

## Response to Gillian Hadfield's "Legal Infrastructure and the New Economy"

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### I. INTRODUCTION

If Gillian Hadfield's intention in writing "Legal Infrastructure and the New Economy"<sup>1</sup> was to spark thinking on the future of legal practice in the emerging wired age, she has succeeded admirably. She diagnoses several serious inadequacies in the legal representation available to clients in the high-tech industries around computing and the Internet, and puts them helpfully into the framework of "infrastructure," her term for the mix of people, rules, knowledge, and practice that is law as it exists in day-to-day application. So far so good. If her intention, however, was to suggest specific steps forward, then she was less successful.

Professor Hadfield breaks her argument down into three parts: first, she describes a new economy and suggests how its need for legal services will be different;<sup>2</sup> second, she explores the inadequacies of the legal services available to actors in the new economy, framing her discussion in terms of "legal infrastructure;"<sup>3</sup> and third, she points to restraints on the market for legal services which she postulates are the source of the inadequacies.<sup>4</sup> Even though I broadly agree with Professor Hadfield's suggestions and conclusions as separate

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<sup>1</sup> See Gillian Hadfield, *Legal Infrastructure and the New Economy*, 8 ISJLP 1 (2012).

<sup>2</sup> See *id.* at Part II.

<sup>3</sup> See *id.* at Part III.

<sup>4</sup> See *id.* at Part IV.

propositions, I do not think she has fleshed out or connected the points so as to make the case for their linkage in this context.

To begin, the challenges that Professor Hadfield identifies are in fact not wholly new. Older information industries like television and film evolved much of the light but effective contracting touch her general counsel subjects long for; they also faced some of the jurisdictional complexity she identifies. There are models on which to draw; models that suggest at least some of the infrastructure she is looking for can exist in the current legal ecosystem. And conversely, the market-based solutions she suggests are worthy, but do not really address the problems she is identifying. The solutions will have only limited impact on the problems she is addressing. To begin with, the solutions are also insufficiently bold. Her remedies could go much further in embracing the techniques of the New Economy to create even better solutions. To fully succeed, her project needs to be better informed about history, and bolder in looking to the future.

## II. AN “N” OF ONE—EXPERIENCES IN THE “OLD” ECONOMY OF FILM AND TELEVISION

Legal scholarship is notorious for often being only lightly tethered to facts. Unfortunately, Professor Hadfield’s initial data points about the dissatisfactions of general counsel are simply too anecdotal and limited to be convincing. She quotes five people from the technology industry and one from television who basically complain that they can’t get good help these days.<sup>5</sup> This claim may indeed be true, but an article that calls for major overhauls in the structure of the entire legal profession needs more support than this. She herself admits that her survey is “hardly a scientific sample,” and that her evidence is “partial and anecdotal.”<sup>6</sup> To successfully generalize the needs of a few general counsel as an indictment of the legal infrastructure as a whole, however, Professor Hadfield needs some additional data points.

By way of a somewhat contrary anecdote (and falling into the trap of a subjectively grounded assertion myself), I offer the single data point of my own experience, now largely twenty years in the past, as a practicing lawyer representing transactional clients in the entertainment industry, with a particular specialty in television. The list of requirements set out by Professor Hadfield as “new” in the

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<sup>5</sup> *Id.* at 3–5.

<sup>6</sup> *Id.* at 5, 29.

twenty-first century tech landscape resonates with many of the challenges faced by television in the twentieth century.<sup>7</sup> Of course there are differences, but the similarities are strong enough to allow comparison to most of Professor Hadfield's points on her list of how the new economy is transforming legal demand.

Her first pair of topics relates to jurisdictional boundary crossing,<sup>8</sup> and television was (and still is) an international business. It has markets and players around the world, and is subject to hard-to-reconcile inter-jurisdictional conflicts around regulations, content requirements, intellectual property, financial practices, and contracting standards. Sound familiar? Creating both individual knowledge and networks of expertise across these jurisdictional requirements was a challenge then, made even harder by the limitations of communication and search in a pre-Internet age. Some assets that made me, as a practitioner, reasonably attractive to clients were a useable knowledge of the international legal landscape and a stable of lawyers in the principal international jurisdictions whom I trusted to be able to help when greater local expertise was necessary. With the addition of the web I could probably have done better. What is ailing lawyers in the tech field?

