituciones dedicadas a las disputas, aconsejando a individuos y entidades sobre cómo manejar y "gestionar" los conflictos, con el fin de reducir de forma real la necesidad de los servicios jurídicos convencionales. El artículo explora los asuntos relacionados con "el conocimiento y la experiencia jurídica" y cómo se puede utilizar este conocimiento para resolver problemas sociales y legales complejos que quedan fuera de los límites profesionales jurídicos convencionales. Se comparan con otras áreas de conocimiento y con la reestructuración de los conocimientos profesionales en otros campos, como las empresas consultoras y de arquitectura. El artículo concluye sugiriendo que abogados y profesores de derecho deben replantear de forma proactiva lo que se considera trabajo legal y educación jurídica, para estudiar y aprender nuevas formas de resolver conflictos humanos y legales.

**Palabras clave**

Abogacía; resolución de problemas sociales; conocimiento jurídico; educación legal; comparación de profesiones

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## 1. Are there too many lawyers?

A variety of social and economic developments in the last decade or so have resulted in claims, in many countries, that there are “too many lawyers” and in many countries “too many law students” (see e.g., Kritzer 2013) (who, at great financial or opportunity costs for their educations, may train and prepare for a very complex profession, without a certain prospect of obtaining professional work, as that work is conventionally defined). These claims assume that we can measure and know what an optimal number of lawyers is, that we have certain expectations about what lawyers do or should do, and that something should be done to appropriately allocate legal education, legal services and entry into (and practice of) the legal profession (see Morgan 2010, Green 2012). In my view, all of these claims are problematic. Is the question whether there are too many lawyers admitted to practice or, too much legal education being offered? Is this a market question (too many lawyers will drive down fees and make the profession less profitable for those already in it), make access too difficult (supply and demand issues) or waste too many social resources on the production of law degrees without sufficient economic and social benefit? Or, is this a social or moral question – do too many lawyers drain the economy, the polity, and the social fabric by producing conflict, increased transaction costs and turmoil, rather than serving to benefit the larger society by mediating conflict,<sup>1</sup> serving as statesmen (Kronman 1995) or problem solvers, or “social glue,” rather than social repellents or irritants.

This symposium permits us to examine the elements of these claims, and in my own case, allows me to combine strands of my own work in several different fields: the study of the legal profession, access to justice for underserved people and underrepresented claims, and the uses and definitions of legal knowledge and legal skills to solve problems (including not only individual and entity conventional legal problems, but problems of social justice and fair and just allocation of the social goods produced by any society) (Menkel-Meadow 1998a). In this essay, I suggest that there is not too much legal education nor too many lawyers, but that both legal education and the work of those educated as lawyers could be and should be more broadly defined, if the goals of a legal profession include solving human problems and producing both peace and justice, as “valued-added” forms of social goods produced by having legal knowledge (Menkel-Meadow 2006). Furthermore, new challenges of inequalities, inadequate or unbalanced resources should force us to realign, re-imagine, and innovate new methods of legal services delivery, which in turn should require different ways of structuring the acquisition and practice of legal knowledge and legal education, as other professions have begun to do (Awan *et al.* 2011).

How do we measure the optimal number of lawyers (Magee 2013)?<sup>2</sup> It is common to look at per capita ratios of lawyers to populations. So we learn that Israel and the United States have among the highest ratio of lawyers to general population (1:163 (D. Barak-Erez, E. Katvan and T. Rostain, *Workshop Proposal: Too Many Lawyers? Fact, Reasons, Consequences and Solutions*, Oñati International Institute for Sociology of Law, 2011.) and 1:265 (American Bar Association 2008) respectively) and South Africa has one of the lowest, 1:2,273 (McQuoid-Mason 2013).<sup>3</sup> But we know much less about whether lawyers are actually meeting the legal needs of the populations they serve and/or whether lawyers are serving an

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<sup>1</sup> Alexis de Tocqueville's claim that lawyers in America (as the social “aristocracy”) mediated class conflict and conflict between the people and the government and served to ensure useful and productive management of conflict, while raising important issues of critique of the polity and its governance, through litigation and statesmanship (de Tocqueville 1835, Ch. XVI).

<sup>2</sup> For one view, Stephen P. Magee argues that lawyers are rent seekers and foster too many lawsuits and too much inefficient regulation, preventing more “positive facilitative effects” for a less regulated and litigated about economy.

<sup>3</sup> David McQuoid-Mason notes that these measures are all relative as South Africa's per capita ratio is much higher than other nations in Africa, e.g. Kenya where the ratio is 1:10,000.

optimally productive function in society. As recently described by sociologist Rebecca Sandefur (2012), there have been few thorough legal needs studies in the United States (and many other countries) since the initial outpouring of interest in access to justice and legal needs studies in the 1970s and 1980s, though Herbert Kritzer (2009) reports on a number of state-based legal needs studies in at least half of the United States in the last twenty five years (see e.g., Curran 1977, Cappelletti and Garth 1979, Meeker *et al.* 1985, American Bar Association 1994, Meeker *et al.* 2000, Rhode 2004). What we know from those older studies and a few newer ones is that both poor and moderate income individuals are grossly underserved by lawyers for their “basic” everyday legal needs, including denials or disputes about public benefits, family law matters, legal status issues (e.g., immigration), basic property transactions (leasing and purchasing housing, now foreclosures), tax issues, neighbor and interpersonal disputes, and employment matters. Recent studies suggest that poor and moderate income individuals most often seek other “non-lawyers” to help them solve “legal” problems (Sandefur 2012). Though many argue the problem is the cost and affordability of legal services, others have noted that low and moderate income individuals have either learned to use other resources or don’t understand or want legal professionals to take on their problems (Sandefur 2012, Kritzer 2009). My own early work in assessing when people of moderate means sought lawyers demonstrated that ordinary people did not want to conceive of themselves as having “problems” (so when asked about a legal problem they had actually encountered and sought legal advice for, they could not remember or denied use of a lawyer in handling their problem) (Menkel-Meadow 1981). For many, what we legal professionals might call a legal “problem” (needing a will, buying a house, signing a lease, making a consumer complaint, getting a traffic ticket, having an “issue” at work, in the family or at school), was characterized as either a normal, if annoying, part of life, or a transaction, not a “legal dispute” requiring legal representation or even advice.

