

## The Hadfield Tunnel: A Comment on “Legal Infrastructure and the New Economy”

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*Abstract: Professor Gillian Hadfield describes an aspirational world in which general counsel of a subset of Silicon Valley enterprises would evaluate legal rules and practices so that the only rules and practices applicable to their industry would reflect what those dominant players deem appropriate for themselves.<sup>1</sup> This is an interesting approach, to be sure, though one not entirely unfamiliar to those with a recollection of late nineteenth-century American history. Then and now, however, it is an approach difficult to square with the Rule of Law, democracy, and the public interest. And while in some circles the Rule of Law, democracy, and the public interest are believed to be characteristic of advanced civilizations, they appear to be of no concern to Professor Hadfield. Rather, she seems content with a scholarly stroll through a caricatured version of the Silicon Valley, collecting anecdotes and embracing a mission to advance the interests of those with whom she chatted along the way. That said, and in what must be record time, please allow me to digress.*

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

## I. AN EARLY DIGRESSION

Nearly forty years ago, I arrived at Brasenose College, Oxford, and immediately descended into a deep funk. I was homesick and not prepared for the social challenges of the single-gender college environment in which I found myself. The playing fields and dreamy spires took me only so far along the road to redemption. They needed a supplement, and I found it in the College's Stallybrass Law Library, which had a nearly complete set of the *Harvard Law Review* dating back to its nineteenth century origins. I fell in love with that dusty old collection. The Forewords were my favorite: Hart, Wechsler, Bickel. I was young and frisky. Those were the days, my friends.

As luck would have it, a few years later I was elected to serve as Editor-in-Chief of the *Yale Law Journal*, and I naturally and quite adroitly reoriented my affections. I relegated my early tryst with the *Harvard Law Review* to the otherwise empty dustbin labeled "My Past Romances." Oh, did I love the *Journal*. I gave my heart and soul to good old Volume 87, as did an entire team of memorable contemporaries. Truth be told, I love the *Journal* to this day. The thought of that white cover with blue accents just gets my juices flowing. Matters of the heart—who can figure?

In light of this amorous past, it pains me to no end to answer the following question: "If you had one law review article to take with you to a desert island for the rest of your days—now we're talking true romance—what would it be?" A candidate from the *Yale Law Journal*? Try "The New Property" by Charles Reich.<sup>2</sup> A worthy submission from the *Harvard Law Review*? How about "The Passive Virtues" by Alexander Mordecai Bickel?<sup>3</sup> Sorry *HLR* and *YLJ*. The winner hands down is that work of transcendent beauty and timeless appeal: Arthur Leff's devastating critique of Richard Posner's *Economic Analysis of Law* in—I feel such a cad to say this—the *University of Virginia Law Review*. Sorry, but Leff's review—"Economic Analysis of Law: Some Realism About Nominalism"<sup>4</sup>—is the Venus de Milo of law review literature.<sup>5</sup>

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<sup>2</sup> Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

<sup>3</sup> Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 *HARV. L. REV.* 40 (1961).

<sup>4</sup> Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 *VA. L. REV.* 451 (1974).

<sup>5</sup> I do appreciate that at times like this a citation to *Aside, The Common Law Origins of the Infield Fly Rule*, 123 *U. PA. L. REV.* 1474 (1975), is obligatory. But while surely a fun read, I'm afraid that it's simply not desert island material.

Leff, who sadly departed this world at an early age, wrote that Posner's approach to legal scholarship—viewing all that he saw through the lens of economic analysis—naggingly reminded him of another art form. What was it? Of course, Leff concluded, Posner was emulating the picaresque novel with its eponymous heroes. Leff put it:

Think of the great ones, *Tom Jones*, for instance, or *Huckleberry Finn*, or *Don Quixote*. In each case the eponymous hero sets out into a world of complexity and brings to bear on successive segments of it the power of his own particular personal vision. The world presents itself as a series of problems; to each problem that vision acts as a form of solution; and the problem having been dispatched, our hero passes on to the next adventure. The particular interactions are essentially invariant because the central vision is single. No matter what comes up or comes by, Tom's sensual vigor, Huck's cynical innocence, or Don's aggressive romanticism is brought into play, forever to transform the picture of the pictured world (without, by the way, except *in extremis*, transforming the hero).<sup>6</sup>

Almost parenthetically, and before he proceeded to flay Posner's worldview, Leff asked: "[W]hat pressures in contemporary legal scholarship might be responsible for the appearance, now, of four hundred pages of tunnel vision and, assuming one could answer that, why this particular tunnel?"<sup>7</sup>

What pressures indeed?

