

## INAUGURAL ARTICLE:

# REFORMING KNOWLEDGE? A SOCIO-LEGAL CRITIQUE OF THE LEGAL EDUCATION REFORMS IN JAPAN

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## I. INTRODUCTION

The founding of a new law review is an opportunity to reflect on the wider purposes of legal education. This is increasingly a comparative question as law becomes a transnational field of practice, and the American model of legal education is emulated around the world. Consider the case of Japan. In April of 2004, a new so-called “Law School” (*rosukuru*) system was introduced. For over a century prior to this reform, legal education had been provided at the undergraduate level on the European civil law model. As many commentators have enthusiastically noted, the primary model for the new law school system was without a doubt the American law school system.<sup>1</sup>

Legal education now must be understood as engaging theoretical debates in the law and demanding analysis using a range of sophisticated interdisciplinary tools. Traditionally, debates about legal education have been considered practical

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1. See, e.g., James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional into Legal Education*, 13 PAC. RIM L. & POL'Y J. 303, 313 (2004). Why Japan would so enthusiastically embrace the U.S. model is a complex question much-discussed in the social science literature. See, e.g., Eric Feldman, *The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-first Century Japan*, 27 MICH. J. INT'L L. 743, 749 (2005) (discussing the role of Western models in social and political reform in Japan more broadly).

questions with relatively little theoretical import. But the explicit aims of the Japanese government's legal education reforms encourage analysts to think in much broader terms about the place of law and legal institutions in society, and about the relationship between democracy, market efficiency, and legal expertise.<sup>2</sup> According to the government and to numerous academic commentators, the introduction of the new law school system constitutes the most important element of a massive reform of the entire Japanese justice system, which, in turn, is widely considered to be nothing less than "the final linchpin" of a structural reform of the entirety of Japanese society.<sup>3</sup> This structural reform aims at transforming Japanese society from a so-called advance-control type society, in which the government dictates private parties' behavior in advance, to a so-called after-the-fact review/remedy type society based on the idea of personal responsibility, in which private parties choose their course of action and face the consequences of those actions in the form of private lawsuits or public sanctions after the fact.<sup>4</sup> It is presumed that this massive social and political change turns on legal reform, since social actors will need predictable, clear, and fair rules to guide their behavior, and the violation of these rules will need to be effectively checked after the fact through litigation or prosecution in the justice system. Since litigation becomes the cornerstone of ex post facto social regulation, in such a system, legal education reform is paramount: it becomes necessary to prepare for an increase in litigation by increasing the number of attorneys and judges and by preparing them to serve this new social function.

In this Article, we aim to think comparatively about the purposes of legal education and hence to give legal education reform the theoretical attention it deserves. Specifically, we argue that the core question should be a broader one than simply "what kind of legal education methods best train fu-

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2. See Takashi Uchida, *Hoka Daigakuin wa Nani wo Motarasu no ka? Mata wa Hochishiki no Bunpu Moderu ni Tsuite* [What Will the Graduate Law Programs Bring? Or, on the Subject of the Model of Legal Knowledge Distribution], 402 UP 27, 27 (2006) (Japan).

3. THE JUSTICE SYS. REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY 1:3 (2001) [hereinafter COUNCIL REPORT], available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

4. *Id.* at 1:1.

ture lawyers.” Rather, the core question should be, “what are the consequences of a certain model of legal education for the nature and distribution of legal knowledge in society.” This wider question in turn requires analysis using methodologies from beyond legal studies—methods from sociology, anthropology, management studies, and cognate fields—about the nature of expertise and its social consequences. Viewed from the perspective of these debates, the nature of legal education is not at all a marginal theoretical question. Rather, legal education institutions emerge as key sites for the social production of a field of valuable expertise.<sup>5</sup>

This methodological approach has important implications for thinking about alternative models of legal education. When viewed from this perspective, we argue, reforms that on first glance seem to epitomize progress towards transparency, democratization, and the rule of law may turn out to be far less democratic. In Japan, after an initial round of euphoria,<sup>6</sup> a number of critiques of the reforms have begun to surface.<sup>7</sup> We contribute to this discussion by taking a broader view from the standpoint of questions about the nature and distribution of legal knowledge in Japan, questioning what exactly is at stake, and what might be the consequences of the law school reforms.

In a recent article, Curtis Milhaupt and Mark West broaden the conversation in important ways by focusing on the employment prospects and choices of the top three hundred graduates of the most elite law schools in Japan. They argue that where these graduates once would have taken positions in the bureaucracy, they now increasingly are choosing to become lawyers in private practice, and that this reflects an overall decrease in the power of the bureaucracy relative to private parties and the market.<sup>8</sup> We agree.<sup>9</sup> But in this Article, we focus

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5. See YVES DEZALAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 19-20 (2002).

6. See, e.g., Gerald P. McAlinn, *Reforming the System of Legal Education: A Call for Bold Leadership and Self-Governance*, *ASIAN-PAC. L. & POL'Y J.*, Spring 2001, at 15; Setsuo Miyazawa, *The Politics of Legal Reform in Japan: Rule of Law at Last?*, *ASIAN-PAC. L. & POL'Y J.*, Spring 2001, at 89.

7. See *infra* notes 40-45 and accompanying text.

8. Curtis J. Milhaupt & Mark D. West, *Law's Dominion and the Market for Legal Elites in Japan*, 34 *LAW & POL'Y INT'L BUS.* 451 (2003).

on the role of law in private ordering rather than the concurrent decrease in the bureaucracy's power.<sup>10</sup> Likewise, we complement Milhaupt and West by turning attention from the top three hundred graduates of law faculties, to the next roughly 45,000 or so. Less than 4% on average of the graduates of law faculties become qualified legal professionals. Even at the University of Tokyo law faculty, which yields the largest number of successful candidates among Japanese law faculties, less than one third of the students become members of the bar (*hoso*)—judges, public prosecutors, and lawyers (*bengoshi*). Our suspicion is that greater attention to those who do not belong to the very highest echelon of professional elites working in the bureaucracy or the highest tier of the Tokyo-based domestic and international law firms may give us a richer picture of how ordinary market transactions are legally ordered in Japan.

Since one aim of the Japanese legal education reforms is to rely more on ex post facto litigation as a regulatory tool, which in turn requires increasing litigation rates and increasing the numbers of litigators, our argument necessarily engages a long-standing debate in Japanese legal studies about the reasons for Japan's relatively low litigation rates compared to other industrialized nations. The question of why litigation rates are low in Japan has been a source of ongoing debate and controversy throughout the post-war period. Early on, some claimed that litigation rates were low in Japan because Japanese have a cultural orientation toward group consensus and an antipathy towards open conflict and towards using courts,<sup>11</sup> but there is now academic consensus that this argument, in its strong form, is overdrawn given the history of litigation in Japan,<sup>12</sup> the highly conflictual nature of many aspects

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9. For his part, John Haley is doubtful that this trend reflects "transformational change" of the kind Milhaupt and West describe. See John O. Haley, *Heisei Renewal or Heisei Transformation: Are Legal Reforms Really Changing Japan?*, ZEITSCHRIFT FÜR JAPANISCHES RECHT (F.R.G.), Summer 2005, at 5.

10. The question of how the changes in legal education may affect the skills and authority of government employees is also an extremely important one, but one that is not the immediate focus of this article. It is the subject of another article by Takashi Uchida. See generally Uchida, *supra* note 2.

11. See Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41, 43 (A. Von Mehren ed., 1963).

12. See JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 83 (1991) ("Historically the Japanese have been quite litigious.").

of Japanese society,<sup>13</sup> and the interest in law among the population at large. Against this position, others have put forward an institutionalist explanation. They have argued that Japanese litigation rates are low because Japanese legal institutions are so inefficient that potential litigants effectively give up on their claims rather than bringing them to court.<sup>14</sup> Among the most important of these institutional barriers, they argue, is the scarcity of lawyers.<sup>15</sup> But the institutionalist argument too fails to explain everything: Japan's judicial institutions are among the most professionalized in the world,<sup>16</sup> and the costs of litigation in time and money, while high, are not so different from some other industrialized nations where litigation rates are considerably higher.<sup>17</sup> Moreover, as Takao Tanase has argued, the institutionalist position does not provide an adequate explanation for why Japanese institutions would remain so fundamentally flawed if, as this theory suggests, they represent such a drain on the economy and political system.<sup>18</sup> An opposing "rationalist" argument put forward by Mark Ramseyer and Minoru Nakazato is that Japan's low litigation rates can be explained not by inefficiencies in the judicial system but rather by its extreme efficiency—by the ease with which parties to a dispute can predict what the litigated ver-

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13. See FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987); see also Andrew Gordon, *Contests for the Workplace*, in *POSTWAR JAPAN AS HISTORY* 373 (Andrew Gordon ed., 1993) (discussing conflicts between labor and management); John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 376 (1978) (discussing landlord tenant disputes). Indeed, Frank Upham has shown in the case of anti-pollution litigation in Japan that a communitarian orientation can actually spur litigation rather than impede it. See Frank Upham, *Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits*, 10 LAW & SOC'Y REV. 579, 616 (1976).

14. See HALEY, *supra* note 12, at 118 ("Above all else . . . the potential litigant must also perceive that he or she has something to gain by litigation. The judicial remedy or sanction must be sufficient to outweigh the costs of a lawsuit.").

15. See John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUD. 265, 273 (1982); Shozo Ota, *Reform of Civil Procedure in Japan*, 49 AM. J. COMP. L. 561, 565 (2001) ("The high cost of litigation (or the public's perception thereof) prevents people with relatively minor disputes or few resources from realizing their rights through litigation.").

16. See generally John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99 (Daniel H. Foote ed., 2007).

17. Cf. J. Mark Ramseyer, *The Rational Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111, 114 (1988).

18. See Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC'Y REV. 651, 655 (1990).

dict will be.<sup>19</sup> Using the example of the calculation of settlement damages in traffic accidents, Ramseyer and Nakazato argue that because the outcome of judicial disputes is particularly clear to the litigants in advance, it is easier for potential litigants to reach a rational settlement without the intervention of the courts. Again, this argument usefully explains the settlement of certain kinds of disputes, like routine traffic accidents, in which disputes and compensation sought are of a standardized type. But it provides a less complete explanation in other areas of law such as contract, where damage awards for particular kinds of breach cannot be predicted in advance with much specificity.

We agree that the explanation for low rates of litigation must be attributable in large part to the success of private parties in accessing relevant legal information without going to court.<sup>20</sup> The challenge then is to understand how parties are able to access such information in situations in which the “answers” to legal questions are not as apparent as they are in routine traffic accident cases. Prior accounts have focused primarily on institutional factors within the judicial system, such as the lack of juries, or the length of time between filing and final disposition.<sup>21</sup> Our suggestion is that there might also be important relevant factors outside the judicial system—indeed, beyond the state altogether.

Here, we wish to propose a hypothesis: Legally trained but non-qualified legal experts—law graduates who are not members of the bar—are playing a positive role in the informal legal ordering of market transactions in Japan. They are part of an important but understudied social phenomenon—the wide distribution of legal knowledge throughout Japanese society. If that is so, then efforts to reform legal education, which focus on producing more professional litigators and other kinds of formally-qualified legal experts, overlook (and eventually undermine) the important social and economic value of Japan’s cadre of informal legal experts.

The remainder of this Article proceeds as follows: In Part II, we outline some of the weaknesses we see in Japan’s legal

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19. See Ramseyer, *supra* note 17, at 114.

20. See J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 289-90 (1989).

21. See Ramseyer, *supra* note 17, at 116.

education reforms on their face. Our argument in this Part echoes and builds upon the criticisms of the new law school system advanced recently by a number of other commentators. Then in Part III, we bring debates about the nature and social distribution of expertise in the social sciences to bear upon this debate. Here, we argue that the reforms have a different and arguably larger flaw: they fail to appreciate, and thus ultimately may negatively impact, the important social and economic function of the broad distribution of legal expertise in Japanese society. Along the way, we elaborate our alternative hypothesis concerning the longstanding debate over why litigation rates are low in Japan—that one explanation lies in the broad distribution of legal knowledge in Japanese society. In Part IV, we conclude with some suggestions concerning the Japanese legal education reforms and then present some comparative implications for debates about legal education in the United States and elsewhere.

## II. JAPAN'S LEGAL EDUCATION REFORMS: CAUSES AND CONSEQUENCES

### A. *The Proposed Reforms*

In June 2001, the Justice System Reform Council, charged with making proposals to the Prime Minister concerning the reform of the justice system, submitted a set of "Recommendations" that included the introduction of an American-style law school system.<sup>22</sup> In its report, the Council pointed to two key problems in the current legal training system. The first was the shortage of legal professionals.<sup>23</sup> With a bar examination pass rate of 2%-3%, and a cap on the number of successful examinees still at only 1000 in 2001, putting the total number of attorneys at just over 17,000,<sup>24</sup> Japan suffered from an insuffi-

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22. See generally COUNCIL REPORT, *supra* note 3.

23. See COUNCIL REPORT, *supra* note 3, at 1:2:2; cf. Kahei Rokumoto, *The Present State of Japanese Practicing Attorneys: On the Way to Full Professionalization?*, in *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 160, 166 (Richard L. Abel & Philip S. C. Lewis eds., 1988).