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

Thus, usage of lawyers to solve some “legal” problems is a complex social phenomenon in which the variable availability of legal services and subsidies for legal aid may structure people’s expectations of how and when they can use lawyers to solve their problems. Choosing to use non-lawyers may be a fully

adaptive strategy if lawyers are not sufficiently available at a “fair” cost or at a cost that justifies the expense (consistent with findings that the same “legal problem” (e.g. house ownership) may be handled by lawyers or not, depending on the economic value of the problem itself) (Kritzer 1991, 2008). Whether lawyers or non lawyers perform better, worse, or the same in handling a wide variety of matters, remains a contested empirical question, requiring constant study by type of matter, and over time, with both new simplification (electronic and form documents) and simultaneously, complexification (more regulation, more complex claims and entities) of legal matters (Kritzer 1998, Menkel-Meadow forthcoming).

At the organizational level, early predictions of an ever expanding market for lawyer services in the creation of ever increasing new private entities and increased governmental regulation (Sander and Williams 1989) have met with current realities of technological change and the possible “replacement” of lawyer work product by increasingly routinized computer forms and electronic documentation and communication (Susskind 2008), as well as ever increasing competition from non-lawyer providers of legal services (Kritzer 1998, compare Menkel-Meadow 1985b). The question of whether there are too many lawyers now transcends any one jurisdiction, as scholars and practitioners consider what the “globalization” of legal services means for us all – more work for more (specialized) lawyers around the globe (Gardner, Morris and Anand 2002) or increased competition from lawyers who are able to cross borders to practice, even as cross-border licensing to legitimate such practice remains somewhat unresolved (Terry 1998, 2008, 2010, Silver 2005, Sokol 2007).

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

Whether there are, in fact, too many lawyers, as with many over generalized empirical claims, may depend on location, type of practice, and the externalities of “other” factors. Are there too many lawyers in Nevada, Florida and California where the economic crisis has caused mass foreclosures? Would many homeowners benefit from lawyers to re-negotiate (or mediate) their mortgages (Schneider and Fleury 2011, State of Nevada Foreclosure Mediation Program 2012)? How flexible are modern specialized lawyers in shifting from one form of practice (“m and a” – mergers and acquisitions in boom times) to another (bankruptcy in economic downturns), and from one ‘sphere’ (corporate and entity representation) to another (individual representation) (Heinz and Laumann 1994)?<sup>5</sup> Unlike employment in less specialized fields, flexible movement from one sphere to another is not easy and is variable with both type of professional knowledge as well as professional licensing

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<sup>4</sup> Although the lawsuit against New York Law School was recently dismissed (Lattman 2012), other suits remain pending against such schools as Thomas Jefferson, University of San Francisco, and Southwestern Law School (all of these in California).

<sup>5</sup> John Heinz and Edward Laumann have demonstrated two non-substitutionary “hemispheres” of the bar—lawyers serving corporate interests and those serving individuals (Heinz and Laumann 1994).

and credentializing requirements (as is the case with differences between most older professions—e.g. medicine, architecture, accounting, and nursing, which require licensing, with newer professions such as engineering, computer techs, and business consulting, which do not (McKenna 2006)). Law licensing and credentialing is even more complex as states, not the nation (in the United States), regulate entry and also vary as to whether they permit specialization certification (as does California in a number of specialties) or reciprocal bar entry from other states or countries. Thus, the claims about too many lawyers tend to conflate a number of more complex issues – are there too many law graduates or law trained individuals for what is currently available to be “lawyered” about, at rates that justify the investment in a legal education, or are lawyers misallocated both in what they want to do and what they might actually be helpful for if they could be allocated to work in a different way.<sup>6</sup> Must all those who receive a legal education work in the same kinds of “legal” jobs?

Most of the relatively rapid increase in the number of law students and lawyers in the last few decades has been attributed to the diminished exclusivity of entry barriers (in most Western and some Eastern, e.g. China and Japan (Chan 2012), countries) to legal education (if not to full certification and bar membership) and the dramatic increase in the number of women, and the slightly less dramatic rise of minority group representation in legal education and the legal profession (Menkel-Meadow 1989a, 1995, Kritzer 2013).<sup>7</sup> Thus, to this author (and others), it seems deeply ironic that claims are made that there are “too many lawyers,” just as the legal profession becomes more diverse. This is not unrelated to the claim that there is too much litigation and too many lawsuits, just at the same time as new causes of action and increased litigation over basic human, civil, and economic rights have increased access to the legal system for those who were previously denied both access and substantive claims and legal relief (Galanter 1983, 1992, 2004). Again, what is an “optimal” number of lawyers and legal claims and who should be available to handle those claims?<sup>8</sup>

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

It might be useful to separate consideration of whether there are too many lawyers from the issue of whether there are too many law students or too much (?) legal education. The United States, Canada (and Japan (Riles and Uchida 2009), Korea, China and in some schools, Australia) are among a few countries that treat legal education as a subject of graduate education. In most countries of the world, legal

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<sup>6</sup> Scholars have demonstrated that lawyers are “stickily” allocated to their work by their own choices and market forces; lawyers who train to be (and are paid accordingly) sophisticated corporate lawyers who specialize in highly complex matters are not likely to be “reallocated” to different tasks at different rates of pay—many would prefer to be under or unemployed than shift work location, both for economic and status based reasons (see e.g., Hadfield 2000).

<sup>7</sup> Other scholars have reported on the rapid influx into the profession in the United States from returning veterans, first from WWII, and then from Viet Nam (see e.g., Morgan 2010).