In fairness, and with profound appreciation, I note that Professor Hadfield's tunnel isn't four hundred pages long.

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<sup>6</sup> Leff, *supra* note 4, at 451–52.

<sup>7</sup> *Id.* at 452.

## II. A VISIT TO PROFESSOR HADFIELD'S ODD TUNNEL

### A. PROFESSOR HADFIELD'S EPONYMOUS HERO

Professor Hadfield's eponymous hero is the new economy, whose enterprises' core characteristics she contrasts with relics from the Old Economy, as follows:

1. "[T]he prototypical old economy enterprise is fixed and stable—with identifiable boundaries—[while] the prototypical new economy enterprise is dynamic and fluid, its boundaries indistinct."<sup>8</sup>
2. "The old economy firm trades products across its boundaries—inputs from suppliers, outputs to buyers—and is regulated at its boundaries. The new economy firm is deeply networked and highly integrated at the transaction level with a web of suppliers, consumers, regulators, investors, researchers and so on."<sup>9</sup>
3. "The old economy firm is domestic. The new economy firm is global."<sup>10</sup>
4. "The old economy firm makes its decisions in a relatively stable and insulated environment, with uncertainty coming in the form of exogenous shocks. The new economy enterprise makes its decisions in a constantly changing and open environment; uncertainty is pervasive."<sup>11</sup>

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<sup>8</sup> Hadfield, *supra* note 1, at 18.

<sup>9</sup> *Id.*

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

<sup>11</sup> *Id.*

5. “The old economy firm is planned; the new economy enterprise is reactive and emergent.”<sup>12</sup>

6. “The old economy firm is a box; the new economy firm is a network.”<sup>13</sup>

7. “The old economy firm is G.M. The new economy enterprise is Google.”<sup>14</sup>

In short, old economy firms are Joan Rivers while new economy firms are Lady Gaga.

### B. SOME INCONVENIENT TRUTHS

With apologies to a notable Silicon Valley venture capitalist, Professor Hadfield’s reductionist description of the Old and New Economies—creating a binary world that she apparently visits on scholarly adventures—ignores a boatload of inconvenient truths, all of which blur the distinction she wishes (and needs) to create and only some of which are noted here:

1. Professor Hadfield’s interdisciplinary approach apparently does not count history as within the curriculum. If it did, she might discover a couple of Old Economy icons known in times past as “Ma Bell” and “Bell Labs.” They crossed so many boundaries that the government finally had to break them up before they ran the world. Were they innovative? As a law firm lawyer, I am apparently the last person on earth who would know what counts as innovative. But my hunch is that Information Theory, UNIX and other fundamental discoveries would be regarded as innovative, even in Professor Hadfield’s new economy.<sup>15</sup> And rewind the reel several generations to

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> PRESCOTT C. MABON, MISSION COMMUNICATIONS: THE STORY OF BELL LABORATORIES 49, 178 (1975).

the era of Edison and his laboratory. Again, as a law firm lawyer, I'm apparently innovation-challenged, but my instinct is that the light bulb, direct current versus alternating current, the phonograph record, and so on probably count as innovative.

2. Stellar and innovative technology companies—think Cisco, Microsoft, and Apple for a start—sell products within as well as across boundaries. They have supplier problems. They have customer problems. Their products can be pirated and their intellectual pedigrees infringed. They are regulated at their boundaries and at national borders. Is Professor Hadfield relegating them to the Old Economy? And what about Google? With its announcement that it will pay \$12.5 billion for Motorola Mobility,<sup>16</sup> a maker of smart phones, it too will be entering the physical world of moving atoms as well as bits.<sup>17</sup>

3. According to their 2010 Annual Reports, nearly two-thirds of DuPont's sales revenue was not domestic;<sup>18</sup> nearly three-fourths of General Motors' total vehicle sales volume was not domestic;<sup>19</sup> and over half of General Electric's revenue was not domestic.<sup>20</sup> Are these global enterprises perforce part of Professor Hadfield's new economy? Yet fully half of Google's revenue was domestic.<sup>21</sup>

4. Innovation, dynamism, reactive nimbleness, and fluidity—to the extent that these terms can be defined,

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<sup>16</sup> Steve Lohr, *Google Goes Hardware Shopping*, N.Y. TIMES, Aug. 21, 2011, at SR9.