24. See Kohei Nakabo, *Judicial Reform and the State of Japan's Attorney System: A Discussion of Attorney Reform Issues and the Future of the Judiciary Part II*, 11 *PAC. RIM L. & POL'Y J.* 147, 150-51 (2002); see also JAPAN FED'N OF BAR ASS'NS, 2006 FISCAL YEAR COUNTRY REPORT 4 (2006), available at <http://www.nichibenren.or.jp/en/activities/statements/countryreports.html>.

cient supply of lawyers from the Council's point of view.

The second key problem was the dysfunctional quality of the Japanese legal education system as a mechanism for training and producing lawyers. Japan's legal education model at that point was a fairly standard version of the dominant approach to legal education in civil law countries, where law is an undergraduate subject taught largely through lectures divided according to areas of the legal code (civil law, criminal law, commercial law, constitutional law, etc.). Because few law graduates actually became lawyers, law faculties aimed at a generalist education, leaving practical training for the Legal Training and Research Institute (LTRI),<sup>25</sup> run by the Supreme Court. Those who passed the bar spent an additional two years at the LTRI before qualifying as professional lawyers (*hoso*).<sup>26</sup> The Council argued that this model of legal education did not put sufficient pedagogical emphasis on the practical training of lawyers.<sup>27</sup>

The Council also pointed to the dysfunctional nature of what it termed the "double school phenomenon."<sup>28</sup> As in most jurisdictions, legal education in law faculties did not focus directly on preparation for the bar examination. But given the extremely competitive nature of the bar examination, most law students who planned to sit for the bar enrolled in parallel bar review cram schools almost from the start of their legal studies.<sup>29</sup> Some students ignored their university classes completely and focused only on their studies at these preparatory schools.<sup>30</sup> By their own admission, cram schools teach only techniques for passing the bar examination.<sup>31</sup> They provide neither practical legal training nor real theoretical legal education. As the Council stated in its Recommendations, "this has had a serious adverse impact on securing the quality of those

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25. See generally Supreme Court of Japan, The Legal Training and Research Institute of Japan, <http://www.courts.go.jp/english/institute/index.html> (last visited Mar. 2, 2009).

26. In 1999, the training course at the LTRI was shortened to eighteen months, and in 2006 it was again shortened to twelve months. See *id.*

27. See COUNCIL REPORT, *supra* note 3, at 3:2:1.

28. *Id.*

29. Daniel H. Foote, *Forces Driving and Shaping Legal Training Reform in Japan*, 7 AUSTL. J. ASIAN L. 215, 217 (2005).

30. See Dan Rosen, *Schooling Lawyers*, ASIAN-PAC. L. & POL'Y J., Spring 2001, at 66, 69.

31. Foote, *supra* note 29, at 219.

who are to become legal professionals.”<sup>32</sup>

In response to these two problems, the Council proposed a new system that would place the emphasis on legal training instead of on examination passage rates. In the Council Report and the debates that followed, the catch phrase for the Council’s proposal was “from a single point to a process.”<sup>33</sup> The new law school system was to be the materialization of this proposal: the key Council proposals included the creation of graduate law schools aimed at producing professional lawyers, and an increase in the pass rate for the bar. The goals of the new legal education system were ambitious and inspirational:

Education for training professionals at law schools should comprehensively achieve the following philosophy, building a bridge between theoretical education and practical education, and focusing on fairness, openness and diversity.

- Enable law students to acquire the specialized qualities and capacity required for legal professionals who take direct responsibility for the “rule of law” and are expected to play a role as the “doctors for the people’s social lives,” and foster and improve their human nature as persons with kind hearts who can deeply sympathize with the happiness and sorrows of people who are going through their one and only life.
- Enable law students to acquire specialized legal knowledge as well as foster their creative thinking ability to critically review and develop such knowledge and their capacity for legal analysis and legal discussion necessary for solving actual legal problems according to the facts.
- Provide law students with basic understanding of cutting-edge legal areas, have them take a broad interest in various problems arising in society and have a sense of responsibility and morals as legal profession-

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32. See COUNCIL REPORT, *supra* note 3, at 3:2:1.

33. See COUNCIL REPORT, *supra* note 3, at 1:3:2:(2); Japan Fed’n of Bar Ass’ns, The Japanese Judicial System and Judicial Reform, [http://www.nichibenren.or.jp/en/about/judicial\\_system.html](http://www.nichibenren.or.jp/en/about/judicial_system.html) (last visited Mar. 2, 2009).

als based on their contemplation of how human beings and society should be and on their own actual observations and experiences, and also provide them with opportunities for actually contributing to society.<sup>34</sup>

### B. *The New Law School System*

Following the Council's recommendations, the Ministry of Education launched the new graduate law school system in April 2004.<sup>35</sup> In the first year of the new system, sixty-eight new law schools were ultimately accredited. In total, 5767 students were admitted to these law schools in the first year. The following year, six more law schools opened their doors.<sup>36</sup> The new law school education program is a three-year graduate program, although students who have already received an undergraduate degree in law can proceed directly into the second year if they successfully demonstrate their knowledge of law on the entrance examination. Candidacy for the new national bar examination is now limited to those who have completed this law school program.<sup>37</sup>

In accordance with guidelines drawn up by the Ministry of Education,<sup>38</sup> these law schools introduced many elements of the American legal education system, as Ministry officials and

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34. See COUNCIL REPORT, *supra* note 3, at 3:2:2:(1).

35. See Senmonshoku Daigakuin Setchi Kijun [Standards for the Establishment of Professional Graduate Schools], Ministry of Education, Culture, Sport, Science and Technology Ordinance No. 16 of 2003.

36. See Setsuo Miyazawa, Kay-Wah Chan & Ilhyung Lee, *The Reform of Legal Education in East Asia*, 4 ANN. REV. L. & SOC. SCI. 333, 346-47 (2008).

37. The old national bar examination is still conducted side by side with the new exam through 2009 for the sake of those who graduated from a law faculty prior to the establishment of the new law schools and have been preparing for existing bar examination. In addition, a new qualifying exam (*yobishiken*), slated to begin in 2011, would allow persons who have not attended law school to qualify to sit for the bar exam without graduating from law school. See Shiho Shikenho Fusoku [Supplementary regulations issued under the Bar Examination Law], Law No. 138 of 2002, cl. 7; see also Ministry of Justice, Q & A, <http://www.moj.go.jp/SHIKEN/shinqa01.html#14> (last visited Mar. 3, 2009).

38. See Senmonshoku Daigakuin Setchi Kijun [Standards for the Establishment of Professional Graduate Schools], Ministry of Education, Culture, Sport, Science and Technology Ordinance No. 16 of 2003; Senmonshoku Daigakuin Setchi Kijun Daigojo Daiikko Nado no Kittei ni Motozuku Senmonshoku Daigakuin ni Kanshi Hitsuyona Jiko [Particular Requirements for Professional Graduate Schools Pursuant to Article 5 Paragraph 1 and Other Sections of the [Ordinance Concerning the] Standards for the Establishment of Professional Graduate Schools], Ministry of Education, Culture, Sport, Science and Technology Notification No. 53 of 2003.

Council members saw them, such as the incorporation of practitioners as teachers, the creation of legal clinics where students could learn practical skills, the establishment of law school advisory committees to give advice to the law schools on internal reforms, and even the establishment of a J-LSAT modeled on the U.S. LSAT examination for admission to law school.<sup>39</sup> Ministry guidelines also required dramatic reduction of class sizes, limiting them to fifty to seventy-five students, and the adoption of interactive teaching methods approximating the Socratic method. These reforms all represented very substantial changes to the educational model in law faculties at that time.<sup>40</sup>

However, from the beginning there were signs that the new law schools were falling short of the Council's lofty ideals. First, the Council's ambition to create a more diverse bar composed of lawyers with expertise in fields outside the law—to ensure lawyers would be better able to understand their clients' legal problems—fell short almost immediately. Of the first class of admitted students, 65.5% were graduates of law faculties, 22.0% were graduates of humanities or social science departments, and only 8.4% were graduates of science departments. Since then, the numbers of non-law graduates admitted to graduate law programs has steadily declined, and the class admitted in 2007 included about half as many graduates of engineering and science programs (graduates with specialized expertise that is particularly valuable for fields of law such as intellectual property law) as the class admitted in 2004.<sup>41</sup>

To the extent that diversifying the range of legal education institutions from which lawyers have graduated can contribute to diversifying the legal profession—since differing institutions may attract students from different geographical areas or economic backgrounds and differing law faculties may ap-

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39. The usage of a standardized examination for law school admissions was first proposed by the Council. The examination is jointly created and administered by the Japan Law Foundation (*Zaidan Hojin Nichibenren Homu Kenkyu Zaidan*) and the National Center for University Entrance Examinations (*Daigaku Niushiki Senta*). See generally Japan Law Found., <http://www.jlf.or.jp/tekisei/index.shtml> (last visited Mar. 2, 2009).

40. For a positive assessment of the pedagogical changes at the University of Tokyo under the new system, see Foote, *supra* note 29, at 228-29.

41. See Toshiko Takenaka, IP Education and Training in Japan, Paper presented at Washington University in St. Louis Conference: Law in Japan (May 2008).

proach law and legal education in different ways—the new system has again been a resounding failure. The results of the first years of the new bar exam demonstrate that the same elite schools that produced the most students who passed the old bar exam have been most successful at the new bar examination as well.<sup>42</sup> In the short run, this will most likely result in considerable fluctuation and uncertainty, as law schools whose students have not succeeded at the bar examination may have difficulty attracting students and eventually even face closure.

Some argue privately that the real intention of the government is to eventually reduce the number of law schools and law students competing for bar passage to a number that is more in line with the ultimate number of new lawyers it hopes to produce each year by weeding out low-quality law schools through a process of market competition.<sup>43</sup> The idea is that eventually, with fewer law schools and hence fewer law students competing to pass the bar, bar passage rates ultimately will rise to a more comfortable level. But such an experiment in market selection in the field of education does not seem to be a sound policy where the consumers of the product—potential law students—are not in a particularly strong position to evaluate objectively the claims made by legal education providers about their future career prospects upon graduation. A number of law graduates who have spent a great deal of money on tuition and devoted three or more years of their lives to law studies will necessarily lose their investment. Law schools are not required to disclose the full risks associated with buying their product to potential consumers. There are further doubts about the job prospects of graduates of law schools who fail the bar examination. Graduates of undergraduate law programs who do not pass the bar have a range of

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42. Five law faculties have historically produced two-thirds of the students who ultimately are successful at passing the bar exam. These are the University of Tokyo Kyoto University, Waseda University, Chuo University, and Keio University. See Maxeiner & Yamanaka, *supra* note 1, at 323.

43. In fact, the government is not waiting for the market mechanism to achieve its effect. It is already exerting pressure to this end. The Central Council for Education of the Ministry of Education, Culture, Sports, Science and Technology issued a recommendation on September 30, 2008, that law schools that have shown sluggish results to date should cut back on enrollments and should consider merging with other law schools in order to reduce the total number of law schools in Japan. See, *Law Schools Now Paying Price for Hasty Beginnings*, NIKKEI WEEKLY, October 14, 2008.

other job options in the private and public sector, but companies may be more reticent to hire graduates of professional law schools who have failed the bar, preferring instead undergraduate law program graduates who are younger and therefore seen as easier to train, and who have been selected through what many company managers assume is a more competitive entrance examination.

Moreover, in the view of many faculty, administrators, and government regulators, the fact that graduate law faculties include students who have studied law as undergraduates alongside students who have studied other subjects as undergraduates leads to disparities in academic ability.<sup>44</sup> Graduate law students who have studied disciplines other than law at the undergraduate level must compete on curved examinations with students who have already received four years of legal education. Although students who have not yet studied law receive a one year crash course in the first year of the graduate law program before merging with the class of law graduates in the second year of their studies, it has proved almost impossible for such students to reach a place from which they can compete on an equal footing with law graduates on black-letter oriented law school examinations in just one year.<sup>45</sup> Hence it is no surprise that the disciplinary diversity the reformers had hoped to create has proven elusive.

At the same time, students who have studied law as undergraduates now must spend at least six years in the classroom before qualifying to take the new national bar examination (four years of undergraduate education in law followed by two years of graduate legal studies). For those students who ultimately pass the bar examination, this will be followed by one further year of practical legal training at the government-

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44. See, e.g., Munehira Sasaki, *Shinshiho Shiken no Kekko to Hoka Daigakuin Kyoiku: Heisei 18 Nen Kara Heisei 20 Nen Made no Aida no Hoka Daigakuin Betsu no Kekka Bunseki* [The Results of the New Bar Examination and Law School Education: An Analysis of the Results by Individual Law Schools from 2006-2008], 340 HOGAKU KYOSHITSU 8, 10 (2009) (Japan) (focusing on the fact that those students who have studied law as undergraduates perform better on the bar examination after graduating from law school than those students who have not).

45. See, e.g., *id.*, at 15-16 (showing that students who have studied law as undergraduates ultimately perform much better on the new bar examination). But see Foote, *supra* note 29, at 230 ("True, some [students who did not study law as undergraduates] may not attain the same level of minute knowledge of certain legal subjects as some [who did study law as undergraduates], but they are likely to make up for it with expertise in other fields.").

run LTRI.<sup>46</sup> Much of this education is arguably quite redundant.<sup>47</sup> And the sheer length of legal education, unparalleled in other liberal democratic societies, may in turn have the effect of discouraging many otherwise qualified young people from pursuing a career in law.