<sup>8</sup> The addition of new substantive claims for consumer rights, anti-discrimination laws, human rights, social, political, economic, racial, gender and other forms of equality and equity were also accompanied by claims for greater diversification of the profession so that claimants might have lawyers who literally “felt” and represented their “pain” and experience.

<sup>9</sup> Carroll Seron found women more likely to be in solo or part-time, “local” work.

education is still a general, undergraduate or first degree, conceptualized as a good general education for a well educated citizen who might enter any number of useful professions<sup>10</sup>. Will we soon be asking the question of whether there are too many college graduates (Steinberg 2010)? (Underemployment in the United States is still highly correlated with educational levels – college graduates are much less likely to be under- or unemployed.) Other (developing) countries may be having different experiences, with less work available for the highly educated as more physical or unskilled labor might still be necessary for manufacturing, infrastructural development or export businesses.<sup>11</sup> But, employment issues to one side, legal education may be a particularly useful (if properly structured) form of knowledge to impart to any educated citizen of the world, and as this paper will argue, there may be more “uses” of that legal knowledge than conventional deployment in what is considered a “legal” career. One could contrast the much larger legal profession to the smaller and newer profession of business consulting and the older profession of architecture and planning (see below) to see how realignments and the creation of “new” knowledge and forms of expertise can both deepen and expand the uses of knowledge to consider and facilitate dramatic social, physical, and economic change. Legal education could play a useful role in not only advising on and solving more problems and social issues, but could also be important in just allocations of goods, services, and more dignitary human issues in an ever changing world of commerce and human interaction, as law students, like business, architecture, engineering, and science students learn how to “innovate” within their fields (Henderson 2012, Lehrer 2012).

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

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<sup>10</sup> There might even be a new market for legal education in the United States for law training for those who specifically don't want to be lawyers—there are a few undergraduate programs in “law and society” or criminology now,-- but one could imagine a graduate school of law study intended for those who do not want to “practice” law but want to know about law to enter government, public policy, administration, journalism, or business careers.

<sup>11</sup> I am personally skeptical of these claims. Almost any kind of work (regardless of how it is compensated), is better performed by those with education (ask your local waiter or barista (as opposed to barrister) if you are a middle class well educated person).

<sup>12</sup> This is Richard Abel's long standing argument about “the professional project” as being one of market control.

<sup>13</sup> These are reported as “pre-recession” (2008) figures. The ABA report of law school placement for 2011 by law school is even more dismal. My top-ranking law school (Georgetown) had a placement rate of just over 60% for its 2011 graduates. See ABA Report of 2011 Law Placement at [www.taxlawblog.com](http://www.taxlawblog.com).

<sup>14</sup> For earlier arguments that lawyers can and should be efficient “transaction cost engineers” and productive transaction managers, see e.g., Gilson, 1984; Gilson and Mnookin (1994, 1995), Mnookin *et al.* (2000), and Peppet (2004).

<sup>15</sup> Howard Gardner, Mihaly Csiksentmihali and William Damon (2002) compare the ethically integrated profession of genetics with the ethically questionable profession of modern journalism where profit and



## 2. What lawyers could and should do

Here I explore some of the ways in which legal education has been, and might be further, harnessed for different (and potentially more socially useful) functions. To the extent that legal education is a combination of a general education in ways of thinking and analyzing problems (a little bit different in civil and common law countries) and more specialized knowledge (both in subject matter expertise and process expertise), a legal education might actually permit “lawyers” to do a variety of tasks in society that are not necessarily traditionally or conventionally called “lawyering.” I begin with some of the applications of legal knowledge I know best from my own experience and study, and then turn to some other possible adaptations of legal knowledge for other use. I will also contrast legal expertise with how at least two other professions – business consulting and architecture – have adapted to changing economic conditions and increased professionalization through education by diversifying, reconceiving, 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.

As someone who began her own career as a poverty lawyer, seeking to deliver both individual justice to the underserved, and to engage in social change (through law reform, litigation, class and otherwise, and through community organizing and organizational representation), it was not long before I saw the inefficacy of much social change litigation and adversarial advocacy. I will not here recount all of my personal history that led to a focus on changing the legal paradigm from one of litigation “victory” to legal problem solving,<sup>16</sup> but these observations were not mine alone. Critiques of litigation in the United States began in the late 1970s and early 1980s from different sectors of the legal profession. As recounted, not uncontroversially, by many different sectors of the legal profession (Chief Justice Warren Burger of the United States Supreme Court (Burger 1982), the consumer empowerment movement (Abel 1982, Harrington 1985), including deprofessionalization efforts (Shonholtz 1985, Merry and Milner 1993), scholars and practitioners seeking more creative and Pareto optimal solutions to complex problems (Raiffa 1982, Fisher *et al.* 2011) and more just or forgiving solutions to crime and victimization (Umbreit 2000)), joined by those in economics, political science, game theory, business, labor and many other fields (Menkel-Meadow 2000a, 2009a),<sup>17</sup> arguments about both quantitative factors (too many cases clogging the system and making litigation too expensive and too time consuming) and qualitative factors (creating better solutions to problems), were used to suggest other ways for lawyers to work. From this critique the modern “alternative” (now called “appropriate”) dispute resolution movement was born.<sup>18</sup> Even hard core social justice litigators, like Gary Bellow, were sometimes critical of the individual lawsuit (and litigation) as the best way to achieve social justice (Bellow 1977). In my own experience, cases might be won, including cases against big governmental and private organizations and institutions, but adaptive officials or lawyers on the “other side” would soon learn to circumvent legal rulings or change the rules themselves (my experience was in welfare litigation, employment discrimination, prison reform, domestic violence and family law, 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, military and some government lawyers began to focus on “other” ways to use their legal

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personal ego now dominate other professional goals of information gathering and dissemination. Consider where the legal profession belongs in this taxonomy.

<sup>16</sup> For the scholarly versions and skills imperatives of my early work, see Menkel-Meadow (1983, 1984b).