<sup>17</sup> See NICHOLAS NEGROPONTE, BEING DIGITAL (1995) (predicting a world in which the focus would be on moving bits and not atoms).

<sup>18</sup> E. I. du Pont de Nemours & Co., Annual Report (Form 10-K), 17 (Feb. 8, 2011).

<sup>19</sup> Gen. Motors Co., Annual Report (Form 10-K), 50 (Mar. 1, 2011).

<sup>20</sup> Gen. Electric Co., Annual Report (Form 10-K), 47 (Feb. 25, 2011).

<sup>21</sup> Google Inc., Annual Report (Form 10-K), 31 (Feb. 11, 2011).

and Professor Hadfield makes no attempt to do so—are hardly unique to what she describes as the new economy. As she strolls through the Silicon Valley, Professor Hadfield needs to rub the stardust from her eyes. These are characteristics of the twenty-first century global economy. They are endemic to all markets and embedded within all successful enterprises, no matter the industry or sector; even—heaven forbid—law. The impact of globalization and the Internet is not felt exclusively within certain precincts of the technology sector, and market-driven adaptations to that impact are continuous and dynamic throughout all sectors of the economy. And again, from an historical standpoint, is the impact of the Internet on the nature and pace of economic enterprises all that different from the impact of the automatic telegraph or the telephone? Even assuming, *arguendo*, that Edison and Bell were a couple of Old Economy dinosaurs, just because life now moves at 10,000 miles per hour instead of 9,000, does this mean that the impact is greater than that which was felt accelerating from 10 to 100 miles per hour? Those dinosaurs rocked.

5. Contrary to her unsupported contention, “uncertainty” is indeed pervasive outside what Professor Hadfield calls the new economy, and “exogenous shocks”—again undefined—are felt by her new economy firms just as much as by others. I would suggest, for example, that when Google encountered governmental opposition in China<sup>22</sup> (followed, as happens in markets, by Microsoft’s effort to fill the search engine vacuum in the PRC)<sup>23</sup> it experienced an exogenous shock. In a binary world of exogenous and endogenous, that has to count as exogenous, right?

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<sup>22</sup> Jessica E. Vascellaro & Loretta Chao, *Google Runs into China’s ‘Great Firewall,’* WALL ST. J., Mar. 31, 2010, at B1.

<sup>23</sup> Anupreeta Das & George Stahl, *Digits / Insights from WSJ.com: Baidu Seeks Out Bing,* WALL ST. J., July 5, 2011, at B5.

6. Planning, contrary to what Professor Hadfield suggests, occurs in her new economy as well as in her Old Economy enterprises. But perhaps Professor Hadfield didn't mean *planning qua planning*, but rather meant that *planning qua planning in shorts, flip-flops, and tank tops doesn't count as planning*. The latter *qua* and not the former *qua*, as it were. More to the point, I suspect that new economy enterprises that build giant and fabulously complex data centers and server farms engage in old-fashioned planning when doing so.

7. Except at faculty teas of economics departments, the universe of metaphors for economic actors is not composed exclusively of boxes and networks. Really, and in an important way, those metaphors are so old school as to be familiar across the centuries to Marconi, Westinghouse, and Ford. There's only one definitive metaphor for any successful economic enterprise in the twenty-first century, and that's the human brain. I'd encourage the reader to think about that, but to do so might suggest a fondness for circular thought.

8. Companies fairly described as "emergent" are thankfully abundant across industry sectors and are not located exclusively in Professor Hadfield's new economy. And I wonder where within her artificially binary world Professor Hadfield would locate biomedical, robotic, and other cutting-edge enterprises that are at once emergent in development and perspective—Old Economy or New?