Additionally, although one of the Council's key recommendations was to increase the bar passage rate to around 70%, about the same overall pass rate as in the United States, in actuality the pass rate of the new bar examination is, and will continue to be, far lower.<sup>48</sup> From 2010, the number of successful candidates is to be capped at 3000,<sup>49</sup> with the objective of raising the total number of legal professionals to 50,000 by 2018.<sup>50</sup> This target is at most less than one tenth of the number

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46. See generally Supreme Court of Japan, The Legal Training and Research Institute of Japan, <http://www.courts.go.jp/english/institute/institute.html> (last visited Mar. 1, 2009). Graduation from the LTRI is the formal criterion for qualification as a lawyer (*hoso*). See Bengoshi Ho [Lawyers Law of Japan], Law No. 205 of 1949, as amended, art. 4.

47. See Maxeiner & Yamanaka, *supra* note 1, at 318; Takahiro Saito, *The Tragedy of Japanese Legal Education: Japanese 'American' Law Schools*, 24 WIS. INT'L L.J. 197, 203-04 (2006).

48. According to Ministry of Justice statistics, in the first year in which the new bar examination was offered (2006), 1009 people passed the examination, amounting to a passage rate of 48.25%. See PERSONNEL SECTION, OFFICE OF THE MINISTER, MINISTRY OF JUSTICE, HEISEI 18 NEN SHIN SHIHOSHOKEN NO KEKKA [RESULTS OF THE NEW BAR EXAMINATION FOR 2006] (2006), available at <http://www.moj.go.jp/SHIKEN/SHINSHIHOU/h18-02kekka.pdf>. In the first year, however, the examinees all had studied law as a first degree, since the first class of students in the new law schools did not graduate and become eligible to sit for the bar exam until 2007. In the second year (2007), 1851 people passed the examination, amounting to a passage rate of 40.18%. See PERSONNEL SECTION, OFFICE OF THE MINISTER, MINISTRY OF JUSTICE, HEISEI 19 NEN SHIN SHIHOSHOKEN NO KEKKA [RESULTS OF THE NEW BAR EXAMINATION FOR 2007] (2007), available at <http://www.moj.go.jp/SHIKEN/SHINSHIHOU/h19kekka01-4.pdf>. In 2008, the passage rate declined further to 32.98% due to the increase in law graduates and to the fact that those who failed the exam in 2006 and 2007 were eligible to take it again in 2008. See PERSONNEL SECTION, OFFICE OF THE MINISTER, MINISTRY OF JUSTICE, HEISEI 20 NEN SHIN SHIHOSHOKEN NO KEKKA [RESULTS OF THE NEW BAR EXAMINATION FOR 2008] (2008), available at <http://www.moj.go.jp/SHIKEN/SHINSHIHOU/h20kekka01-4.pdf>. In fact, the actual number of bar passees increased in 2008 by 200 to a total of 2065. See *id.*

49. See COUNCIL REPORT, *supra* note 3, at 1:3:2:(2). The Bar Exam is in actuality an examination for admission to the government-administered LTRI and therefore is administered and controlled by the government.

50. The choice of the year 2018 corresponds to the year Heisei 30 in the Japanese calendar. In order to attain a population of 50,000 lawyers in 2018, it was necessary to produce 3000 successful candidates each year beginning in 2010. The figure of 50,000 was worked out through comparisons with the number of lawyers relative to total population size in other industrialized nations. After looking at the United States, the United Kingdom, Germany and France, the Council chose to aim to achieve the same number of lawyers per capita as France. Some explained the selection of France as the target for Japan because both countries have a system in which administrative power is centralized. But the most probable reason is that France has the least number of legal professionals among the four countries used as a comparison

of attorneys in the United States relative to the size of the U.S. population.<sup>51</sup>

In March of 2008, accredited law schools graduated a total of 4910 graduates.<sup>52</sup> These graduates are allowed to take the new bar examination up to three times. Assuming that the Ministry of Education continues to allow around 3000 applicants to pass the bar exam each year, that accredited law schools continue to graduate around 5000 students each year, and that those who fail the examination on the first and second try exercise their option to sit for the examination again, the anticipated number of applicants competing for 3000 spots will amount to 9000 or more every year. With a cap of 3000 on successful applicants, the reality is that the pass rate of the new bar examination will stabilize at around 33%. If, as is expected, certain law faculties continue to dominate the bar examination as they have done to date,<sup>53</sup> for students who do not attend one of the five or six law schools with the best passage rate, the average pass rate may be considerably lower.<sup>54</sup>

At first, many law students apparently applied to law school under the illusion that Japan had truly moved to an American model of legal education characterized by high bar passage rates. There was a certain degree of collective shock and panic, therefore, when in 2005, the Ministry of Justice publicly announced that the expected pass rate of the new bar examination in 2006 would be around 34%, and that the pass rate for the following year would be around 20%.<sup>55</sup> This announcement had the effect of sending existing law students back to cram schools, and of discouraging many potential applicants

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benchmarks, so it presented the easiest target for Japan.

51. The Ministry allowed 1009 applicants to successfully pass the bar in 2006, 1851 in 2007, and 2065 in 2008. *See supra* note 48.

52. Eighty percent of the students who entered law school in this year's graduating class ultimately graduated. *See* MINISTRY OF EDUC., SPORTS, SCI. AND TECHNOLOGY, HEISEI 19 NENDO HOKA DAIGAKUIN SHURYO NINTEI JOKYO NI TSUITE [ON THE CERTIFICATION CONDITION OF THE 2007 GRADUATES OF GRADUATE LAW PROGRAMS] (2008), available at [http://www.mext.go.jp/b\\_menu/houdou/20/05/08051914.htm](http://www.mext.go.jp/b_menu/houdou/20/05/08051914.htm).

53. *See* Sasaki, *supra* note 44, at 17 (arguing that a set number of law schools have maintained a higher pass rate).

54. In 2008, three accredited law schools—Aichi Gakuin, Himeji Dokkyo, and Shinshu—had a pass rate of 0%. *See id.* at 19.

55. The planned pass rate was higher for 2006 because only newly enrolled second year students with undergraduate degrees in law were eligible to take the new bar examination, and hence there were fewer students sitting for the test.

from attending law school altogether. However, given the agreed caps on the numbers of new lawyers to be passed each year and the number of law students being graduated by new law schools each year, the reality of these numbers was predictable from the start.

The reality of the low bar passage rate is already resulting in the disturbance of the Council's wider goals of encouraging broad and creative learning. The low pass rates have aroused serious anxiety among faculty and administrators at many law schools who are concerned with maintaining the reputation of their schools. They fear that if their graduates do not do well on the bar exam, their schools may not even be able to survive. As a result, formal law school courses have started to focus on preparing for the new bar examination.<sup>56</sup>

Not surprisingly, this has created an opportunity for cram schools to flourish again. In order to ensure that their graduates do as well as possible on the bar exam, some law schools have reportedly already partnered with major cram schools to bring bar review in house.<sup>57</sup> Although the accreditation of a law school that openly proclaimed its alignment with one major cram school was rejected by the Ministry of Education in 2004,<sup>58</sup> alignments behind the scenes are gradually expanding.<sup>59</sup> Given that the bar examination remains demanding, even those law students who attend schools with the highest pass rates on the new examination, and which therefore are better able to resist pressures to turn legal education into bar review, spend substantial time outside of class preparing for the bar examination. In sum, Japan has now recreated the problem of teaching to the test.

Moreover, the government has insisted that practical training, quite narrowly defined, become the core of the new law school curriculum. This decision most likely reflects the reformers' understanding of the U.S. model since, in the United

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56. In one case, this pressure led a Keio Law School professor with information about bar exam test questions to share that information with students of his law school. See Miyazawa et al., *supra* note 36, at 349.

57. See *id.*

58. The university in question was Ryukoku University in Kyoto. See Nottage, *infra* note 115, at 246.

59. See Miyazawa et al., *supra* note 36, at 349 ("There are even rumors that some law schools have entered into arrangements to have their students taught by a cram school during the academic year.").

States, unlike in most other countries in the world, including even most other common law countries, the balance of responsibility for formal training lies with the law faculties.<sup>60</sup> But as one American observer of the Japanese reforms puts it, “[T]he assumption that law schools are the exclusive place for preparation for the profession of law is bad for students, bad for the bar, bad for law schools, bad for the legal system and bad for society.”<sup>61</sup>

Given the fact that the expected pass rate of the new bar examination is not likely to be much higher than 33%, and that such skills are therefore not central to what most law graduates do, the reasonable choice would seem to be to teach the nitty gritty of practice after a student has successfully passed the bar exam. In this respect, Japan’s LTRI, which trains students after they have passed the bar exam, exists for this purpose. The Institute surely is in need of reform of its own of various kinds, including a revision of its curriculum guided by an appreciation of the way the details of practice are always intimately related to the substance of law, its history and theory, and its relationship to wider social and economic problems. The government might have chosen to invest energy and resources to extend the Institute’s capacities and revitalize its curriculum to meet the growing numbers of successful bar exam candidates and the changing nature of legal practice. But instead it reorganized the core of graduate legal education itself to focus on practical skills.

Finally there is another lasting and consequential cost to the new system: the turmoil of law school reform has deprived legal scholars of time for research. This has been particularly true in the start-up period: in spite of the fact that this reform was the biggest one since legal education system was introduced into Japan in late nineteenth century, the universities had less than one year to prepare, and hence whole law faculties were mobilized to draw up entirely new curricula, entrance examinations, and endless accreditation documents.

Yet now even several years after the establishment of the

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60. See Roy Stuckey, *The Evolution of Legal Education in the United States and the United Kingdom: How One System Became More Faculty-Oriented While the Other Became More Consumer-Oriented*, 4 INT’L J. CLINICAL LEGAL EDUC. 101, 135 (2004).

61. James R. Maxeiner, *More Than Just Law School: Global Perspectives on the Place of the Practical in Legal Education*, Address to the International Conference on the Future of Legal Education 6 (Feb. 20-23, 2008).

new law schools, law teachers are charged with a far heavier teaching obligation than before. Faculties have far less time for research and publication than before. In subtle but consequential ways, the focus of students and faculty alike has increasingly shifted to matters of black letter law covered on the bar examination and away from wider questions of theory, policy, and legal reform. If one understands the mission of a law faculty as something more than simply a factory for producing future lawyers—also as an institution in which serious, sustained, and objective thought is given to legal issues and to wider political and legal reform problems—the new law school system comes at serious cost to the longer term political and legal outlook of the nation. There are potential consequences here as well for Japan's place in the international legal research community as Japanese scholars can be projected to produce less scholarship, to have less time to spend overseas, and to participate less in international research collaboratives and conferences than before.

C. *Do the Japanese Reforms Really Emulate the U.S. Model? A Case of a Failed Legal Transplant*

Now from a comparative point of view, one of the interesting puzzles of this reform, as an example of a modern legal transplant,<sup>62</sup> is how a model perceived as directly imported from the United States could stray so far from the American model of legal education as it is understood in most law faculties in the United States today.<sup>63</sup> The low bar passage rate, as compared to the bar examination passage rate in most American jurisdictions, is only the first of many differences between what was imported as “American” and the American system.

First, the picture of American legal education as a system centered on practical training and dominated by courses taught by practitioners and legal clinics is surely a partial one

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62. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* ch. 4 (1993). On the Japanese legal education reforms as partially successful legal transplants, see generally Masahiko Omura, Satoru Osanai & Malcolm Smith, *Japan's New Legal Education System: Towards International Legal Education?*, 20 J. JAPAN L. 39 (2005); Mayumi Saegusa & Julian Dierkes, *Integrating Alternative Dispute Resolution into Japanese Legal Education*, 20 J. JAPAN L. 101 (2005).

63. Cf. Pierre Legrand, *The Impossibility of “Legal Transplants,”* 4 MAASTRICHT J. OF EUR. & COMP. L. 111, 116-17 (1997) (arguing that legal concepts and rules are culturally contingent, and therefore, cannot be transplanted).

at best. Law schools are not by any means the only—or even the principal—sites of professional training in the United States.<sup>64</sup> Most U.S. law firms expect new law school graduates to leave law school with a good overall sense of the law and strong writing and analytical skills but little practical expertise, and most larger firms have extensive in-house legal training programs aimed at helping new lawyers to develop practical skills.<sup>65</sup>

It is more accurate to say that the American model is one that works through a productive tension between practical and theoretical education. Legal historians describe the history of modern American legal education, for example, as a kind of struggle between proponents of skills-based training and proponents of theoretical training,<sup>66</sup> a struggle that continues today.<sup>67</sup> It is now generally appreciated on American law faculties, however, that theory and practice are equally important to legal education, and that a successful curriculum must make ample room for both.<sup>68</sup> There is relatively little room in

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64. See Stuckey, *supra* note 60, at 145.