<sup>17</sup> In the cited articles, I provide fuller descriptions of both the legal concepts and contributions of non-legal scholars to the origins of the modern ADR movement.

<sup>18</sup> For a more complete recount of this history, see Menkel-Meadow (2005a).

skills. Labor law had always used mediation and arbitration as one form of dispute resolution (Menkel-Meadow 2011a); family lawyers turned first to mediation, then to “collaborative law (Tesler 2001), construction lawyers began to use “partnering” agreements requiring pre-dispute meetings and mediation (Carr *et al.* 1999); large scale commercial lawyers moved toward more arbitration (especially in transnational disputes (Born 2010)), then to mediation<sup>19</sup> and then to a series of hybrid processes, including mini-trials, med-arb, and arb-med, summary jury trials and others (Menkel-Meadow *et al.* 2011). The public sector followed with court annexed ADR programs, including arbitration, mediation, early neutral evaluation, and other hybrids, formally authorized and then sometimes required in both federal and state practice.<sup>20</sup> In the United States the “ADR” concept spread also to governmental decision making and policy formation, as trained facilitators managed complex rule and regulation drafting in “negotiated rule-making” processes or “reg-neg” (Harter 1982) or what are now called “consensus building processes” (Susskind *et al.* 1999, but see Menkel-Meadow 2011b). Even in the binary world of criminal justice (guilt/innocence; punishment or freedom) these new processes were harnessed to the reform seeking efforts of social workers, probation officers, creative judicial officials<sup>21</sup> and others who looked for “restorative” justice to reintegrate offenders with their communities and to provide some restitution or emotional relief for victims (Menkel-Meadow 2007a). This latter movement for restorative justice in criminal law also helped contribute both the theory and practice for the development of new processes and institutions in international law (including the new field of “transitional justice” (Teitel 2002) in post conflict settings, both between and within countries).

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

The rapid movement to these new or reconfigured processes led to an outpouring of new skills training, initially conducted outside of the traditional law schools, offered to practitioners in a variety of continuing education (including within and by courts) or privately offered professional training programs. [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

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<sup>19</sup> The Center for Public Resources, founded in 1979 became a think tank and promoter of ADR for use in commercial large scale disputing and eventually created and managed not only new processes, but developed industry protocols for dispute resolution in a variety of different substantive business and fields, e.g. oil and gas, employment, franchising, construction, banking, health, etc.

<sup>20</sup> See e.g. Civil Justice Reform Act (1990); Administrative Dispute Resolution Act (1990), and Alternative Dispute Resolution Act (1996).

<sup>21</sup> E.g. Justice Judith Kaye, who in New York, became a proponent of problem solving courts, designed to treat and recover drug users, sex workers, and families in drug, vice and specialized family courts (see, e.g., Kaye 1997, Berman and Feinblatt 2005).

the private and public offerings of mediation and arbitration training programs, 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>22]</sup> As I discuss more fully below, after a first generation of general skills training in mediation, arbitration and facilitation, the new field of “dispute system design” was spawned around the development of the design of structured dispute resolution programs, both within institutions and in situations of iterated dispute or transaction management (Ury *et al.* 1988, Menkel-Meadow 2009b).<sup>23</sup> An even more specialized form of process expertise and institutional design in post-conflict dispute resolution has developed alongside this new “profession” in international law (Stromseth *et al.* 2006).

Efforts to document and report on the dimensions and market share of these new professions have been largely unsuccessful, in large part because so much dispute resolution (mediation, arbitration and hybrids) is conducted in the private sphere without any requirements for reporting to public agencies in the United States (Stipanowich 2004).<sup>24</sup> Nevertheless we know that a vast number of cases filed in the American courts are settled through one of these processes, whether in the courts themselves (through mandatory settlement conferences, court annexed mediation or arbitration programs) or through private processes.<sup>25</sup> We also know the use of these court annexed and private processes are increasingly being used in the United Kingdom (Lord Woolf reforms in England and Wales (1996, see also Goriely *et al.* 2002)<sup>26</sup> and increased use in Scotland too), and now in Europe, as well, through the EU’s Directive on Mediation (2008)<sup>27</sup>, as well as in Australia (King *et al.* 2009), Asia (Lee and Hwee 2009) and South America (Leathley 2007). 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 as mandatory pre-dispute assignment to arbitration is found in almost all contracts, and the practice has been sustained by the United States Supreme Court against virtually all constitutional and statutory challenges (Sternlight 2002).<sup>28</sup> Most family courts (a matter of state, not federal law in the

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<sup>22</sup> Several American law schools now specialize in the wide array of dispute resolution skills, e.g., Ohio State, Missouri, Florida, Harvard, Hamline, Cardozo, Pepperdine, to name but a few that offer certificates, specializations, special degrees and now LLM’s in these fields. 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).

<sup>23</sup> Two new legal texts for law school teaching are now in development for this field (Rogers *et al.* 2013) and Bingham *et al.* (forthcoming).

<sup>24</sup> Thomas Stipanowich sought to report on statistics and usage of mediation and arbitration processes in public settings (courts) and private settings (reporting on some limited data available from the American Arbitration Association and similar organizations, and reporting on some few studies of ADR usage in both settings). Like Professor Stipanowich, many of us in the ADR field have tried to get access to a variety of data sources on ADR usage. Over ten years ago I served on the Advisory Board of a major national research institution seeking to document the effects of the “privatization” of the judiciary, as increasing numbers of judges left the bench for more lucrative private mediation and arbitration positions. JAMS (Judicial Mediation and Arbitration Services), one of the leading private ADR providers in the United States (originally founded by a retiring California state judge) refused to release any data on their case load, third party neutral fees, etc. claiming that what their clients most valued was “private” dispute resolution. (In California, litigants can use “rent-a-judges” who are former judges who may render (arbitral) decisions with the full force of law that even includes an appellate process, but promises privacy (see California Code of Civil Procedure §§638-645, see also Hadfield 2004, Menkel-Meadow 2010).