The next cluster of topics relates to the complexity, speed, and individuality that characterize transactions in information.<sup>9</sup> While the details are of course different, transactions in the information industries of film and television had needs remarkably similar to Professor Hadfield's New Economy. Each production, after all, was (and still is) a *sui generis* project that required putting together tens, even hundreds, of quick, interlocking deals for rights, scripts, acting talent, music, technical help, etc. And talk about intolerance for legal expense—most productions operated on tight budgets, and the push to keep costs reasonable was a constant refrain I heard from clients.

Finally, Professor Hadfield lists a greater demand for integration of legal and business expertise.<sup>10</sup> This is a refrain heard from business clients in many industries and is an area where reform in legal education, to increase the exposure to business and financial concepts, would be very helpful. In the entertainment field, the quality of my

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<sup>7</sup> See *id.* at 18–23.

<sup>8</sup> *Id.* at 20–21.

<sup>9</sup> *Id.* at 21–22.

<sup>10</sup> *Id.* at 23.

own services to clients increased significantly as I grew more expert on the workings of the business itself. Many companies institutionalize this combined expertise in an in-house role called “business affairs.” When I teach Entertainment Law, I try to address the need for industry knowledge by devoting the first week of classes entirely to what the business is and how it works. I am also the co-author with Howard Blumenthal, a producer and executive, of a book called *This Business of Television*, which seeks to present law and business as mutually dependent subjects in a single work.<sup>11</sup> A feature of this book, by the by, is an appendix full of short form contracts and accompanying checklists aimed at allowing quick yet reasonably tailored responses to the contracting needs of a fast-moving industry.<sup>12</sup>

I do not mean to claim any special prescience or depth of insight for these efforts—rather just the reverse. There is an active entertainment bar with attitudes and capabilities similar to my own, and others have published good collections of reasonable contracting forms for film and television.<sup>13</sup> Furthermore, similar legal representation practices appear to be present in the construction industry.<sup>14</sup> Rather, my claim (sparsely supported as it may be) is that there are commonalities between the supposedly novel challenges of the “New Economy” and those faced by “older” media and entertainment clients, and that these common challenges were at least partly addressed by lawyers and clients in the “old days.” This claim, if true, has a mixed impact on Professor Hadfield’s argument. The fact that the challenges are long-standing in some ways adds strength to her call for further reform. However, my assertion that the existing system produced at least some workable solutions and the fact that these solutions are largely unaddressed in Professor Hadfield’s treatment, undercuts her argument that the existing infrastructure cannot meet the need and her call for regulatory change in legal practice as the best way to address these challenges.

### III. IS LEGAL INFRASTRUCTURE THE PROBLEM?

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<sup>11</sup> HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THIS BUSINESS OF TELEVISION* (Bob Nirkind ed., 3rd ed. 2006).

<sup>12</sup> *Id.* at 495–555.

<sup>13</sup> *E.g.*, MARK LITWAK, *CONTRACTS FOR THE FILM & TELEVISION INDUSTRY* (2d ed. 1998).

<sup>14</sup> *See* JONATHAN J. SWEET, *SWEET ON CONSTRUCTION INDUSTRY CONTRACTS* (5th ed. 2008).

After her analysis of the complaints of in-house counsel about getting good legal help for the New Economy, Professor Hadfield turns to the topic of her title: our “legal infrastructure.” She defines this as, “the accumulated stock of what legal actors—broadly defined—produce.”<sup>15</sup> Her thesis is that the current infrastructure is inadequate and that the gaps in demand and supply she points to in her anecdotes are evidence that it is not working as it should. In this, I am in agreement. What needs better evidence, however, is *why* the gaps exist. One of the characteristics of infrastructure is that it is frequently a *public good*, and not a private one. Economic theory suggests that an increasing reliance on market-based solutions of the kind ultimately proposed by Professor Hadfield may not be the best way to solve a public goods problem.

Turning again to Professor Hadfield’s approach, the supposedly failing model she most frequently invokes is that of large, well-funded companies seeking help from large, well-educated firms of lawyers—a model some call “Big Law.” Again, I can offer a partially confirming, partially contradicting example with an “N” of one, incorporating some small dose of experience from a generation ago. Before shifting to the entertainment practice I described above, which took place principally at a New York firm called Kay Collyer & Boose, I was an associate for two and a half years at the New York office of Cleary, Gottlieb, Steen & Hamilton, an archetypal example of the kind of astonishingly thorough, supremely careful, and very expensive law firm Professor Hadfield sees as out of step with the needs of the New Economy.