Here's the most inconvenient truth of all: My law firm (among many others) is global, integrated, dynamic, fluid, reactive, nimble, unplanned, networked, open, and innovative; our commerce is conducted across boundaries and borders in the form of ideas and information. Are we—get a grip here—a new economy enterprise? In fairness, my law firm is also trustworthy, loyal, helpful, friendly, courteous, kind, obedient to clients, cheerful, thrifty, brave, clean and



reverent, and no one has accused us of being a Boy Scout troop. The reverent part, as I think about it, might be shaky.<sup>24</sup>

### C. PROFESSOR HADFIELD'S NON-EPONYMOUS HEROES

Professor Hadfield appears also to have two heroes of the not eponymous variety.

The first is a composite figure of a general counsel that emerges piecemeal from interview snippets with in-house counsel at Silicon Valley technology companies. These interviewees can be found at companies with extraordinary revenues, net income, and market capitalization. Their legal budgets, from the perspective of mere mortals, must look like the GDP of France. Yet they say that they can't identify legal counsel who will approach things their way. They need two-page contracts off the shelf, for example, not ten pages or more of bespoke contracts. "How," they wonder, can they provide their "legal teams[, inside and out,] the right incentives in contracting . . .?"<sup>25</sup> Here's a hint: Waive any malpractice claims against your lawyers and my guess is that they will get your contracts down to one page. It seems that our non-eponymous, composite hero wants the work product, reputation and independence of law firms to be able to say that he or she has reduced or externalized risk but then wishes to criticize the firms for playing this role and expecting to be paid at market. There is, however, an alternative: own the risk and keep the work in-house. Or, to be really devilish, incent outside lawyers with a success fee based on how little work product they generate, not how much. Any experienced lawyer knows that it costs more to produce a short document of better quality than a long early draft that covers all bases multiple times. Put another way, law firms adapt quickly to market incentives, and my educated guess is that they will respond in a Silicon Valley minute to a well-funded consumer preference.

Second, although she doesn't mention him, Professor Hadfield is clearly a member of the George Bernard Shaw Fan Club. Professor Hadfield apparently shares the Shavian view that "[a]ll professions are

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<sup>24</sup> It's interesting that the debate in law firm circles focuses not on whether law firms should be global but on how integrated global law firms should be. My firm sides with those that maintain that full integration is crucial, even though more difficult to execute. See Peter Kalis, *Grand Illusion*, THE AMERICAN LAWYER, May 2011, at 49. Compare Chris Johnson, *Taking on the World*, THE AMERICAN LAWYER, Mar. 2011, at 70.

<sup>25</sup> Hadfield, *supra* note 1, at 3.

conspiracies against the laity,”<sup>26</sup> or at least that portion of the laity that resides between San Jose and San Francisco. Her selected clients “complain (rightly so), about spiraling legal fees . . .,” says Professor Hadfield.<sup>27</sup> Really? “[R]ightly so,” Professor Hadfield? Is that a scholarly conclusion or a cheap shot calculated to cultivate favor with the anecdote-generating general counsel who populate her new economy? What could Professor Hadfield possibly know about pricing within the market for legal services that would trump that which the market itself knows? Law firms price at market. There’s a shock. Lawyers and clients—suppliers and customers—verbally joust and otherwise interact to define where supply intersects demand. (Sometimes they speak through academic surrogates.) Push and pull. That’s the nature of markets. It’s funny how economists tend only to use the market as a sword and rarely—to mix metaphors—as a lantern.

#### D. PROFESSOR HADFIELD’S VILLAINS

Professor Hadfield also has two villains.

The first is democracy, or at least government. What else could explain her contempt for lawyers who place “almost exclusive reliance on mandatory legal rules imposed by public actors”?<sup>28</sup> Is it better to ignore these byproducts of democracy than to exhibit “a heavy reliance on densely-worded and complex statutes, regulations and contracts?”<sup>29</sup> Apparently so. Rules and courts—who needs these complications in the new economy? The Rule of Law? Come on. Just let the kids have fun. Robert Frost said that “[w]riting free verse [was] like playing tennis with the net down.”<sup>30</sup> Eliot said “yep,” and reached for his racket and immortality.<sup>31</sup> And so it goes in Professor Hadfield’s new economy. Tennis anyone?