<sup>25</sup> While one often hears that only 2% of all cases filed are actually tried, therefore over 90% of cases are settled in some fashion, we know that actually the settlement rate is much lower. Many cases (perhaps as much as another 20-30% of cases are terminated in ways other than full adjudication (motions or summary judgments) or negotiated or mediated settlement (see Kritzer 1986, Hadfield 2004).

<sup>26</sup> New studies in the UK reveal that the Woolf reforms have actually “front-loaded” and increased expenses in the early stages of civil litigation (Lord Justice Jackson 2010).

<sup>27</sup> Some have opined that the use of mediation in mandatory settings might be a violation of Article 6 of the European Convention on Human Rights. See Jacqueline Nolan-Haley (forthcoming) discussing *Halsey v. Milton Keynes General NHS Trust* (2004) (see also de Hoon and Verbeck 2011).

<sup>28</sup> See most recently *AT&T Mobility v. Concepcion* (2011).

United States) require divorcing parents to attend mandatory mediation or conciliation programs.

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

“employment of arbitrators, mediators and conciliators is expected to grow faster than the average for all occupations through 2018. Many individuals and businesses try to avoid litigation, which can involve lengthy delays, high costs, unwanted publicity and ill will. Arbitration and other alternatives to litigation usually are faster, less expensive, and more conclusive, spurring demand for the services of arbitrators, mediators and conciliators. Demand will also continue to increase for arbitrators, mediators and conciliators because all jurisdictions now have some type of dispute resolution program (BLS 2010-2011).”<sup>29</sup>

The increased use of such laws as “three strikes” (and you’re out! and go to jail for life sentence after three convictions, as in California), meaning less plea bargaining and more demand for trials in the criminal area, produces more need for other forms of dispute resolution in civil cases, as courts become less available. Clearly the use of arbitrators and mediators has increased in high stakes matters like the BP oil spill, the September 11 Victims Compensation Fund<sup>30</sup>, other major class actions, and in the use of court adjuncts as special masters, designers and implementers of other mass tort, mass disaster and similar claims.<sup>31</sup> Just within this one “newer” area of legal expertise there are at least ten new possible sites of work:

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

<sup>29</sup> The United States Bureau of Labor Statistics projected a 14% growth rate from 2008-2018 in the employment of arbitrators, mediators and conciliators.

<sup>30</sup> 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 other staff have been employed to resolve compensation claims in mass disasters (Feinberg 2006).

<sup>31</sup> 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, as well as 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., Menkel-Meadow 1998).

- o transactional mediation.

These “newer” forms of dispute resolution lawyering work use both conventional litigation, dispute-based modalities of thinking and structuring work, but they also use different models, paradigms and approaches to what is the purpose of the work—not just to “win” a case for a client but to effectuate client’s goals, through the recognition of needs and interests of others who work with one’s clients, and in some cases, even the concept of “client” is different than in the conventional legal paradigm.<sup>32</sup> Non-partisan legal problem solving may not always involve conventional representation (remember the “lawyer for the situation” (Hazard 1978).<sup>33</sup> Lawyers as dispute resolution professionals or peacemakers may work within different conceptual mind-sets as well as in different work locations, e.g. NGO’s (neither governmental nor profit based work settings with very different programmatic and organizational goals).

New forms of ADR and dispute resolution practice are also located within the 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 or more recently “preventative” processes and measures for workplace relations, ethics, communication, and problem solving. Some governmental and private organizations use ombuds, mediator offices, peer counselors, hotlines, as well as more formal grievance processes to handle, prevent, manage, and when necessary, resolve such disputes. Lawyers and legal adjuncts provide education and training in conflict resolution and handling, both internally within organizations, and more conventionally to clients as outside counsel.

International organizations, such as the UN, World Bank, IMF, International Red Cross and many others, are often not subject to traditional national or international law (due to the unique nature of their creation either in the Bretton Woods treaties following World War II, or because of the unique legal status of private international organizations, for resolution of both internal and external disputes) and thus have created their own “justice” systems within their organizations.<sup>34</sup> These dispute systems may be motivated by other values than litigation vindication – preventative resolution or management to insure healthy workplaces, and efficient communication of systemic issues within the organization (Sturm and Gadlin 2007), though these processes are not without their critics as well (Edelman *et al.* 1993).

As discussed more fully below, in order to counsel and 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 to include problem solving strategies, economics, organizational development and sociology, decision making, human resources management, psychology, and a variety of other topics more often taught in business management or public policy programs. Goals of such organizations may be different depending on whether they are public, private, hybrid or international in scope and purpose. Clearly, there is no single paradigm of the lawyer’s work that describes what this work entails.

At the international level, without any accurate accounting of which I am aware, dispute resolution in both its formal (the many new international tribunals which

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<sup>32</sup> 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 adversarially based (see e.g., Menkel-Meadow 1997, 2000b).

<sup>33</sup> Geoffrey Hazard discusses Louis Brandeis’ work in “representation” of both creditors and debtors in bankruptcy.

<sup>34</sup> These international organizations increasingly employ individuals with multi-national legal education credentials and experience, as well as non-lawyers. This is an especially good employment site for those without national bar licensure.

have been created in the last few decades<sup>35</sup>) and more informal for a (truth and reconciliation commissions, hybrid national courts for past atrocities, use of local indigenous processes such as *gacaca* in Rwanda (Bolocan 2004)) have produced literally thousands of new legal jobs in an increasingly, denationalized form of lawyering (Menkel-Meadow 2011c). As William Twining has so eloquently argued, globalization of law can mean both “transnational” legal systems or “sub-national” or more local legal systems (Twining 2009), leading to a greater complexity of legal pluralism, both in substantive law and processual law, all of which may require new kinds of “lawyers” or legal professionals or “translators” at many different layers of law and legal institutions.<sup>36</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 kinds of jobs and occupations can be similarly imagined and described for other legally-related specialties (beyond the specific scope of this paper) –consider public-private partnerships for infra-structure, 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. 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.