Hadfield asserts that these attributes of Big Law are defects, and in some contexts, like the New Economy, that may well be true. But that begs a question: if Big Law is so counterproductive, how did it come to exist? These behemoths are artifacts produced in, what is in fact, a very competitive free market, at least in the supplier-buyer relationship. Major and mid-sized law firms in locations across the country fight tooth and nail to land representation. No one puts guns to the heads of general counsel and says, “Hire Cravath.” There must be reasons why Big Law has, until recently, grown and prospered. Exploring these reasons needs to be part of the discussion Professor Hadfield urges on us.

The big firm model is, to a large degree, the product of corporate finance, an industry with needs very different from those identified by Professor Hadfield. In corporate finance, huge values are at stake in

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<sup>15</sup> Hadfield, *supra* note 1, at 25.

what are often individualized deals, and the risk profiles in transactions acceptable to clients are very different from those faced in daily business by innovative web-providers. The lawyer care that clients desire and are willing to pay for may indeed be well provided by Big Law in the corporate finance context. Furthermore, the desired certitude of interpretation on which financial transactions depend supports the kind of elaborate documentation of rules and contracts that Professor Hadfield criticizes. The deployment by a client of “over the top” lawyers can actually have its own value in this milieu. Evolutionary game theory reminds us that the huge rack of antlers that a mature, male elk carries about has its rationale. It may well be expensive to grow and it certainly inhibits supple movement, but it sends a signal of ability in a particular form of stylized combat that may be worth the cost in the escalating arms race of Darwinian “sexual selection.” Similarly, displaying and perhaps even using Skadden Arps in a takeover battle between corporate mastodons may be worth every penny. The fact that it would be an expensive error to deploy this kind of care and cost on a quick tech deal does not negate their value in a different context. Rather than a single legal infrastructure, what we probably need are diverse possibilities—including one that will meet the needs of the New Economy managers like Professor Hadfield’s high tech general counsel.

So, if we need a different infrastructure for players in the New Economy, how do we get there? To my ear, the complaints of the New Economy general counsel reflect their own failure in firm selection and task specification as much as a problem with suppliers. Many of the “missing bridges and roads”<sup>16</sup> Professor Hadfield speaks of would be built if the demand for them were unequivocally expressed and pursued by the client side. There are probably dozens, perhaps even hundreds of firms in the United States that would be interested in getting legal work from a company like Google and that have the potential for competently adopting a lawyering approach like that described by Professor Hadfield.

Even within the old model of firm-based representation, it would be possible to require firms that want this work to first present a portfolio of shorter form contracts that they feel comfortable using. Some firms may shy away from this, but I would be astounded if several were not willing to make the investment. And an increasing number of companies are asking the firms that represent them to lend associates and partners to the client for a specified time to learn the

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<sup>16</sup> See *id.* at 28–29.

business in just the ways Professor Hadfield calls for.<sup>17</sup> It does not take a restructuring of the capital investment rules in law firms, good idea as that may be, to make this possible, so much as a client willing to make service re-design a priority and to accept the consequences of occasional deal complications that might spring from decreased lawyer micro-attention.

#### IV. SOURCE OF REAL REFORM 1: PUBLIC GOODS DEVELOPMENT AND THE DISTRIBUTED APPROACHES OF THE NEW ECONOMY ITSELF

Seen in this light, Professor Hadfield's call for reforming the legal infrastructure for the technology industry is not so much a private goods problem to be solved by a better and cheaper source of supply in the dyadic client-lawyer relationship, but a public goods and coordination problem across the industry as a whole. If companies and the firms that represent them stand to gain some short term advantage from adding a documentation or negotiation complication to the transaction process, then they are likely to do so, even if the cumulative impact of this arms race, like the huge antlers of the elk, is a burden for the industry as a whole. A solution to this may require coordinated action across the many players in the industry to restrain short-term gain for long-term mutual benefit—the classic public goods scenario. This kind of problem may be best resolved by public-spirited gatherings and efforts by industry associations, or by the development of forms in non-profit contexts, like the Creative Commons licenses that have proved so useful. Relaxing law practice restrictions and investment rules, the steps advocated by Professor Hadfield, might help this process, but they are not central to it.<sup>18</sup>

Once again, it may be helpful to draw on the entertainment industry for examples. There, some of the short form usage is made possible by the existence of a high level of repeat play within a small group of industry actors that makes defection potentially costly. For instance, I have seen commitments of tens of millions of dollars supported only by a brief thank you letter from one CEO to another.