The second is sovereignty. Can you imagine that nations actually regulate commerce at their borders and in their national interests?

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<sup>26</sup> GEORGE BERNARD SHAW, *THE DOCTOR’S DILEMMA* ACT 1, 116 (1965).

<sup>27</sup> Hadfield, *supra* note 1, at 2.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *THE WORDSWORTH DICTIONARY OF QUOTATIONS* 134 (Connie Robertson ed., 3d ed., new rev. 1998).

<sup>31</sup> T. S. ELIOT, *THE WASTE LAND* (1922).

new economy players have to “face trade and customs regulations at the borders,”<sup>32</sup> for crying out loud! Surely her new economy’s global information dominion should trump the sovereign power of China, the world’s largest country and second largest economy. And what about our own International Trade Commission, with the fastest growing intellectual property docket in the world?<sup>33</sup> Shouldn’t the United States just back off and let infringing products flow into our markets? That idea should play well in the Silicon Valley. Just think—Silicon Valley inventors could dedicate their lives to projects pro bono publico and venture capitalists on Sand Hill Road could retreat en masse into philanthropy. Not in this lifetime, I’m afraid.

#### E. VENUS, MEET MARS

Here’s Professor Hadfield’s view of the legal profession: “The practices and expertise of legal practitioners are honed within the bounds of an insulated profession that faces little competition, controls access and education, and determines what, where, and how legal goods and services can be offered.”<sup>34</sup> Reluctant as I am to draw upon practical experience to counter theoretical constructs, I frankly have no idea where Professor Hadfield’s description of my industry comes from. It’s not the industry that I compete within every day of my life. I know that much.

##### 1. AN INSULATED PROFESSION THAT FACES LITTLE COMPETITION?

My global law firm—dozens of offices on multiple continents housing 2,000 lawyers—competes against hundreds of other law firms: other global law firms, national law firms in dozens of different countries, regional law firms, boutique law firms, sole practitioners, Wall Street law firms, and Magic Circle law firms—any one of which can reinvent itself or its offering to address market opportunities. That process of reinvention is continuous. And we compete against other market participants: legal process outsourcers, business process outsourcers, accounting firms, electronic discovery firms, document vendors, contract lawyers, investment banks, human relations firms,

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<sup>32</sup> Hadfield, *supra* note 1, at 3.

<sup>33</sup> Joseph Rosenbloom, *Making Their Move at the ITC*, THE AMERICAN LAWYER (INTELLECTUAL PROP. SUPP.), Spring 2011, at 9–10.

<sup>34</sup> Hadfield, *supra* note 1, at 8.

mediation firms, consulting firms in countless disciplines, and a variety of other emergent enterprises. And what about corporate law departments, including the ones controlled by Professor Hadfield's non-eponymous heroes? We compete against our own customers for the same work! What other industry can say that? We even compete against ourselves—partners depart law firms every day of the week to reinvent themselves and compete against their former partners without meaningful legal restriction in the United States. The sheer size and diversity of viewpoint in this group of advocates—totaling in excess of 750,000 lawyers in the United States alone, and not counting the hundreds of thousands of non-lawyer competitors—ensure unrelenting competitive innovation that lawyers and law firms ignore at their peril. No competition indeed.

## 2. A PROFESSION THAT CONTROLS ACCESS AND EDUCATION?

Would that it were so. In Professor Hadfield's world, the "profession" must be monolithic and incapable of sustaining intensely different points of view. Believe me, if I controlled legal education, we wouldn't be subsidizing massively incoherent babble that emanates from the academy. The only inviolable border within the legal profession of which I'm aware is that which surrounds tenured law professors. Can no one write like Leff, Bickel, and Wechsler anymore? Would law schools please produce a student who can analyze *Hadley v. Baxendale*?<sup>35</sup> Is that too much to ask? Deconstructing the canon is fine, don't get me wrong. But for clients, shooting the cannon is even better, and we need young lawyers who understand the ammunition at their disposal. An appreciation for the common law—which, as expressed through English-language opinions, supplies not only the legal framework but also the market narrative for much of global commerce—would be a good place to start. And "controls access" to what? I suppose "the profession" controls access to courts, at least to a degree. But how much of what constitutes the practice of law in the twenty-first century gets played out in court? Professor Hadfield apparently would prefer a world with no attorney-client privilege. I hope that she never gets drawn into a legal dispute or transaction of consequence, as happens from time to time, even in her new economy.<sup>36</sup>

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<sup>35</sup> *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854).