### 3. What lawyers should learn

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

Decision making, problem solving, and judgment, often implicit in the legal curriculum must now be made more explicit, as they have been with a few new textbooks (Jackson *et al.* 2010, Brest and Krieger 2011) and teaching materials, and in some schools, with new courses.<sup>37</sup> As has been argued by many of us for decades, now even more urgently, some diversification of law school types and teaching within law schools might be well advised for “tracks” of emphasis to focus on different models of lawyering – public and private lawyering, dispute or litigation based, problem solving, transactional, counseling, creative (start-ups, intellectual property, organizational design and form), social and community service, as well as others, to better reflect the diverse sites in which some legal knowledge might be of use.

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<sup>35</sup> 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.) (Dezalay and Garth 1996, see e.g., also Ahdieh 2004, Berman 2007).

<sup>36</sup> With different kinds of legal educations, see e.g. Strauss (2006).

<sup>37</sup> 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.

As I and others have long argued, a basic grounding (say 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 (see e.g., Menkel-Meadow 1999, 2007b).<sup>38</sup> Or, Americans could move to a more generalized first degree in law (as is common in most parts of the world), with more specialized training and different subjects in graduate law programs (as is happening with the increasingly globalized and specialized LLM, (Acello 2012)).<sup>39</sup>

Law schools could choose either to integrate complex intellectual and substantive learning with skills needed for the practice of law (and those skills might vary depending on what kind of law practice<sup>40</sup>) or law schools might choose (like medical schools) to separate the foundational intellectual, conceptual, and substantive study from the more practical “applied” or clinical problem solving skills in service to clients, institutions, law making, interpretation and enforcement. Different schools might make different choices as some have already tried to do with shortened programs (Michigan and the University of Dayton’s 2 and ½ year programs, Southwestern’s intensive two year program) or longer programs (joint degree programs with business and policy schools or joint graduate programs in other substantive fields for those more inclined to academic or more substantively specialized work, e.g. science/technology and the law).

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

I have participated in a new innovative program, founded by Georgetown Law Center and 24 other law faculties from different parts of the world (in its own

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<sup>38</sup> 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.

<sup>39</sup> In the last few years I have taught specialized courses in International Dispute Resolution, Consensus Building, Conflict Resolution and Mediation, and Dispute System Design in law schools (some open to other kinds of students who are not lawyers) in Australia, Singapore, the UK, Israel, Switzerland, Central America, South America (Argentina, Paraguay and Brazil), China and Canada; this is not counting several programs run by American law schools or other sponsoring agencies abroad but which include many American students within their regular legal studies programs).

<sup>40</sup> Many American law schools now tout their ability to train “practice-ready” graduates, but what kind of practice may actually remain stratified (elite schools to corporate law firms and public interest; local schools to small firms, prosecutor or government offices) or at least specialized. One strategy for legal education marketing in this time of economic uncertainty for lawyers is law schools explicitly advertising for specialized practice areas. Others proclaim the rigor and excellence of their general legal education.

detached space in London) to bring students together from different legal systems to study all courses (for one year or one semester) comparatively, 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 (Menkel-Meadow 2011c). In addition to this more diverse substantive (and processual) form of learning, students form social networks that have already led to multi-national legal work projects, across continents, legal systems, and law schools. Whether this will lead to "more" or "less" legal work remains to be seen, but it is a way of unpacking and repacking what might be necessary for lawyers to learn in an increasingly globalized legal world, while also developing "local knowledge."

#### **4. Legal knowledge compared to business consulting, architecture, new problem solving, and other adaptations to professional practice**

It is instructive to contrast the development of the legal profession and the current controversy about too many lawyers with other professions suffering from similar claims. Here I briefly explore how two other professions, one newer profession – business consulting—and an older one – architecture, have or are beginning to adapt professional ideas, service delivery and forms of practice to changes in economics, demographics, legal environments, and other social changes.

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

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

While McKenna and other business historians note that the brokering of information by outsiders often resulted in a remarkable similarity in 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 is that there can be "too quick" shifts of paradigms with bandwagon effects (Six Sigma (Pande and Holpp 2001), Seven Habits (Covey 1989), Corporate Excellence (Peters and Waterman 1982)) that can produce such failures as Enron (Jeffrey Skilling was a "master" at business consulting and "out of the box thinking") and group think and corporate conformity. The Enron scandal brought a quick end to the Andersen firm which had so skillfully (pun absolutely intended) recombined business consulting with audit functions after the regulatory climate changed.

At the peak of the economic boom, lawyers actually feared competition from the consulting industry and attempted regulation of the most creative efforts to add legal consulting to the ever expanding portfolio of multi-national business consulting firms which had begun to offer "one stop shopping" for consulting services for the world's largest companies.<sup>41</sup> The current economic recession seems to have (temporarily) dampened that effort<sup>42</sup> but the adaptability of the business consulting industry is still instructive for the more troubled and slower to adapt legal profession. Specialization and difference of strategies actually helped to expand the market of business consultants as some, using their prior expertise (e.g. engineer Arthur Little), went "deep" into consulting with one kind of industry; others (accountants) chose to accumulate more general knowledge and instead develop consulting themes around organizational structures, management protocols, and investment strategies, including compliance consulting (which lawyers took up as a specialty after business consultants). A third strand of consulting focused on government contracting, leading to a whole segment of the profession anchored to "the beltway bandits," consultants to federal agencies in Washington DC (remarkably resilient, even in times of economic downturns). Indeed, it could be said that the business consulting profession "invented" the public-private partnerships of the 1980s and 1990s as deregulation allowed combinations of organizations to take on many of the projects of the state, thereby assuring a relatively stable, if not growing source of business (Guttman and Wilner 1976).<sup>43</sup> Other business consultants specialized in the non-profit (hospitals, NGOs, universities and religious, cultural, and charitable organizations) sector, with a variety of different "tax-exempt" issues.