65. See generally James W. Jones, *Show Me the Training! A Good Professional Development Program Can Create a Strategic Advantage*, N.Y. L.J. MAG., Oct. 31, 2005, at 24. Although many large firms offer training to new associates in some form, the structure of training programs is fairly diverse. White & Case, for instance, holds an annual training event called the Professional Skills Institute, an umbrella program composed of three separate “tracks.” Each track offers training for a different skill set: Orientation programs focus on practical skills for working in a law firm, such as time management and cultural awareness. Business skills programs focus on skills, such as communications and business development. Legal skills programs, tailored to different attorneys’ skill levels, focus on topics specific to the attorney’s field of expertise. See Karen Asner, *Training the Global Attorney: Developing Skills Essential to Cross-Border Transactions and Multijurisdictional Cases*, N.J. L.J., Aug. 10, 2007, at 28. Some firms have entered into partnerships with academic institutions to form training programs. For instance, Reed Smith works in conjunction with the Wharton School, and offers a program entitled Reed Smith University, which is structured along the lines of a traditional university. The “university” has several “schools,” each with a different focus: technology, business development, etc. See REED SMITH UNIVERSITY, 2005 COURSE CATALOG, available at [http://www.reedsmith.com/special\\_topic.cfm?cit\\_id=10](http://www.reedsmith.com/special_topic.cfm?cit_id=10); see also Kristin Eliasberg, *Law Firm Training Programs Teach By Example*, LAW FIRM INC., Apr. 10, 2006 (describing training programs at numerous American law firms).

66. See M.H. Hoeflich, *Plus Ça Change, Plus C’est La Même Chose: The Integration of Theory & Practice in Legal Education*, 66 TEMP. L. REV. 123, 128 (1993); Cheryl Weston, *Legal Education in the United States: Who’s in Charge? Why Does it Matter?*, 24 WIS. INT’L L.J. 397, 408 (2006).

67. For two contrasting positions in this debate, compare ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1987), with DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY—A POLEMIC AGAINST THE SYSTEM* (1983).

68. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 191-202* (2007)

the Japanese law school model, in sum, for what most would nevertheless agree is the dominant aspect of the American approach to legal studies today – its interdisciplinary nature and its focus on understanding legal problems in a wider social and economic context.<sup>69</sup>

It should be added that reformers in Japan and elsewhere in Asia who now turn to the U.S. model with such enthusiasm may be ignoring the extent to which the U.S. model is understood, in the United States, to be in need of reform of its own,<sup>70</sup> enveloped in what one commentator has described as “deep-seated, often unrecognized, malaise.”<sup>71</sup> In the United States, much debate about legal education reform now focuses on the failure of the existing law school curriculum to impart to law students such higher commitments at the core of legal practice such as ethical integrity, independence of judgment, and respect for the rule of law.<sup>72</sup> Likewise, a substantial reform of the U.S. system aimed at internationalizing the law school curriculum is now underway, as law schools come to terms with the fact that graduates must be able to practice in a transnational legal environment.<sup>73</sup> This involves reforms such as mandating coursework in transnational law subjects like comparative law, conflict of laws, international law and international commercial arbitration, creating extensive opportunities

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(describing the “integrated model” of legal education).

69. See, e.g., Elena Kagan, *A Curriculum without Borders*, HARVARD LAW BULL., Winter 2008, available at <http://www.law.harvard.edu/news/bulletin/2008/winter/dean.php>. For a discussion of the value of interdisciplinary legal education in the Japanese context, see Luke Nottage, *Reformist Conservatism and Failures of Imagination in Japanese Legal Education*, ASIAN-PAC. L. & POL’Y J., Spring 2001, at 28, 42-47.

70. See Sullivan et al., *supra* note 68, at 192.

71. Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 J. LEGAL EDUC. 91, 96 (2001).

72. See generally Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1997).

73. A number of law schools have recently added courses focusing on international law in the first year law school curriculum. See, e.g., Columbia Law Sch., History of International Law at Columbia, [http://www.law.columbia.edu/center\\_program/intl\\_progs/History](http://www.law.columbia.edu/center_program/intl_progs/History) (last visited Mar. 22, 2009), Harvard Law Sch., The Curriculum, <http://www.law.harvard.edu/prospective/jd/about/curriculum.html> (last visited Mar. 22, 2009), Michigan Law Sch., The Curriculum, <http://www.law.umich.edu/curriculum/Pages/default.aspx> (last visited Mar. 2, 2009), NYU Law Sch., Areas of Focus: International, <http://www.law.nyu.edu/academics/areasoffocus/international/curriculum/index.htm> (last visited Mar. 2, 2009); cf. Andrew King-Ries, *Just What the Doctor Ordered: the Need for Cross-Cultural Education in Law Schools*, Paper Presented at the International Conference on the Future of Legal Education (Feb. 20-23, 2008).

for study abroad, and adding course offerings in foreign law. Here the U.S. reforms are several years behind similar reforms already well-underway in Canada, Australia, and New Zealand.<sup>74</sup>

Finally, the additional teaching and administrative responsibilities imposed on Japanese faculty come without the American system of research support including research assistants, secretaries, librarians, sabbatical leaves, and more, that ensure the demands of Socratic teaching do not get in the way of scholarship. Serious impact on the quality and quantity of future legal scholarship in Japan seems unavoidable. That is, the Japanese reforms failed to appreciate the wider institutional function of the American law school in the political system as a cross-disciplinary policy-relevant research center where ideas from across the disciplines are synthesized and brought to bear directly on the questions of the moment. This also feeds back into the quality of legal education: The reformers did not appreciate one central lesson of the American model, that good education is more than just a teaching style or a set of subjects. It must be supported by high quality research.

In sum, we share with other commentators a concern that the new graduate law school system cannot possibly achieve what it aims to achieve on its own terms. Although the Japanese legal education reforms are presented as a change in the class of persons who become lawyers and in the nature of legal skills, in practice the new law school graduates turn out to be drawn from much the same population as before, and their legal training is not substantially broader than the training received by currently practicing lawyers. In other words, the new system merely reproduces most of the defects of conventional Japanese legal education. At the same time, the new system comes at tremendous costs to the financial and intellectual resources of law faculties. Taking account of the vast investment of time and money involved in establishing law schools, the reforms represent a massive waste of resources with relatively little to show for it.

But there are potentially even larger costs associated with the reforms. In the next Part we turn our attention to another consequence of the reforms that, to our knowledge, has not re-

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74. See generally Terry Hutchinson, *The Transnational Lawyer: GATS, Globalisation and the Effects on Legal Education*, 11 AUSTL. & N.Z. J.L. & EDUC. 93 (2005).

ceived adequate attention. In order to do this, we must first introduce what we regard as a hidden strength of the existing system.

### III. LEGAL KNOWLEDGE IN MODERN JAPANESE SOCIETY

In recent years, socio-legal studies has developed a more complex, less formalistic approach to the relationship between law and social institutions,<sup>75</sup> which has yet to be entirely absorbed into comparative legal studies and the study of the global diffusion of transnational legal norms.<sup>76</sup> Rather than understand law as merely an external force that constrains social and economic activity, law and society scholars have demonstrated that legal norms are in fact produced and transformed within institutional contexts. As sociologists Suchman and Edelman put it, "the demands of the law can never be entirely separated from the processes by which particular organizations define for themselves what is possible, normal, and desirable."<sup>77</sup> Legal norms are not simply imposed on the market and civil society by legislatures and courts; rather, the interpretation of those norms within companies, schools, and other institutions, in turn, shapes the way courts understand the law, and as such, these other interpretations become part of the normative content of the law.<sup>78</sup> The activities of institutions, therefore, must be understood as the product of the actions of the individuals working within them, who bring their own educational backgrounds, political commitments, and pragmatic objectives to legal problems.<sup>79</sup> In sum, the law is an

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75. See, e.g., Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 905 (1996).

76. See Annelise Riles, *Comparative Law and Socio-Legal Studies*, in OXFORD HANDBOOK OF COMPARATIVE LAW 775, 783-85 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (discussing some of the reasons for the failure of comparative lawyers and socio-legal scholars to sufficiently engage one another's insights); Terence Halliday, *Crossing Oceans, Spanning Continents: Exporting Edelman to Global Lawmaking and Market-Building*, 38 LAW & SOC'Y REV. 213, 214 (2004) (discussing the significance of Edelman's model for transnational legal studies).

77. See Suchman & Edelman, *supra* note 75, at 939.

78. See generally Lauren B. Edelman, *The Endogeneity of Law: Civil Rights at Work*, in HANDBOOK ON EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 337 (Robert L. Nelson & Laura Beth Nielsen eds., 2005) (discussing civil rights norms); Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323 (2005) (discussing the impact of scientists' actions within university laboratories on the evolution of environmental standards).

79. See Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 LAW & SOC'Y

effect of the activities of people – both legal professionals and non-professionals, not a given imposed on people from outside.<sup>80</sup> If this is the case, then the activities, ambitions, and allegiances of institutional actors of all kinds that impact upon the law – not simply of those who claim professional expertise in the law – become important to our understanding of the nature and content of law.<sup>81</sup> And studies of law cannot focus exclusively on courts and legislatures – they must investigate a range of institutional and cultural settings in which legal norms and practices are produced.<sup>82</sup>

This methodological perspective has much to contribute to the current debate about legal education reform. Discussions of the Japanese legal education reforms – whether favorable or critical – almost universally proceed from one unexamined assumption: Japan needs more *professional lawyers* – individuals who have passed the bar examination and graduated from the LTRI (*hoso*).<sup>83</sup> It is usually assumed in these debates, without much evidence, that this is what the market requires – that pressure for legal education reform naturally comes from the corporate sector, which wishes to see the supply of *hoso* increase so that these will become more easily and cheaply ac-

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REV. 27, 28 (1995) (describing how the law gains legitimacy through lawyers' individually motivated competition for business).

80. See ERIC FELDMAN, *THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY & HEALTH POLICY* 143-45 (2000); Kitty Calavita, *Immigration, Law, and Marginalization in a Global Economy: Notes from Spain*, 32 *LAW & SOC'Y REV.* 529, 553 (1998) (describing the role of immigration official in constructing immigration law norms).

81. See, e.g., Bill Maurer, *Due Diligence and the "Reasonable Man," Offshore*, 20 *CULTURAL ANTHROPOLOGY* 474, 484-88 (2005) (describing the role of accountants and other bureaucratic actors in elaborating global due diligence standards).

82. See, e.g., MASAJI CHIBA, *LEGAL PLURALISM: TOWARD A GENERAL THEORY THROUGH JAPANESE LEGAL CULTURE* 57-88 (1989) (studying spheres of legal norm-making such as corporate culture and school district rules); ANNE RILES, *THE NETWORK INSIDE OUT* 171-84 (2001) (describing the role of the mundane activities of nongovernmental organizations in creating international law); BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE* 85-89 (2003) (articulating a theory of global legal pluralism); Gunther Teubner, *The Corporate Codes of Multi-Nationals: Company Constitutions Beyond Corporate Governance and Co-Determination*, in *CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND: PATTERNS OF SUPRANATIONAL AND TRANSNATIONAL JURIDIFICATION* 3 (Rainier Nickel ed., 2008).

83. See, e.g., George Schumann, *Beyond Litigation: Legal Education Reform in Japan and What Japan's New Lawyers Will Do*, 13 *U. MIAMI INT'L & COMP. L. REV.* 475, 504-06 (2006). As discussed in Part I above, the term *hoso* encompasses all professionally qualified lawyers, including judges, public prosecutors, and lawyers (*bengoshi*).

cessible.<sup>84</sup> It is likewise assumed that the only way to increase the rule of law in Japanese society is to increase the number of *hoso* because difficulties in accessing professional lawyers are impeding parties from bringing lawsuits to court, and hence forcing them to rely on other extralegal mechanisms of planning and dispute resolution.

These assumptions go entirely unchallenged in debates about legal education reform, but they are highly contestable. One often hears it repeated, for example, that the impetus for reforms aimed at increasing the number of *bengoshi* came from the Japan Business Federation (*Nippon Keidanren*), the umbrella organization of industry organizations and private companies and the venerable collective voice of the Japanese business community in politics. But in fact *Keidanren's* submission to the Justice System Reform Council concerning the size of the Japanese bar asked only that the restrictions barring corporate legal staff who have not passed the bar examination from performing legal functions be relaxed and that the number of Japanese *judges* be increased.<sup>85</sup> If *Keidanren* represents the voice of the market, then the market's message was far more complex and ambiguous than the discussions about legal education reform typically suggest.

The same can be said of the oft-repeated assertion that an undersupply of *hoso* accounts for low private litigation rates in Japan.<sup>86</sup> This argument is a version of the argument developed by Haley and others, that the lack of litigation in Japan can be attributed to the basic inefficiencies of the Japanese system (of which a lack of available lawyers would be one).<sup>87</sup> As noted above, however, there is vigorous debate in Japanese legal studies about whether Japan's low litigation rates reflect

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84. See, e.g., Miyazawa et al., *supra* note 36, at 350.

85. See NIPPON KEIDANREN [JAPAN BUS. FED'N], SHIHO SEIDO KAIKAKU NI TSUITE NO IKEN [OPINIONS ON THE REFORM OF THE JUDICIAL SYSTEM] § II(1) (1998), available at <http://www.keidanren.or.jp/japanese/policy/pol173.html>. Japanese law limits pro se representations by Japanese companies to appearances in court by the company's CEO. See CARL F. GOODMAN, JUSTICE AND CIVIL PROCEDURE IN JAPAN 234 (2004) ("In Japan a corporation may appear in court represented by its Representative Director . . ."). Since few CEOs have the skills necessary to represent the company in court, this right is largely useless in practice. *Keidanren* asked that this right to pro se corporate representation be expanded to allow members of a company's legal department to represent the company in court.