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<sup>17</sup> E.g., Lorelei Laird, *Lending Lawyers: Secondments Gaining Popularity*, CORPORATE COUNSEL (May 20, 2008), available at

<http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202421517914>.

Gina Passarella, *Loaning Out Lawyers to Get a Bigger Piece of the Corporate Pie*, CORPORATE COUNSEL (Oct. 27, 2006), available at

<http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1161767119173>.

<sup>18</sup> See Hadfield, *supra* note 1, at 50–57.

When I inquired about this to one of the in-house lawyers involved, the story was that they and the lawyers for the other company used to send fifty page forms back and forth, negotiating furiously. As it turned out, although these forms were seldom settled or signed, the deals went forward anyway, and eventually the lawyers just gave up and made sure at least a thank you was on file. And so the infrastructure evolved. This kind of non-law anchoring in film and television is also supported by the existence of a cadre of knowledgeable agents who act as repeat-play gatekeepers for all kinds of transactions. Another factor in promoting relatively cheap uniformity is the presence of strong unions whose basic agreements provide a framework of agreed complexity within which quick contracting in individual cases is possible. All of these structural elements have costs as well as advantages, but none of them requires a change in who can provide capital to a law firm.

#### V. SOURCE OF REAL REFORM 2: NETWORKS, CROWD-SOURCING, AND OTHER NEW ECONOMY APPROACHES

One of the discoveries of the New Economy is that there is wisdom not just in closely held and selected experts, but also in disbursed individuals acting alone or through loosely organized networks, often motivated by rewards like acclaim or prizes. The New Economy might find Professor Hadfield's innovative solutions to transaction documentation in a contracting wiki, through a prize competition, or in some other harnessing of the power of networks. These approaches are notably explored by Yochai Benkler in his book *The Wealth of Networks: How Social Production Transforms Markets and Freedom*,<sup>19</sup> which is itself available not only on a paid basis through traditional publishing, but also through a gratis download available in many formats. One of the benefits of such networked solutions is that they can be tailored to help solve public goods problems that might stymie traditional market-based transactions.

Paying for it can still be a help, however, even on the web. Would Professor Hadfield's general counsel be willing to set up a private representation market where the company puts contracts out to bid among a pre-cleared group of service providers and then lets competition, through some kind of purpose-designed auction, select who gets the job? Amazon Mechanical Turk does this for minor,

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<sup>19</sup> YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

routine tasks, but sites like *Elance.com* offer professional services “in the cloud.”<sup>20</sup> In such a context, Professor Hadfield’s suggestion for relaxing the licensing rules on providers might have a greater role to play in creating a market, although the gatekeeper and quality control function governing whom the general counsel is willing to let into the auction would have to be addressed by some other means.<sup>21</sup> In his book *The End of Lawyers? Rethinking the Nature of Legal Services*, Richard Susskind explores some of what this market might look like and the rule changes that would be necessary to unleash it on the world.<sup>22</sup> And general counsel like United Technology’s Chester Paul Beach, Jr. are already putting portions of this approach to work in his company’s corner of the New Economy.<sup>23</sup>

## VI. CONCLUSION

Professor Hadfield’s “Legal Infrastructure and the New Economy” usefully identifies problems in the infrastructure of legal practice that render it less helpful than it should be in meeting the structuring needs of players in the new economy. Her overall argument would be improved, however, by comparisons to industries where at least some of her concerns have been faced and at least partly addressed in the legal infrastructure that has evolved to serve them. Furthermore, her suggested free-market solutions may be worth pursuing, but on examination they seem at best tangential to ameliorating the problems identified in her paper. Rather, successful solutions should reflect the public goods nature of the problems and should make bolder use of the new models for productive work that are emerging from the New Economy itself.

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<sup>20</sup> ELANCE, <http://www.elance.com> (last visited Feb. 17, 2012).

<sup>21</sup> See Hadfield, *supra* note 1, at 57–59.

<sup>22</sup> RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2008).

<sup>23</sup> Webcast: Future Ed Conference: New Business Models for U.S. and Global Legal Education, Panel 1, held by New York Law School and Harvard Law School (Apr. 9, 2010), <http://nyls.mediasite.com/mediasite/SilverlightPlayer/Default.aspx?peid=11c4b60a82cc4af6a5dadobdc29c2e9e1d> (remarks of Chester Paul Beach, Assoc. Gen. Counsel of United Techs. Corp.).