When the American market for business consulting seemed somewhat "saturated" in the 1970s and 1980s, the "profession" was exported to Europe and Asia (and American business schools saw a boom in foreign MBA students, demonstrating the symbiotic but ultimately complex, relationship between professional schools' need for tuition revenue and the danger of elimination of one market source for professional work).<sup>44</sup>

Thus, market conditions affected different 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 (transfer from "m and a" to bankruptcy and corporate reorganizations) there has

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<sup>41</sup> My law school devoted a large part of its annual retreat one year to discuss the impact of this growing "multi-disciplinary practice" on the job market and the legal education of our students. At the same time, the American Bar Association scurried to make rules prohibiting some aspects of multi-disciplinary practice to prevent even more competition for lawyers by accountants and business consultants, just another stage in the professional monopolization project. In England some of these issues had appeared earlier in competition for conveyancing work and the slow removal of the distinction between barristers and solicitors for rights of audience in courts.

<sup>42</sup> And post-Enron legislation in the United States now formally restricts certain combinations of services under one roof.

<sup>43</sup> Called by some "the shadow government."

<sup>44</sup> Legal education may be going through a similar process as many law schools (especially the bigger and more prestigious ones, like Harvard and my Georgetown home) derive revenue from increasingly large foreign LLM classes, but which may diminish the need for American lawyers abroad or those doing multi-national work.

been less evidence of this where large firms try to keep lawyers from all parts of the specialties in their ranks. Litigation patterns (and moves to cheaper in-house counsel from more expensive firm lawyers) seem to be highly correlated with economic cycles. As lawyers as corporate counselors, compliance monitors, tax advisers and now organizational and investment strategists (especially with that all powerful J.D-M.B.A joint degree<sup>45</sup>) compete with management consultants (with complex internal ethical rules and discipline muddying the waters) it remains to be seen who will win the competition for new forms of complex corporate and organizational work, but my money is on the more flexible, adaptive and entrepreneurial business consultants.<sup>46</sup> In some countries (first Australia, now the UK) restrictions on non-lawyer investments in law firms have been lifted so that the "market forces" of capital investments can be brought into law firms to finance and perhaps spur change. How much "multi-disciplinary" practice will emerge remains unknown. Multi-national business models applied to lawyering have brought us the modern development of "outsourcing" legal services to India, another form of business judgment that threatens American (but grows Indian) legal employment (Ballakrishnen 2013).

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

As another point of contrast, a new movement in the older profession of architecture has attempted to reframe the "doing" of architecture by renaming the field as one of "spatial agency" (Awan *et al.* 2011; <http://www.spatialagency.net>). By reconceiving the purpose of designing the use of physical space to include redesign of old spaces, to encourage more collaboration between "professional designers" and "users" of space, to solve problems of density in new urbanization, increased demographic diversification of common users, and relations of space to each other (habitation, food production and storage, childcare) and to work together to "make policy, as well as stuff," a world-wide collaborative of architects and planners, working through a web-site to share ideas and projects has attempted to reframe the work of its "profession." Having posted a number of actual projects and designs for new and old spaces and suggestions for physical

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<sup>45</sup> One suggested solution to the "are there too many lawyers" problem, of course, is to suggest more specialized education (law and engineering, law and business, law and planning,) through joint or dual degrees or as is emerging in countries where law is a first degree more secondary legal degrees with greater specialization. I do not know of any studies yet documenting whether second or specialized degrees in fact enhance employment possibilities.

<sup>46</sup> Other readers of this paper have reminded me of the resiliency of lawyers to invent new forms of legal actions, ("big" litigation for "big law firms, new causes of action for public interest and now human rights lawyers) and new partnerships, perhaps with business consultants and others, to continue to provide and expand legal services in new domains. Lawyers, like business consultants, have been highly adaptable to new market conditions, often creating their own new services and markets. And remember, of course, lawyers dominate many legislators so their ability to create new laws and new employment remains strong.

space issues, the “group” now seeks to document its work, through websites, books and shared projects to expand the conception of what it means to be an architect or planner. Though this very politicized reconception of a profession broadens the conception of what it means to be an architect, it also seeks some “deprofessionalization” of its expertise (a move that lawyers know well from the 1960s/70s de-legalization movement in the early days of consumer activism) to increase participation by those professionally trained and those with other skills and experiences, as well as end users of the physical space and designs – those who are “socially embedded in the built (or non-built) environment.”

As the present economic recession has decreased new building (in some, but not all parts of the world), the need for redesign of old spaces to solve new physical, social and economic problems 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 and credentialing, as well as training and education, new institutions and forms of education and collaboration have been designed to foster this kind of “collaborative” work in the design field. “Necessity,” as they say, “may be the mother of invention.”

What do these brief examples have to tell us about how legal education, legal problem solving and the legal profession might be altered so that lawyers too might be adaptable to changed conditions to make “more productive” use of their expertise?

Some of the younger generation of lawyers and recent graduates (those under or unemployed or unhappy with conventional legal practice) have begun some forms of new entrepreneurial activity to launch new sectors of legal or quasi-legal practice, 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 (Bornstein 2007).

At the level of community lawyering and in the underserved population, new ideas to create small new “incubator” law firms loosely linked across the country with like-minded practitioners in different regions in contiguous specialties (e.g. immigration, family relations, criminal law, small business, social welfare, civil rights, consumer law, rights advocacy, and community legal education) are emerging within some (newer and innovative) law schools or in heavily over lawyered but client underserved metropolitan or rural areas.<sup>47</sup> Some of the work to create and support new incubator community law practices are located within law schools (clinics, externships, mandated skills training) and others depend on fellowships (e.g., Skadden Public Interest Fellowship) from large law firms or other private sources or both financial and professional training support from foundations, committed individuals and other institutions. The Open Society Institute in the United States, for example, has over the years supported a wide variety of innovative lawyering projects, some focused on individual service with social change models and others focused on new forms of legal services delivery. If

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<sup>47</sup> Such incubator ideas have emerged at CUNY (Community Resource Network, New York) and my own new (University of California, Irvine) law school (see e.g., Boniwell and Rosenberg 2012), as a consortium of law schools seeks to expand this network. One of my students is active in creating a national website called Just Leap (Justice Through Legal Entrepreneurship and Access to Partnering, which hopes to digitally link experienced lawyers with younger ones for mentoring, advising and collaboration on cases, focusing on sharing resources, knowledge, training and advice, with the hope of adding “new blood” in groups of young lawyers to serve those who need access to legal services. Designers of the website hope to establish “crowd-sourcing” forms of information sharing and partnerships with older lawyers and younger lawyers forming start-ups in their communities, not unlike some of the efforts in the Spatial Agency website. Thank you Edgar Aguilosocho for your groundbreaking work. Washington and Lee Law School in Virginia has begun an innovative program in which third year students all serve in yearlong clinics, with mandated skills training to prepare students for practice, now called “practice ready” law graduates.