86. See, e.g., Hideo Tanaka & Akio Takeuchi, *The Role of Private Persons in the Enforcement of Law: A Comparative Study of Japanese and American Law*, 7 LAW IN JAPAN 34, 42 (1974).

87. See *supra* notes 14-15 and accompanying text.

inefficiencies or efficiencies in the Japanese institutional system.<sup>88</sup> Therefore, the claim that a lack of lawyers accounts for low litigation rates at the very least fails to engage the debate on the causes of low litigation rates in Japan with any degree of sophistication. But in debates about Japanese legal reform it is usually presented as a given fact that needs no normative or empirical defense.

But what really interests us about this unexamined assumption that what Japan obviously needs is more *hoso* is its implicit view of the proper distribution of legal knowledge in society. Any debate about the reform of legal education necessarily takes an implicit or explicit position on the normative question of what should be the allocation of legal knowledge in society. Legal education institutions are sites for the production and ultimate institutional placement of particular kinds of experts—lawyers—and for the transmission of a particular kind of expertise—legal knowledge. In this respect they can be understood on par with other institutions for reproducing expertise such as medical schools, engineering schools, scientific laboratories, graduate education programs, apprenticeship programs in the trades, and many others. How such institutions serve to distribute various kinds of expertise in society is a large and complex question with political, economic, social, and even epistemological dimensions, and one studied from a variety of disciplinary perspectives.

As we see it, there are at least two models with respect to the

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88. The Justice System Reform Council's survey of 591 litigants in civil disputes conducted in June 2000 in 16 district court districts found that only 9.9% of respondents said they had trouble finding a lawyer. See JUDICIAL SYS. REFORM COUNCIL, MINJI SOSHO RIYOSHA CHOSA HOKOKUSHO [CIVIL LITIGANTS' SURVEY REPORT] § 3 (2001), available at <http://www.kantei.go.jp/jp/sihouseido/tyousa/2001/pdfs/repo1.pdf>. This data has provided fuel for lawyers to argue against expanding the size of the bar. See, e.g., YUKAKO TAKEMOTO, HOSO JINKO NI TSUITE NO IKKOSATSU [INQUIRY CONCERNING THE POPULATION OF LAWYERS] (2008), available at <http://t-m-lawyer.cocolog-nifty.com/housoujinkou.pdf>. The Council's analysis of the survey data has been contested and re-analyzed in a fascinating socio-legal study, however. See IWAO SATO, KAZUHIKO YAMAMOTO & IKUO SUGAWARA, RIYOSHA KARA MITA MINJI SOSHO—SHIHO SEIDO KAIKAKU SHINGIKAI "MINJI SOSHO RIYOSHA CHOSA" NO NIJI BUNSEKI [CIVIL SUITS AS SEEN FROM THE POINT OF VIEW OF [THE SYSTEM'S] USERS: A REANALYSIS OF THE JUSTICE SYSTEM REFORM COUNCIL'S CIVIL LITIGANTS SURVEY] (2006). For another survey-based study contradicting the findings of the Judicial System Reform Council survey, see Nakabo, *supra* note 24, at 155 (reporting on a 1994 survey suggesting that 20%-27% of the adult population experienced a legal problem in the last ten years and arguing based on that survey that the ideal number of lawyers needed to service this number of legal problems would be 40,000). Note that this analysis does not assume any role for legal experts other than *bengoshi* in addressing these legal problems.

distribution of expert knowledge in a modern market-based society.

A. *The Monocentric Model*

The assumption that what Japan needs is more *hosono* reflects what we shall call a "monocentric knowledge model." The paradigm of this model is medical knowledge, which is largely monopolized by the medical profession in most societies. In modern industrial societies, if an ordinary citizen wishes to buy drugs or to undergo a medical operation, he or she must turn to an officially certified expert, a doctor. A lay person is forbidden from accessing this knowledge on his or her own, and therefore non-experts know relatively little about medicine. To put it another way, non-expert literacy is low.

In such a society, experts hold a monopoly on a precious commodity, expert knowledge, and are able to charge a premium for sharing it with others. Therefore the expert is often a person of high social and economic status, and admission to institutions that produce experts by sharing expert knowledge is competitive. The main purpose of expert education in such a system is to produce legally certified experts; it is not to increase the level of expertise distributed in the society as a whole. The role of medical schools, for example, is primarily to produce doctors, not to initiate public health awareness campaigns. Professional organizations representing particular kinds of experts often advocate forcefully for monocentric models of expertise allocation, since the monopoly is the source of the profession's collective economic, political, and social capital.<sup>89</sup> Finally, in a society on this model, ex post monitoring and remedy through after the fact expert involvement takes priority over ex ante problem solving because the authority and power of the expert profession dictates that the experts are somewhat removed from ordinary life and are consulted mainly when a problem develops. Unless one is wealthy enough to have one's own personal doctor at one's disposal on a daily basis, one typically visits a doctor after one has become ill, not in order to evaluate one's daily physical

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89. See YVES DEZALAY & BRYANT GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 199-201 (1996).

condition or avoid becoming ill in the first place.

The important advantage of the monocentric model is quality control: by limiting authority to individuals who have passed certain qualifying examinations and who continue to maintain their professional credentials in legally mandated ways, the goal is to ensure that consumers of expert services receive a product that meets certain standards. Such experts can also be readily identified and expected by the state (through its legal system) to assume additional duties of care to their clients, beyond the standard duties ordinary contracting parties owe one another in matters of malpractice. This is particularly important in areas where health and safety are at issue, for example, and where the consumers of such services are not in a position to adequately evaluate the quality of the services they are receiving.

But the monocentric model can also create problems of quality of its own. The first of these stems from the nature of expertise itself. An expert is a person who has access to a particular transnational or global form of knowledge (such as law or medicine). But the true mark of an expert, social scientists agree, is never simply the mastery of the content of the globally circulating knowledge. Expertise inheres rather in moving one step beyond this mastery, to integrating, adapting, and addressing that knowledge to local problems, concerns, and questions.<sup>90</sup> Expertise, in other words, is a “paradoxical blend of particularism and universalism.”<sup>91</sup> This turns out to be a complicated matter, since the more well-versed an expert is in a certain expert language, the more detached she or he may become from the particular conditions or needs of the client. Anthropological and sociological research shows that rather than translating and incorporating local forms of knowledge, experts often privilege global technical knowledge. Studies of the medical profession for example show how doctors often limit the knowledge available to their patients in ways that define and circumscribe patients’ decision-making power.<sup>92</sup> To

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90. See Timothy Choy, *Articulated Knowledges: Environmental Forms after Universality's Demise*, 107 *AMERICAN ANTHROPOLOGIST* 5, 6, 9. (2005).

91. See *id.* at 8; cf. Feldman, *supra* note 1, at 765 (describing the role of “agents” in negotiating the interaction of global and local legal norms).

92. See Rayna Rapp, *Chromosomes and Communication: The Discourse of Genetic Counseling*, 2 *MED. ANTHROPOLOGY Q.* (N.S.) 143, 154 (1988).

the extent that expertise is unevenly distributed, therefore, disadvantaged groups or individuals may be misunderstood or excluded from the process of developing solutions to their own problems.<sup>93</sup> If the experts are drawn predominantly from certain social or economic groups, there is also the danger that the experts will misrecognize their own cultural biases as expertly derived knowledge, as in the failure of the medical profession to appreciate the special medical risks faced by certain minority populations. This in turn makes expertise far less effective in solving actual problems.

Second, in assigning sole responsibility for important social problems, such as health, to one particular group of experts, the monocentric model undervalues the social contributions other kinds of actors and expertise may make to the problem, and discourages such groups from taking an ownership stake in finding solutions to such problems. A patient may wait for a doctor to prescribe a sophisticated and invasive form of treatment, for example, rather than realize that only she has the psychological and emotional resources necessary to improve her condition by taking difficult quotidian measures such as quitting smoking.<sup>94</sup>

Third, even in a monocentric system, non-experts inevitably play an important role in the implementation and elaboration of a body of expertise. As Lauren Edelman demonstrates in American employment law, for example, human resource managers have played a crucial role in interpreting the practical meaning of sexual harassment and civil rights standards, in the process of elaborating corporate employment policies.<sup>95</sup> Where such individuals lack sufficient understanding of the

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93. See, e.g., MARGARET M. LOCK, ENCOUNTERS WITH AGING: MYTHOLOGIES OF MENOPAUSE IN JAPAN AND NORTH AMERICA 370 (1993); Sherine Hamdy, *When the State and Your Kidneys Fail: Political Etiologies in an Egyptian Dialysis Ward*, 35 AMERICAN ETHNOLOGIST 553, 563 (2008); Patricia A. Kaufert & John D. O'Neil, *Cooptation and Control: The Reconstruction of Inuit Birth*, 4 MED. ANTHROPOLOGY Q. (N.S.) 427, 437 (1990); Stacey Langwick, *Articulate(d) Bodies: Traditional Medicine in a Tanzanian Hospital*, 35 AMERICAN ETHNOLOGIST, 428, 431-34 (2008); cf. Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 68 (1988) ("[L]awyers . . . preempt virtually all of the decision-making authority, keep information to themselves, don't spread a full range of choices before their clients or heavily bias the choices they do present, don't tell clients what is happening in their cases, patronize their clients and view them as overemotional and dumb laypeople who can't possibly know what legal options will serve them best . . .").

94. See Ronald J. Maynard, *Controlling Death – Compromising Life: Chronic Disease, Prognostication, and the New Biotechnologies*, 20 MED. ANTHROPOLOGY Q. (N.S.) 212, 212-13, 218-21 (2006).

95. See Edelman, *supra* note 78.

law, as in the United States, where human resource managers typically lack legal training, they are likely to make mistakes and to skew the law in certain ways. Edelman shows how these human resource managers vastly overreacted to sexual harassment legislation and displaced a legal "civil rights" framework with a managerialist "diversity" framework in the United States. These "mistakes" were then ultimately legitimized by U.S. courts as "ordinary business practice."<sup>96</sup>

Fourth, as noted above, a monocentric system of expertise will most likely be an ex post facto system. But to continue with the medical example, it may be less costly and more beneficial to patients' quality of life to address medical problems before they arise than to address them ex post facto.

In the monocentric model of legal knowledge, likewise, legal knowledge is monopolized by the legal profession. Legal rules are the tools of legal professionals; like prescription drugs and scalpels, they are not to be used by lay people. Lay people access the law through certified legal professionals only. They do not claim to understand the law, nor do they take responsibility for learning about the law. To put it another way, legal literacy is low in such a society — knowledge of law is concentrated in the hands of a few. As with holders of other monopolies, legal experts are able to charge a premium for their services.<sup>97</sup> Hence it is not surprising that bar associations are typically forceful advocates for the monocentric model — for limiting the practice of law to those who have passed the bar examination and remain members in good standing of their bar associations.<sup>98</sup> And as with other forms of expertise, there are strengths and weaknesses to the monocentric model of legal knowledge allocation. The strength is that, on the whole, the quality of legal expertise provided to consumers is reasonably high. The weaknesses include serious problems of access to lawyers in certain geographical areas or by certain socio-economic groups,<sup>99</sup> a relative inability to address prob-

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96. See *id.*, at 350-51.

97. See Mark Ramseyer, *Lawyers, Foreign Lawyers, and Lawyer-Substitutes: The Market for Regulation in Japan*, 27 HARV. INT'L L.J. 499, 510 (arguing that economic theory would predict that in a profession with these kinds of barriers to entry, one can expect an increase in price without a parallel increase in quality).

98. See Miyazawa, *supra* note 6, at 91-95 (discussing opposition to the Japanese reforms by the Japanese Federation of Bar Associations).

99. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal*

lems *ex ante*, a lack of sufficient familiarity on the part of legal experts with the nature of the problems faced by those who seek their legal advice, and relatively poor integration of legal expertise with other disciplinary forms of expertise that stand to contribute to a problem, from engineering to planning to medicine and more.<sup>100</sup>

At least in Japan, American society is often identified with the monocentric legal knowledge model. And the premise of the Japanese reforms—that what Japan needs is more professional lawyers—is understood to follow directly from a comparison with the American model.<sup>101</sup> What is perhaps most significant about the legal education reforms in Japan, therefore, is the unchallenged, even unspoken consensus that has emerged—among supporters and critics of the law school system alike—that *Japan should become a monocentric legal knowledge based society*. The Japanese Bar Associations have generally been highly skeptical of the reforms, fearful that any increase in the number of practicing lawyers would create more competition for legal services and hence work against the interests

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*Change*, 9 LAW & SOC'Y REV. 95, 98-104 (1974). For an interesting recent ethnographic study of the problem in Japan, see Suzuka Yoshioka, *Seeking Legal Advice in Rural Areas of Japan: The Recent Changes in Legal Networks*, 41 KOBE U. L. REV. 17 (2007).

100. See Gordon, *supra* note 93, at 36 (reviving Brandeis' argument for "the importance of thorough knowledge of the client's business operations as the precondition to influential counseling.").