<sup>36</sup> *E.g.*, Thomas Catan, *Google Defends Itself Amid Probe*, WALL ST. J., June 25–26, 2011, at B1.

### 3. A CLOSED LEGAL SERVICES MARKET THAT IMPOSES FUNDAMENTAL BARRIERS TO ENTRY?

Let's explore for a moment Professor Hadfield's imaginary profession of law with its sharply defined boundaries. She assumes, without much discussion, that "the practice of law," whatever that means in the twenty-first century, is in fact restricted to lawyers. "The obstacle this imposes to the use of private contracting methods to develop alternative mechanisms for supplying legal inputs"<sup>37</sup> is a substantial barrier to innovation. Huh? No one forces the general counsel of one of Professor Hadfield's new economy companies to use lawyers, much less outside lawyers. Let the chief financial officer handle the next corporate acquisition with the attendant contract drafting, domestic regulatory approvals, securities disclosures, antitrust filings, employment contracts, executive compensation arrangements, intellectual property review, international regulatory compliance, due diligence, and so on. Or, if that work is below the CFO's pay grade, how about the corporate chef or, if we're looking for cinematic inspiration, the corporate gardener?<sup>38</sup> Could it be that, while not all of a lawyer's daily legal tasks rise to the level of neurosurgery, some in fact do? At the very least, could it be that just as much training, experience, and expertise are required to successfully negotiate and consummate a complex merger as to perform liposuction? Both state bar associations and the American Medical Association regulate professional services to protect against unpleasant economic and anatomical surprises. While a company doesn't have to use a lawyer for many tasks composing "the practice of law," if it does it should be able to rely on certain baseline expertise. Caveat emptor, Heroic Ones.

### 4. AND THE PROFESSION CONTROLS WHERE, WHEN, AND HOW LEGAL GOODS AND SERVICES CAN BE OFFERED?

I do not even know what this means. I do, however, know this: There are few industry sectors with less defined boundaries—which, wherever they are located, are invaded daily by new market entrants—

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<sup>37</sup> Hadfield, *supra* note 1, at 55.

<sup>38</sup> In *BEING THERE* (United Artists 1979), Chance the Gardener easily morphed into Chauncey Gardiner and left us with the memorable economic insight: "Yes! There will be growth in the spring!" In the new economy, anything is possible.

than law. There's no intellectual property protection for what I do, no matter how original. Try out that concept in the Silicon Valley.

#### F. THERE'S NO CRYING IN THE REAL SILICON VALLEY

Professor Hadfield's whiny new economy bears little resemblance to the Silicon Valley enterprises that advanced law firms represent and oppose on a daily basis. There is no group of corporate counsel more intensely focused on securing their enterprises' rights under the existing legal system or more successful in doing so. They tend to be winners within that legal system—in its courts, its legislatures, its regulatory agencies, and its conference rooms—and they are admired for their business and legal acumen. Are they frustrated by aspects of the legal underbrush that they must plow through on a daily basis—an underbrush that slows down business decision making, imposes unnecessary costs and leads to inbred risk aversion among both lawyers and business people? I imagine so, just as steel manufacturers bemoan the excesses of the Environmental Protection Agency with its baroque regulatory output. But they plow on brilliantly and they have learned, as their forebears over the last century learned before them, that once they successfully plow through the legal and regulatory underbrush their proven ability to do so becomes a market advantage.<sup>39</sup>

### III. LAWYERS AND CLIENTS IN THE TWENTY-FIRST CENTURY

The commercial world of the twenty-first century imposes three defining challenges on business enterprises, almost regardless of industry sector. These challenges largely dictate the shape of the global legal profession and its value proposition to business clients. Law firms that align themselves to help their clients meet these challenges have a lower coefficient of friction as they hurtle through the twenty-first century. Lower friction doesn't mean lower cost. It