"necessity is the mother of invention," in this case there are two potentially overlapping "necessities" – service for the underserved desperately needing legal services and lawyers desperately seeking gainful and useful employment. Though others have suggested that older, now retired and very skilled lawyers might usefully serve the underserved (Galanter 1999), there is little evidence that this has occurred or fully satisfied the needs of the underserved. But the "old and in the way" might both train and facilitate entrance into the profession of the "new with no place to go."

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, neighborhood groups, religious groups, social action groups, workplaces) to explore other ways to organize for legal and social benefits and to work together. NIMBY land disputes (not in my backyard) still exist and may be pursued through conventional lawsuits, but communities and profit-seekers also get together more often (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. Mass disasters (Katrina, BP Spill, September 11) create needs for faster-than-the-legal-system can provide solutions and law students, young lawyers and creative legal actors have been active in pursuing a variety of new ways to deal with those needs. Larger workplaces (and many with recession based reductions in force) and new technologies may require new 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 all sorts of workplace reorganizations, including immigrant day labor sites, and collaborative collective bargaining processes, in both union and non-union settings (Menkel-Meadow 2011a), and organizational dispute resolution. In one innovative course at Georgetown, my colleague Tanina Rostain has lead a seminar of students who have developed new computer programs and platforms to provide simple legal advice on common legal matters to those who either may not have easy access to lawyers or who need more information before making legal decisions or seeking a particular kind of lawyer, combining legal expertise with a more interactive form of technology (Sloan 2012). 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.

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

In short there may be other places to practice and different ways to organize legal work and legal services.

## 5. Policy implications

For some time now I have found the question, "are there too many lawyers" somewhat off putting, if not downright offensive. Who is asking that question to suggest that we restrict access to a legal education and/or to the legal profession itself? There are a lot of people wanting to study law. Whether that study of law immediately results in employment in a high-paying large law firm or should result in any particular form of employment is a different question. Law is a general first degree in much of the world, so might it be in the United States. But even if it is an

expensive graduate degree, as long as there is truthful disclosure of employment data<sup>48</sup> and people can make informed choices about what they want to study, I can see the value of a law degree far exceeding immediate employment pay-offs. Other commentators have suggested that if we simply stop thinking of law as a special “profession,” but simply as a field of expertise, subject to the same vagaries of any other employment, with some specialized knowledge (and some ethical rules), the practice of law might more honestly face up to its modern economic challenges and begin to adapt, respond and perhaps innovate, as other fields of work have had to do (Morgan 2011, forthcoming).

Here are some of my observations about the relationship of legal knowledge, legal paradigms and legal education to the question about whether we have too many lawyers. First, law study may be an entry “portal” into a large number of other kinds of work – business, politics (either as a candidate or in the new profession of political consulting), policy work, government (non or quasi-legal work), NGO advocacy in both legal and non-legal settings, community, labor or other interest group organizing work<sup>49</sup>, creative work (start-ups of many kinds, including scientific, educational, economic and entertainment), real estate work, education (teaching others about the law, whether lay people or other law students), deal making and social entrepreneurship, and peace work (whether legal mediation or non-legal international or domestic), 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>50</sup>

Second, if there are “too” many or just “many” lawyers, maybe some reallocation might actually provide for some better distribution of lawyers to those who are currently underserved. 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 and to reallocation of services. How market efficient and sensitive the legal profession is continues to elude many of us, though judging from the radio advertising I am hearing in my community (the greater Los Angeles-Orange County area) there 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.

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

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<sup>48</sup> This is currently a big issue in the United States, both in terms of the lawsuits brought against a number of schools for allegedly “misrepresenting” their employment statistics, as well as in claims that law schools are falsely reporting employment data to the US News and World Reports ranking exercise.

<sup>49</sup> Remember President Obama began as a community organizer in Chicago before he went to law school, worked as a civil rights lawyer and then ran for office.

<sup>50</sup> Note I said “likely to be” not are.... Many lawyers and many with legal education do not necessarily perform their work admirably or with logic and justice, just because they have a legal education.

Fourth, some might use law study to change the way we think about the world – conventionally arguing for new or different laws, or, as has been my hope, to rethink law school as a school for social, political, economic and legal problem solving where, in the words of my “other” law school (Georgetown), “law is the means, justice is the end.”<sup>51</sup> Entrepreneurial (socially, legally and economically) new lawyers might just adapt, reconfigure and reconceive the work that lawyers do and see that there is more that people with legal education can do, not just for personal gain, but for the global society in which we live. With other ways to practice law (more conflict resolution, more diversity of the individual and organizational client base, with different forms of practice, and more sites and locations of legal issues, some policy based, some law-making, some transactional, some dispute resolving), there should be both more and different work for those who call themselves lawyers. The question then might be, not “are there too many lawyers?,” but are lawyers being socially productive and what are they doing? There is no one “right” way to practice law, as there most certainly is no one way to achieve social justice (Sen 2009).

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<sup>51</sup> Quotation on Law Library building, attributed to law student, but mostly likely derived from German legal jurispudent, Rudolf von Jhering's *Der Zweck im Recht* (Law as the Means, 1913).

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