101. In the United States, in contrast to Japan's current reforms, the consolidation of a more monocentric legal system was a long historical process and one not clearly directed from one singular political center. Reforms in legal education and bar admission standards were at the heart of the American Bar Association's ostensible founding goals to improve the quality of legal representation, which had suffered during the nineteenth century because of the ease of entry into practice. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 500 (3d ed. 2005) (explaining that by the 1870s, almost no qualifications were required for admission to practice); Max Radin, *The Achievements of the American Bar Association: A Sixty Year Record* (pt. I), 25 A.B.A. J. 903, 904-05 (1939) (expounding the causes of the creation of the A.B.A. in 1878 and describing its founding mission). In the United States, heightened bar admission requirements and legal education regulation aimed to limit the number of practicing attorneys, to control their training, and to preclude price competition. See Hugh C. MacGill & R. Kent Newmyer, *Legal Education & Legal Thought*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: VOLUME II, THE LONG NINETEENTH CENTURY (1789-1920)* 64-65 (Michael Grossberg & Christopher Tomlins eds., 2008). Progress was slow and incomplete during the late nineteenth and early twentieth centuries, see, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 497-500 (3d ed. 2005); KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 218-21 (1989), but during the latter half of the twentieth century, the bar successfully consolidated control over most legal education and achieved heightened bar admission standards in most states. See William W. Fisher III, *Legal Theory & Legal Education, 1920-2000*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: VOLUME III, THE TWENTIETH CENTURY AND AFTER (1920-)* 62-63 (Michael Grossberg & Christopher Tomlins eds., 2008).

of their members.<sup>102</sup> However, if one understands the reforms as a move to a more monocentric legal knowledge system, one can also understand how much the Japanese bar stands to gain from the reforms. In exchange for a very modest increase in the number of lawyers in Japan, the bar may be able to consolidate its monopoly over legal knowledge and hence to consolidate its authority over legal expertise.

### B. *The Polycentric Model*

There is a second model of the social distribution of expertise, however, which we will call the polycentric knowledge model. An example of this model is expertise in economics, especially as it has been distributed in Japan in the postwar period. In Japan, as elsewhere, economists are found in numerous sectors of the society. In order to teach economics at university, it is usually necessary to hold a Ph.D. in the field. However, graduates of master's degree programs and even undergraduate programs are considered to hold significant expertise in the field, and companies routinely hire such persons to work as economists. Graduates of master's or undergraduate programs in economics also work on economic projects in large numbers within the government. Perhaps more than in the United States, moreover, economists are public intellectuals—economists appear frequently on television programs and write articles aimed at generalist audiences in which they explain their research.<sup>103</sup> Bookstores and libraries offer abundant supplies of relatively sophisticated economics textbooks aimed at addressing the specific problems of consumers, company employees, and other social actors. As his-

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102. The Japanese Federation of Bar Associations was initially so divided on the question of how to respond to the government's proposal for reform that it was unable to provide formal input into the deliberations of the Justice System Reform Council. Ultimately it did send a representative to the Law School Planning and Research Council. See Yoshiharu Kawabata, *The Reform of Legal Education and Training in Japan: Problems and Prospects*, 43 S. TEX. L. REV. 419, 427 (2001).

103. See, e.g., YUJI GENDA, *A NAGGING SENSE OF JOB INSECURITY: THE NEW REALITY FACING JAPANESE YOUTH* (2005) (an economic evaluation of the Japanese employment system aimed at a lay audience); KATSUHITO IWAI, *KAISHA WA DARE NO MONO KA? [TO WHOM DOES THE CORPORATION BELONG?]* (2005) (an economist's argument for a generalist audience about the nature of the corporation and corporate ownership engagement, made in conversation with debates in philosophy, history, and literary studies). On the postwar history of this phenomenon, see LAURA HEIN, *REASONABLE MEN, POWERFUL WORDS: POLITICAL CULTURE AND EXPERTISE IN TWENTIETH-CENTURY JAPAN* 57-63 (2004).

torian Laura Hein explains:

Social science, particularly economic thought, is deeply embedded in Japanese public life. . . . [M]ost of them [Japanese] are highly sophisticated about economic matters, at least compared with Americans. They confidently handle statistical concepts that many Americans find difficult (including basic ones taught in all grade schools such as the median and the mean) and are far more likely to be familiar with specialized economic terminology than are Americans. In this respect, Japan is closer to the universal ideal for all democratic societies: to educate citizens in ways that allow them to understand and therefore fully participate in the crucial decisions of their day.<sup>104</sup>

As historians of modern Japan have documented, this fact is the result of a concerted effort by the post-war government and non-governmental groups to disseminate expertise in economics as broadly as possible—including to the individual household level—to encourage rational economic action in all segments of society, including household saving and spending, and to promote political transparency.<sup>105</sup> The idea here is that the more economics is widely understood, the more society as a whole will benefit. This of course does not take away from the need for more highly skilled experts—Ph.D.'s—who do research, teach, and consult on specialized projects for government and industry.

In the polycentric model, in other words, expert knowledge is not monopolized by a singular profession. Rather than restrict access to expertise, the state encourages its broad allocation throughout society. The aim is to ensure that people with expert training will operate not only as professionals but also as administrative officials in both central and local governments, as business persons, bankers, journalists, novelists, politicians, teachers, and so on. This in turn requires concerted pedagogical efforts within the formal educational institutions but also through public education campaigns of various kinds. In the polycentric legal knowledge model, the purpose of edu-

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104. Hein, *supra* note 103, at 3-4.

105. See *id.* at 106-07; SHELDON GARON, MOLDING JAPANESE MINDS: THE STATE IN EVERYDAY LIFE 164-72 (1997).

education is not only to create certified legal professionals but also to distribute legal knowledge to a variety of sectors of society. It also requires that students who study the subject at a less advanced level nevertheless achieve a certain degree of comprehensive knowledge. To put it another way, in such a society, the aim is for the level of non-expert literacy to be high.

In the polycentric model, the expert does not have a complete monopoly, and hence commands something less of a premium for his or her services than in the monocentric model. A financial institution is able to hire an employee with a master's degree in economics to work on its trading floor at a lower wage than it would hire a Ph.D. in economics. At the same time, the very fact that so many individuals achieve a certain degree of expertise in the subject in itself arguably generates interest in and appreciation for more advanced work in the field: the readership of economics journals will be considerably higher for example, if the body of persons with an interest in reading economics articles is not effectively limited to persons holding Ph.D.'s in economics. Finally, in such a system, expertise often can be brought to bear on problems *ex ante* rather than *ex post* since expertise is more readily accessible to individuals and institutions as they are designing their course of action in the public and private sectors alike.

In the opposite way from the monocentric model, the risk associated with the polycentric model is one of quality control. Persons with less expertise, and persons whose expertise has not been shown to meet one general standard through a qualifying examination, are able to act as experts. Again, this risk is most serious where important issues of health and safety are involved or where the consumers of such services are not in a position to adequately evaluate the quality of the services they are receiving from their experts. And the risk may be mitigated in other ways, such as through tighter government regulation, or through the availability of standard legal remedies for negligence or fraud.

But there are also advantages. Most notably, social actors can often resolve problems that require relatively simple degrees of expertise cheaply and efficiently without consulting outside experts. For example, a local government can handle its own basic economic planning and employ outside consultants only for more specialized planning needs. Moreover, one kind of expertise can be more organically integrated with

other kinds of expertise, as a tool for addressing social problems. For example, within a financial services company, an economist designing risk management tools must work side by side with, and hence integrate her economic analysis with, the expertise of sales department staff about the desires of clients.

The same, we suggest, is true of legal expertise. In a society that adopts a polycentric legal knowledge model, legal literacy is high: core legal concepts as well as the larger logic of the legal system are understood by a larger sector of the population, and individuals with solid legal expertise can be found in a wide range of social and economic institutions. To put it another way, legal expertise is not monopolized by the legal profession but is available to a wider range of social actors. In this context, because access to legal concepts is more readily available from co-workers, friends, government officials, and others, legal rules are not simply used to resolve disputes *ex post facto*. Rather, legal expertise can be accessed *ex ante*, to integrate analysis of the legal consequences of particular paths of action as actors formulate their decisions. In such a system, a principal function of legal knowledge therefore is to produce *ex ante* rules of conduct to guide social and economic actors. This is what John Haley has termed the “didactic effect” of law in Japanese society.<sup>106</sup> A principal function of legal education institutions, moreover, is to disperse a general but solid foundation of legal understanding across a wide spectrum of social institutions, not simply to produce certified professionals.

### C. *The Polycentric Character of Legal Knowledge Distribution in Japan*

No society is purely monocentric or polycentric in its approach to legal knowledge, or any other form of expertise. In practice, every system exists along a continuum of monocentrism and polycentrism, as its own hybrid of the two. But it is our contention that until recently, at least, Japanese society has been relatively polycentric in its approach to legal knowledge. As a matter of practice, most professional lawyers working outside specialized fields such as transnational corporate work

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106. John O. Haley, *Heisei Renewal or Heisei Transformation: Are Legal Reforms Really Changing Japan?*, ZEITSCHRIFT FÜR JAPANISCHES RECHT (F.R.G.), Summer 2005, at 5.

and criminal work are litigators — they spend the bulk of their efforts representing clients in court. The remainder of legal tasks then are performed by a vast array of other legal experts, including a significant number of auxiliary legal professionals such as judicial and administrative scriveners, tax attorneys, and patent attorneys who also provide specialized legal expertise.<sup>107</sup> Legal literacy in Japan certainly is high. Individual litigants represent themselves *pro se* in court in robust numbers.<sup>108</sup> One need only consult the very extensive and sophisticated selections on law available in major Tokyo bookstores, and compare these with the meager and very simplistic selections at major bookstores in New York or Philadelphia, to realize that compared to the American population, the general Japanese readership is far more educated about legal questions.<sup>109</sup> One of us has further anecdotal evidence of this relating to his technical textbook on the Japanese civil law: response cards from readers suggest that many readers are not professionally certified lawyers, but rather take their own self-education in law as a kind of hobby, or as a body of knowledge that will help them nonetheless in their work.

More importantly, graduates of Japanese undergraduate law departments are widely dispersed among companies, in the bureaucracy, in civil society, in education, in politics, in the media, and in cultural institutions of various kinds. Until 2004, there were ninety-three law faculties in Japan that produced approximately 45,000 graduates every year.<sup>110</sup> Given historic bar passage rates of between 2% and 4%, the vast majority of these individuals did not pass the bar examination upon graduation but found other kinds of employment. As a result, there are large numbers of talented people with legal knowledge working in positions of substantial responsibility in fields other than the formal legal profession.<sup>111</sup>

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107. Cf. Masanobu Kato, *The Role of Law and Lawyers in Japan and the United States*, 1987 *BYU L. REV.* 627, 647 (1987); Ramseyer, *supra* note 97, at 508.

108. See Ota, *supra* note 15, at 563.

109. See Uchida, *supra* note 2, at 32.

110. COUNCIL REPORT, *supra* note 3, at 3:2:2(2).

111. Kato, *supra* note 107, at 651, 653, 655 (describing how many tasks usually performed by lawyers in the United States are performed in Japan by non-*bengoshi* “quasi-lawyers,” who have a legal background but are not “lawyers” in the traditional sense).

### 1. *Legal Knowledge and the Law Faculties*

This brings us back to the question of legal education because whether such a system actually constitutes a dispersion of legal knowledge throughout society turns on what is actually taught in the law faculties—on what graduates of law faculties know when they fan out throughout the institutions of government, market, and civil society. So what do Japanese law faculty graduates know about law upon graduation from an undergraduate program in law?

Japanese undergraduate education in law is a four-year course of study. As with most other courses of study in Japan, the first approximately one and a half years are devoted to general studies. Students take courses in political science, history, economics, and numerous other subjects, in many cases alongside students studying subjects other than law. The second two and a half years then are devoted to coursework in all the basic subjects of law, as defined in the civil law system. Students take courses in the six core subjects of civil law, criminal law, constitutional law, commercial law, civil and criminal procedure, as well as other subjects such as labor law, corporate law, antitrust, and so on. At most law schools, there are also some course offerings in international and comparative law, and in law and society or interdisciplinary approaches to law.<sup>112</sup> These courses have traditionally been taught in the same way as in most civil law countries, that is, through large lectures.<sup>113</sup> These core subjects are supplemented with a variety of specialized seminars.

As Kahei Rokumoto explains, “The main purpose of the instruction is to impart to the students not only the knowledge of the legal norms and institutions that are currently in force but also the skills of interpreting and applying those statutory norms and concepts to actual cases.”<sup>114</sup> A graduate of such a program most probably does not know a great deal about certain practicalities of legal practice—how to file a brief for example, or how to argue a case. But he or she will have a comprehensive understanding of the civil, criminal and commer-

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112. See Kahei Rokumoto, *Legal Education*, in *LAW IN JAPAN: A TURNING POINT* 190, 194 (Daniel H. Foote ed., 2007).

113. See *id.*

114. See *id.* at 195.

cial codes as well as of the constitution—what is conceived to be the logic of the law in the civil law tradition—and he or she will also have a fairly detailed knowledge of the content of particular legal rules, such as the rules of tort, of contract, and of procedure.<sup>115</sup> He or she will also have sufficient analytical and legal research skills to continue to educate him or herself about the law—to read legal periodicals, follow important court decisions, and to participate in conferences on legal topics. Hence, in the course of their professional and personal lives, law graduates can be expected to have an intuitive sense of when a social or commercial problem might have legal ramifications, an ability to make a good educated guess about how a professional lawyer would evaluate the problem, and then to follow up that guess with legal research as to what the state of the law is about that legal issue. Law graduates will also have the skills necessary to interact with professional lawyers at a high level of sophistication and to competently evaluate the quality of the legal advice such professionals may provide. This is enough to enable these graduates to play an important role in addressing legal problems.