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<sup>39</sup> Whenever I hear leading enterprises rail against excessive regulation, I recall Gabriel Kolko's contention that J. Ogden Armour favored enactment of the Meat Inspection Act of 1906 because compliance costs imposed by the Act constituted a barrier to entry by new participants. See GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM* (1963), reprinted in ROBERT L. RABIN, *PERSPECTIVES ON THE ADMINISTRATIVE PROCESS* 73 (1979). "The reality of the matter . . . is that the big packers were warm friends of regulation, especially when it primarily affected their innumerable small competitors." *Id.* at 78. This presumably is not exactly what Upton Sinclair had in mind. See UPTON SINCLAIR, *THE JUNGLE* (Doubleday, Page & Co. 1906). I know, I know—meat packing is Old Economy.

means higher value. This is a distinction—cost versus value—that Professor Hadfield would be wise to grasp.

The first of these challenges is the movement of people, products, services, capital, and ideas across national borders. Professor Hadfield has the luxury of wishing sovereignty away. Clients don't. Enterprises need advice on this side of the border and on the other side of the border. And they need advice on how to cross the border efficiently and in compliance with all applicable legal rules. This is highly sophisticated advice, for which years of education and experience are required, and the market compensates handsomely the professionals who add value in this way.

The second is the ratchet-like interventions of governments around the world into private markets. These interventions are not so much the product of partisan impulse as they flow from the expansion of knowledge upon which those with a public mission—regulators and legislators—can draw when discharging their public duties. This happens not only in Washington, but also in Beijing, Berlin, Brussels, Brasilia, London, Paris, Tokyo, and other world capitals; and it happens in Albany, Austin, Harrisburg, Sacramento, and other state capitals. Depending on their content, these regulatory and legislative interventions can be deadly or energizing for enterprises and entire industries, and professionals with the experience and insight to ethically influence regulatory and legislative outcomes are, alas, also handsomely rewarded.

The third defining challenge relates to the creation and protection of intellectual property. This is the sweet spot of the technology sector. Microsoft, Apple, Cisco, Oracle, Google and others have distinguished themselves in the intellectual property field. Their business models are predicated in part on the care and feeding of intellectual property. This requires a legal system that promotes and protects inventions, and it equally requires the help of highly trained and experienced intellectual property lawyers. Even outside the technology sector, venerable industries rely on the same foundation of innovation housed within intellectual property. When I started law practice in 1980, ten person-hours were required to produce a ton of finished steel.<sup>40</sup> Now two hours are required.<sup>41</sup> Are steelworkers five times as

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<sup>40</sup> AM. IRON & STEEL INST., PROFILE OF THE AMERICAN IRON AND STEEL INSTITUTE 2010–2011 4, *available at* [http://www.steel.org/~media/Files/AISI/About%20AISI/Profile%20Brochure%20F-singles\\_CX.ashx](http://www.steel.org/~media/Files/AISI/About%20AISI/Profile%20Brochure%20F-singles_CX.ashx) (last visited Feb. 17 2012).

<sup>41</sup> *Id.*

strong? Innovation is also at the cultural core of this smokestack industry whose global competitors operate on razor-thin margins. Lawyers who know how to participate in the creation and protection of strategically important intellectual property are in demand regardless of sector.

The legal profession of the early twenty-first century resides at the intersection of globalization, regulation, and innovation. This is the legal marketplace in which the modern law firm and its clients compete. It is a world that, on her next scholarly adventure, Professor Hadfield may well wish to visit.

#### IV. WHAT'S MISSING? LAW AND MARKETS

What I find most baffling about Professor Hadfield's thesis is its obliviousness to market forces. By grouping together all legal service providers in a single static construct, she denies the possibility that market players—many of whom are lawyers and law firms and many of whom are not—will compete with each other, adapt, and meet the dynamic requirements of the evolving twenty-first century economy. By assuming that the legal industry has rigid boundaries, she leaps efficiently to a flawed conclusion without evincing any knowledge that those boundaries, even if they in fact exist in the twenty-first century, are transgressed daily. And by ignoring the symbiotic influences of markets and legal rules she sucks the breath from a legal system that happily is very much alive and well today—if not in a form entirely recognizable to the practitioner of twenty years past or hence.