For example, although most bureaucrats who have graduated from law departments have not passed the bar examination, bureaucrats' aptitude for legal problems within their area of expertise in many cases equals that of professional lawyers. The civil service examinations at all levels, in fact, test for legal aptitude and knowledge, and in many cases these bureaucrats develop specialized legal skills, such as legal drafting abilities, which elude many qualified lawyers. The Cabinet Legislation Bureau, responsible for drafting and reviewing legislation, is staffed by persons who are not qualified lawyers.<sup>116</sup>

## 2. *Legal Education Beyond the Law Faculties*

In addition, it has become increasingly common for law graduates working in the bureaucracy and in elite companies, at least, to continue their legal studies at an advanced level overseas. A significant number of Japanese bureaucrats and

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115. Cf. Peter Lawley, *The Post-'Law School' Future of Japanese Undergraduate Legal Education: A Personal Perspective Comparison with Australia*, 20 J. JAPAN L. 81, 84-85 (2005).

116. See Cabinet Legislation Bureau Home Page, <http://www.clb.go.jp/english/about.html> (last visited Mar. 2, 2009).

company employees have advanced (LL.M.) degrees from American law schools, and on the conclusion of their advanced studies in the United States, many then qualify as lawyers in New York or another U.S. state (although they are not qualified in Japan). Hence these law graduates arguably have a more internationalist and comparative understanding of the theory and practice of law than many of their counterparts in the United States.

But crucially, these legal experts are not simply experts in law. That is, it is assumed that the completion of their legal education does not end their professional training. When a young law graduate enters into a career at a trading company, for example, he or she may be expected to rotate through different divisions and actually to work as a salesperson, a staff member at a branch office, or a low-level manager in the financial services division before settling into the company's legal division responsible for contracting and other legal issues. Through this rotation, these legal experts come to be far more intimately knowledgeable about their "clients" than are the typical legal experts in a monocentric legal knowledge model. Unlike even in-house counsel in an American company, who usually maintain a degree of professional distance from the company's day-to-day operations, a law graduate employed at a Japanese company becomes a part of the ethos of that company. He or she will ideally understand the culture well enough to be able to predict the internal institutional consequences of different possible legal courses of action. This also has disadvantages: if in-house counsel in the United States find it difficult to offer independent judgments that may go against management's immediate intentions, this is even more the case where the legal expert lacks something of the professional status of the company "lawyer."<sup>117</sup>

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117. See Hugh Gunz & Sally Gunz, *The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L. J. 2, 241 (2008); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study* in THE SOCIOLOGY OF ECONOMIC LIFE 191, 204 (Mark Granovetter and Richard Swedberg eds., 2d ed., 2001); Barbara Jane Macon, *Relationships of Corporate Counsel with Outside Law Firms*, 30 INT'L BUS. LAW 99 (2002).

### 3. *The Social and Economic Contribution of Legal Knowledge in a Polycentric System*

So what do these legal experts do in society? Since the claim is so often made that it is the *market* that demands more *hoso*, it may be helpful to begin with the economic contribution of these informal legal experts within the market. In the large city banks and securities firms, one finds law graduates heading up trading units, working in sales divisions, serving in high level management positions, and much more. Staff members working in legal affairs departments perform a range of tasks performed in American banks by lawyers, such as negotiating and drafting contracts, and in some cases the most senior of these even become involved in legal reform projects, working collaboratively in industry organizations and with bureaucrats, academics, and qualified lawyers. But they also perform tasks often performed by paralegals in American banks, such as issuing standardized confirmation documents for trades.<sup>118</sup> Much of this work then is a mix of what would traditionally count as legal work in the United States with management or administrative work, such as developing protocols for relationships with clients or participating in industry-wide committees.<sup>119</sup>

What is the value of this work to the market? To begin with, these individuals are delivering a quality service<sup>120</sup> at a very reasonable price, relative to the cost of hiring qualified law-

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118. See Annelise Riles, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 AM. J. COMP. L. 605, 609-10 (2008) (describing the work of legal office staff in Japanese banks involved in global derivatives trading). This fact has led to interesting questions about whether these individuals are within the scope of attorney client privilege when a Japanese company is involved in litigation in the United States. American courts have ruled that to the extent that they are giving legal advice, their communications are covered by attorney-client privilege rules. See *Minebea Co. v. Papst*, 228 F.R.D. 13, 21 (D.D.C. 2005) (memorandum from Managing Director to Manager of Minebea's Legal Department requesting that Mr. Naka draft a document in response covered by attorney-client privilege).

119. See Annelise Riles, *Legal Fictions*, CURRENT ANTHROPOLOGY (forthcoming 2009) (describing the participation of bank legal staff in industry-wide committees).

120. The legal work of non-*bengoshi* who fall into one of the other categories of professional legal service providers, such as tax attorneys, judicial scriveners, and patent attorneys, is regulated by statute and through government oversight, see, e.g., *Shiho shoshiho* [The Judicial Scriveners Law], Law No. 197 of 1950; *Gyosei shoshiho* [The Administrative Scriveners Law], Law No. 4 of 1951; *Benrishiho* [The Patent Attorneys Law], Law No. 49 of 2000; *Zeirishiho* [The Tax Attorneys Law], Law No. 237 of 1951, and subject to duties of care roughly analogous to those of *bengoshi*. The legal work of those who do not fall into one of these categories is subject to general tort law liability for negligence, fraud, and so on.

yers.<sup>121</sup> From this point of view it is not surprising that *keidannren* first proposed expanding the scope of the legal authority of these law graduates. Because the cost of these individuals' service is relatively low compared to qualified lawyers, companies can afford to use their services much more readily and proactively, as for example to develop procedures and protocols in advance, which may save the cost of legal conflict later.<sup>122</sup> In economic terms, a polycentric legal knowledge system has lower transaction costs.<sup>123</sup>

But these legal experts may do more than provide the same legal service as qualified lawyers at a lower cost. Their appreciation of the wider parameters of the institution's work or business means that by definition they also are able better to integrate legal reasoning with other forms of knowledge in the company (management expertise, economic expertise, industry-specific, etc). This is what they have been trained to do by their employers through the rotation system. Management studies experts have shown how the institutional integration of various forms of expertise is the key to innovation within institutions, as organizational actors with one kind of tacit knowledge are sufficiently integrated with actors with a different kind of tacit knowledge to engage in the "cross-leveling of knowledge" that constitutes one aspect of innovation.<sup>124</sup> In

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121. In the United States, in contrast, perhaps owing to the fact that in-house counsel have the same professional qualifications as lawyers practicing in firms, the gap between the remuneration of in-house counsel and of lawyers practicing in firms is not as large. According to the American Bar Foundation study, *After the JD* (2004), the medium income for a recent graduate of a top-10 law school working in a firm of 101-250 lawyers in 2004 was \$145,000, while the medium income for a graduate of a top-10 law school working for a Fortune 1000 corporation was \$120,000. See RONIT DINOVIETZ ET AL., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 44 (2004), available at [http://www.nalpfoundation.org/webmodules/articles/articlefiles/87-After\\_JD\\_2004\\_web.pdf](http://www.nalpfoundation.org/webmodules/articles/articlefiles/87-After_JD_2004_web.pdf). At the other end of the career spectrum, the medium salary for chief legal officers in the United States in 2007 was \$457,400 including bonus, see Altman Weil, Inc., *Compensation for In-House Lawyers Up Sharply*, Sept. 18, 2007, <http://www.altmanweil.com/2007LDCBS/>, while median compensation for managing partners at firms of 55-129 members was approximately \$650,000. See *id.*

122. See Riles, *supra* note 118, at 617-24 (arguing that these individuals' work in the global financial industry constitutes a form of global private law).

123. See Ramseyer, *supra* note 97, at 520 ("In effect, large corporations find it more efficient in the existing cartelized market to train their own specialists than to purchase professional legal assistance on the market.").

124. See IKUJIRO NONAKA & HIROTAKA TAKEUCHI, *THE KNOWLEDGE-CREATING COMPANY: HOW JAPANESE COMPANIES CREATE THE DYNAMICS OF INNOVATION* 88 (1995); Jonathon Cummings, *Work Groups, Structural Diversity and Knowledge Sharing in a Global Organization*, 50 MGMT. SCI. 352 (2004); Thomas Davenport, David De Long & Michael Beers, *Successful Know-*

other words, the wide distribution of legal knowledge in Japanese society creates an opportunity to bridge the divide between the “universal” aspects of legal expertise and its “local” integration with institutional practices and application to precise problems. This may in turn translate into a special ability to help develop creative *ex ante* solutions to legal problems that avoid costly litigation *ex post facto*.

We want to emphasize, however, that the benefits of such a polycentric system are not simply economic. In any society in which democratic change happens through legal means, democracy depends upon the widespread appreciation of and respect for the rule of law, and the accurate interpretation and implementation of legal reforms throughout society. In a society in which a sophisticated knowledge of the law and appreciation of the nature of legal reasoning is relatively widespread, individual and institutional actors will be better able to understand the nature and function of particular reforms, and also their limits—they will better understand what they should and should not expect of government, and of one another as citizens. Citizens will be in a better position to evaluate government actions critically if they have a more sophisticated understanding of the principal tools of governmental action, law-making, law-interpreting, and law-enforcement. And of course they will be in a better position to propose alternatives and advocate for change.

Here, the insights of social science about the problems of reconciling expertise with democracy are relevant. Research shows that when not properly translated to “lay” people, expert knowledge can perpetuate already existing socio-economic divides.<sup>125</sup> As a result, there is now increased pressure from both within and without expert communities to open expert processes to non-expert constituencies.<sup>126</sup> Indeed,

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*ledge Management Projects*, SLOAN MGMT. REV., Winter 1998, at 43; Morten Hansen, *The Search-Transfer Problem: The Role of Weak Ties in Sharing Knowledge Across Organizational Subunits*, 44 ADMIN. SCI. Q. 82 (1999); Milan Zeleney, *Management Support Systems: Towards an Integrated Knowledge Management*, 7 HUMAN SYS. MGMT. 59, 65 (1987); Mark Ackerman, David McDonald, Wayne Lutters & Jack Muramastu, *Recommenders for Expert Management*, Paper given at the ACM International Conference on Research and Development in Information Retrieval (1999) (on augmenting expert networks within organizations), available at <http://projects.ischool.washington.edu/mcdonald/papers/Ackerman.SIGIR99.pdf>.

125. See, e.g., Sheila Jasanoff, *(No?) Accounting for Expertise*, 30 SCI. AND PUB. POL'Y 157, 157-60 (2003).

126. See MICHAEL GIBBONS, CAMILLE LIMOGES, HELGA NOWOTNY, SIMON SCHWARTZMAN,

it is possible to view public calls for the reform of the legal profession in Japan as one example of this trend.<sup>127</sup> One of the great ironies of the current reform, then, may be that its undebated consequence of a move to a more monocentric legal knowledge system may actually decrease, rather than increase, lay participation in the expert processes of the law.

#### D. *An Alternative Hypothesis about Low Litigation Rates*

This brings us to the puzzle of low litigation rates in Japan. Here we wish to offer an alternative hypothesis to the culturalist, institutionalist, and rationalist explanations described in Part I of this Article. We agree that low litigation levels may reflect certain hidden efficiencies in the Japanese legal system. Nakazato and Ramseyer provide a guide where they emphasize economic actors' degree of certainty, in advance, about ex post facto legal outcomes. But, we ask, where does that certainty come from? How is it produced, as a sociological fact? How do potential litigants come to "know" (that is, come to agree about) what the rational legal outcome of a potential dispute might be before they ever take the matter further? And what is its content?

To begin to address this question we need to acknowledge, in a post-legal formalist way, that what is rational as to the content of law (or indeed any form of expertise) is "not given" at the outset, but socially and institutionally derived.<sup>128</sup> This basic realist insight then directs our attention to the socio-technical and institutional contexts in which practical day-to-day agreement is reached about what constitutes the "truth" of the law. Recent social scientific research has focused on

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PETER SCOTT & MARTIN TROW, *THE NEW PRODUCTION OF KNOWLEDGE: THE DYNAMICS OF SCIENCE AND RESEARCH IN CONTEMPORARY SOCIETIES* 161 (1994); DAVID GUSTON, *BETWEEN POLITICS AND SCIENCE: ASSURING THE INTEGRITY AND PRODUCTIVITY OF RESEARCH* 28-32 (2000); DANIEL KEVLES, *THE BALTIMORE CASE: A TRIAL OF POLITICS, SCIENCE AND CHARACTER* 10, 189, 269 (2000).

127. See Uchida, *supra* note 2, at 27.

128. Terence Halliday, *Crossing Oceans, Spanning Continents: Exporting Edelman to Global Lawmaking and Market-Building*, 38 *LAW & SOC'Y REV.* 213, 215 (2004) ("[R]ationality becomes an emergent process bubbling up from within a market actor to become a market norm ultimately institutionalized in law."); cf. Lauren B. Edelman, *Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 *LAW & SOC'Y REV.* 181, 188 (2004) (contending the law and economics idea of the rational actor should be replaced with a law and society model of a "social actor whose thinking incorporates institutionalized notions of rationality").

how certain truths come to be “calculable.” In a market, for example, we properly speak of price being discovered through market interactions. But in order for all market participants to calculate price in the same way, such that they can agree on a singular outcome, price, a complex network of social, political, material, and institutional conditions, including the integration of certain kinds of expertise, must exist.<sup>129</sup> The same can be said of the calculation of legal truths.<sup>130</sup>

Nakazato and Ramseyer answer the question of how legal agreement is reached by drawing attention to certain aspects of the formal judicial institutional system—such as the lack of jury trials. And indeed, the courts surely are one venue for the dissemination of legal knowledge, or rather, for the production of consensus about the content of legal knowledge. But as generations of law and society scholars have shown, courts are but one such institution among many others. Certainly, the pedagogical institutions in which legal expertise is imparted, for example, would be another.

Indeed, social science research suggests that there are many more venues for the production of legal truth than formal legal institutions—be they legislatures, courts, or even law schools. For example, Mariana Valverde has shown how judges, lawyers, police officers, public health inspectors, and others negotiate common legal understandings of what behavior violates standards of decency, and therefore can be regulated by municipalities without raising concerns about state violations of free speech rights.<sup>131</sup> In this example, legal truth emerges as

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129. See Michel Callon, *An Essay on Framing and Overflowing: Economic Externalities Revisited by Sociology*, in *THE LAWS OF THE MARKETS* (Michel Callon ed., 1998); Herbert Kalthoff, *The Inventory of Firms: How Banks Analyze Risk in Central Europe*, 16 *ÖKONOMIE UND GESELLSCHAFT* 59, 79-83 (2000); Andrea Mennicken, *Figuring Trust: The Social Organization of Credit Relations*, 16 *ÖKONOMIE UND GESELLSCHAFT* 35, 50-53 (2000); Fabian Muniesa, *Performing Prices: The Case of Price Discovery in Automation in the Financial Markets*, 16 *ÖKONOMIE UND GESELLSCHAFT* 289, 304-08 (2000); Alex Preda, *Financial Knowledge and the “Science of the Market” in England and France in the 19<sup>th</sup> Century*, 16 *ÖKONOMIE UND GESELLSCHAFT* 205, 213-16 (2000); cf. BRUNO LATOUR, *SCIENCE IN ACTION* 26-29 (1987) (making a similar claim about the social construction of scientific truths); TIMOTHY MITCHELL, *RULE OF EXPERTS: EGYPT, TECHNO-POLITICS, MODERNITY* 288-91 (2002) (arguing that externalities in formal and informal economies should be considered intrinsic elements of the economy regardless of the difficulties that market participants experience in accounting for externalities prospectively).

130. See BRUNO LATOUR, *LA FABRIQUE DU DROIT: UNE ETHNOGRAPHIE DU CONSEIL D’ETAT* (2002) (describing the socio-technical process of fact-making at the French Conseil’ D’Etat).

131. See MARIANA VALVERDE, *LAW’S DREAM OF A COMMON KNOWLEDGE* (2003); Ron Levi & Mariana Valverde, *Knowledge on Tap: Police Science and Common Knowledge in the Legal Regula-*

much in a policeman's spot-evaluation of what he encounters while on patrol as in a court of law. Our argument is that it is important to look beyond state-sponsored institutions such as courts, to include also private institutions beyond the state. To take the argument a step further, our contention is that the substance of "legal truth" is often not simply a prediction about what state organs—courts—would do. At least for the case of market relations in Japan, "legal certainty" is often its own body of privately derived legal norms, developed with less concern, in the first instance, about what courts ultimately may have to say about them, and more concern about how to create efficient and just private legal ordering.<sup>132</sup>

But the extent to which this consensus is influenced by legal expertise will in turn depend upon the extent to which legal knowledge is diffused throughout society.<sup>133</sup> Where social actors are surrounded with sound and solid information about the law, they also have a more sophisticated appreciation of its uses—they have a realistic view of the costs and benefits of formal court procedures in all liberal legalistic systems, and a legal vocabulary for fashioning norms and procedures outside the state. Because legal knowledge is shared more broadly in a polycentric legal knowledge based society, successful dispute resolution through alternative methods out of court is more readily available and more effective than litigation.

Our hypothesis, then, is the following: Japan's numerous, talented graduates of undergraduate programs in law are one important human resource for the broad distribution of legal knowledge in society. By assuming positions of responsibility in all sectors of society, and as integrated institutional actors, these individuals become important resources for achieving legal consensus—for gaining knowledge of legal truth. As Nakazato and Ramseyer emphasize, where actors already possess such knowledge, they have little need for the expensive, time-consuming, and burdensome process of going to court to seek a determination about the truth of the law.

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*tion of Drunkenness*, 26 LAW & SOC. INQUIRY 819 (2001); Mariana Valverde, *Authorizing the Production of Urban Moral Order: Appellate Courts and Their Knowledge Games*, 39 LAW & SOC'Y REV. 419 (2005).

132. See generally Riles, *supra* note 118.

133. In this respect, Ramseyer and Nakazato also mention in passing the significance of widely available how-to books on law written for a lay audience as one possible source of information. See Ramseyer and Nakazato, *supra* note 20, at 270.

## IV. CONCLUSION

We hasten to add that Japan's polycentrism is not a perfect system. In fact, we believe that the traditional Japanese system has not been nearly polycentric enough: while companies, government, media organs, and other large institutions that are able to hire law graduates "in house" have benefitted substantially from this system in the ways outlined above; ordinary citizens, especially in more rural areas, have less immediate access to legal expertise of all kinds (not simply to professional lawyers). Hence ordinary citizens have benefitted less from Japan's legal polycentrism than they could, and they have certainly benefitted less than have larger institutional players.<sup>134</sup> These disparities no doubt play a role in citizens' groups' support for the current legal education reforms because, as we have argued, the debate about how best to provide ordinary citizens with increased access to legal expertise has erroneously assumed that legal expertise can only be provided by those who have passed the bar exam.<sup>135</sup>

As described above, there are also disadvantages to a polycentric expert knowledge system alongside the advantages. The greatest of these, as we mentioned, is quality control. In any society, not all law graduates will be equipped with the same quality of legal skills. There is variation in Japan, as elsewhere, in the intellectual and personal qualities of law graduates, and in the training they have received. Where legal knowledge is being provided by a variety of institutional actors who lack professional qualifications, the standards of professional liability for poor-quality legal advice are less clear, and ordinary consumers may have more difficulty seeking redress from the courts for harms incurred. This may be less of a problem for large "repeat players" in the system than for ordinary consumers: an organization that employs legal experts to work within an established management framework that includes institutionalized supervision and evaluation is in a much stronger position to evaluate the quality of the expertise it is receiving than is an individual who only rarely seeks legal

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134. See Yoshioka, *supra* note 99.

135. See COUNCIL REPORT, *supra* note 3, at 2:2 (explaining that the goal of reform of the legal profession is to increase the responsiveness of the judicial system to the needs of individual citizens).

advice and has a relatively attenuated contact with the legal expert he or she employs.

Moreover, we wish to be clear about the following: we do not intend this Article as a defense of the traditional law faculty curriculum. There is no doubt that legal education in Japan can and must be reformed. Some of the current reforms—most notably the effort to encourage more interaction in the classroom—represent important improvements on the traditional system. Likewise, the goal of diversifying the legal profession is a crucial one, although the first years of the new law school system suggest that the system is falling far short of its goals on this front.

But what is striking is how little debate there has been about the question of the proper distribution of legal knowledge in Japanese society, and about the precise uses of legal expertise.<sup>136</sup> Our contribution to the debate about legal education reform therefore, is to encourage observers to separate two analytically distinct issues: the question of whether legal education should be reformed, and the question of whether Japan should become a monocentric legal knowledge society.

Here, we believe that on the whole, a polycentric model of legal knowledge is both more economically efficient and more politically suited to the goals of a liberal democratic society than the monocentric model of legal knowledge distribution. Graduates of Japan's undergraduate legal studies programs continue to make important, and often unacknowledged quotidian contributions to the economic value of their enterprises and to the welfare of society as a whole, precisely because of the generalist quality of their legal expertise. We have already provided examples of the contributions of legal affairs staff at Japan's large companies and banks. But one could multiply the examples from other sectors of Japanese society. The comparatively high quality news coverage of Japanese court cases and other legal affairs, produced in many cases by journalists who are graduates of undergraduate law programs, and the technical quality of the legal drafting and analysis produced by law graduates working as bureaucrats at the local and national levels would be two further examples.

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136. Cf. Luke Nottage, *Building Postgraduate Law Schools in Kyoto, and Will They Come—Sooner or Later?* 7 AUSTL. J. ASIAN L. 241, 241 (2005) (“[B]efore setting out on reforms, policy-makers ought to identify the big issues and develop a vision aimed at resolving them.”).

This argument suggests several conclusions. First, contrary to the view of many that the retention of an undergraduate program in law alongside the new graduate law school program is simply the product of an unfortunate political compromise,<sup>137</sup> we maintain that there is high social value in an undergraduate program in law that trains graduates to assume diverse positions of responsibility *other* than those of professional lawyers. Some have surmised that government reformers may ultimately hope to eliminate undergraduate legal education some time in the near future, in order to create a graduate legal education system that more closely emulates the American system. We think this would be a mistake.

Second, our analysis suggests that Japanese legal education should be reformed in a variety of ways *in addition* to those suggested by the Council that would specifically aim to prepare graduates better for the range of important social roles they play, as described above. For example, if the strength of the Japanese legal knowledge expert is an ability to work in an environment in which legal knowledge is organically incorporated into other forms of relevant expertise, then there is a need for legal education in Japan to be even more interdisciplinary.<sup>138</sup> An interdisciplinary approach to law – including not just a familiarity with other disciplines but the development of skills for thinking about law in non-legal contexts and in conversation with other forms of expertise – would seem to be a crucial skill for graduates who will work in professions other than *hoso*.

Finally, one of the laudable goals of the reform is to produce lawyers with good practical skills. But we nevertheless believe that the reformers' emphasis on practical skill, as it has been narrowly and technocratically defined, is overdrawn. What is neglected in this focus on practical legal skills is an appreciation of the role of the legal expert not just as a technician, but as an intellectual – a person called upon to use his or

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137. See, e.g., Kawabata, *supra* note 102, at 432.

138. This was in fact the recommendation of the representative of the Japanese Federation of Bar Associations to the Ministry of Education Committee. He proposed that the undergraduate curriculum be reformed with the aim at educating generalists rather than professional lawyers. See Kawabata, *supra* note 102, at 429; see also Miyazawa, *supra* note 6, at 113 (“Because most undergraduate law faculties teach both law and political science, law programs should be turned into liberal arts programs combining political science and social scientific studies of law and reducing technical and doctrinal courses.”).

her expertise in the service of higher social goals and moral commitments. Legal knowledge is not just a set of tools but an institutionally engaged way of thinking about large and profound social problems, and the very distribution of legal experts in society is a testament to the role such experts play as practically situated social thinkers. This requires a clear ethical foundation, a sense of purpose, a sensitivity to diverse points of view, strong communication skills, and sometimes even a good deal of courage and confidence, as well as a solid and substantive understanding of the law.

From a broader comparative vantage point, the question of whether legal education should be generalist or specialized, graduate or undergraduate, and interdisciplinary or doctrinal is hardly unique to Japan.<sup>139</sup> What the Japanese case opens up, therefore, is a range of new research questions for law and society scholars about the social distribution of legal expertise. In the United States, for example, it is also the case that many law graduates do not work as professional lawyers. One need only look at the number of lawyers working in high level government positions, in politics, in corporate management positions, and as leaders of civil society institutions to have some indication of this fact. One of the strengths of the American law school education, according to its defenders, is that it prepares graduates for a range of career options beyond professional law practice. Although this is all widely known, the role of law school graduates who do not practice law is understudied. What the strengths and weaknesses of these legal knowledge experts' training might be, relative to their professional responsibilities, and how legal knowledge interacts with or competes with other forms of expertise, is still widely unknown.

These are questions of much practical import, of course, as American law schools also now begin to update the Socratic method for a new era. But they are also questions of great theoretical import, as we consider what is the proper role for formal state run institutions in producing social consensus and

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139. Even in the United States, where it is well-established that law is a graduate and professional subject of study, there has been some discussion about the value of undergraduate legal studies that do not aim to train professional lawyers, but rather to teach legal concepts and legal reasoning to persons who will pursue a wide range of career paths. See, e.g., *LAW IN THE LIBERAL ARTS* (Austin Sarat ed., 2005).

achieving political goals ranging from economic efficiency to social justice, and what role is there for actors working beyond the state, organized through other forms of professional, social or institutional affiliations.<sup>140</sup> Here, comparative analysis of Japan's experiment with a polycentric model of expertise may lead us, in the best of comparative traditions, to rediscover some underappreciated aspects of what it is to be a legal expert that deserve reform and development, but also respect.

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140. The Japanese case may also offer lessons for other fields of expert knowledge in Japan and elsewhere, from medicine to urban planning, in which experts are confronting pressure from the outside to democratize access to expert decision making without sacrificing the quality of expertise.