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Nadia Chiesa, Adam de Luca & Bernadette Maheandiran

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SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

Law and Learning in an Era of Globalization

*By Harry W. Arthurs**

A. Introduction

The optimists amongst us assume that human hands — our hands — shape legal education, that legal education shapes the law, and that law shapes the world. The pessimists contend that the process works in reverse, that the forces of political economy ultimately have their way with law as a system of social ordering, as a cultural phenomenon and an intellectual enterprise, and as the subject or object of study in law schools. I am a pessimist by nature, so I will begin on a pessimistic note. However, I am trying to overcome my nature, so I will end on what, for me, is an optimistic one.[1]

B. Legal Education, Political Economy and Globalization

Governments pass laws, enter into treaties, appoint judges, establish tribunals, oversee officials and police, and shape or respond to public attitudes concerning immigration, anti-social behaviour, the environment, and many other issues. They regulate the involvement of citizens with the legal system by adjusting the balance between social control and individual freedom of action, by opening or closing avenues for complaints and claims and by juridifying or de-juridifying citizens' encounters with the machinery of the state. They

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[1] More accurately, perhaps, I am trying to recover the optimism I demonstrated in SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA, LAW AND LEARNING / LE DROIT ET LE SAVOIR: REPORT OF THE CONSULTATIVE GROUP ON RESEARCH AND EDUCATION IN LAW (1983) (also known as "the Arthur's Report"), which eroded badly in my subsequent writings, see *e.g.* Harry Arthurs, *The Political Economy of Canadian Legal Education* 25 JOURNAL OF LAW & SOCIETY (J. Law & Soc.) 14 (1998); Harry Arthurs, *Poor Canadian Legal Education: So Near to Wall Street, So Far from God*, 38 OSGOODE HALL LAW JOURNAL (OHLJ) 381 (2001); Harry Arthurs, *The State We're In: Legal Education in Canada's New Political Economy,* 20 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 35 (2001).

influence the market for legal services by regulating the legal profession's monopoly, providing funds for legal aid, hiring lawyers in the civil service and engaging private practitioners to perform legal work on their behalf. Their influence on law, and hence on legal education, is pervasive. However, governments act not in a vacuum but within a range of possibilities defined by the forces of political economy. In that sense, I claim, political economy ultimately determines the content of the law school curriculum, the attitudes and assumptions law students bring to their studies, the judgments and books which find their way onto law school syllabi and the research agenda of legal academics.

Nor do governments — and the forces of political economy — influence legal education only by indirection. They set higher education policies, establish the structure of legal education, license educational providers, provide funds for law faculties, impose fees on law students, require legal academics to meet quality standards in their teaching and research, and measure the success of law schools in recruiting top students and improving the job prospects of their graduates.

My pessimist's conclusion, to reiterate, is that political economy does much to determine the ends and means of legal education and research. And because globalization is a dominant influence on political economy, it becomes the 800-pound gorilla whose presence in our deliberations we can hardly avoid.

The question is: "how, exactly, will that gorilla make its presence felt?" In one sense, the answer is as obvious as the gorilla itself. Globalization alters the material circumstances of states and of groups and communities within states. This restructuring of the economy leads to the reconfiguring of the market for legal services. In the United Kingdom, the decline of the industrial economy and the rise of one based on information technology and financial services has led directly to the decline of High Street law practices which serve small, local businesses and to the growth of large, city firms which serve a global clientele. In Canada, ever-closer integration into a North American economic space dominated by the United States has realigned our economic and political elites and, inevitably, our legal elites as well. The result in both countries is not only specific changes in legislation, doctrine, procedures and institutions directly affected by the new economy. It is a more general redistribution of power and prestige within the legal profession; a new emphasis on what the profession and its regulators view as "relevant" knowledge, valued skills and exemplary behaviour; and of course a revised sense amongst legal academics of what it is important for us to be teaching and writing about.

A quick tour of law school websites and calendars supports my hypothesis that globalization has become a dominant theme. Some law schools have declared themselves "global law schools", adopted a "global curriculum", hired a "global faculty", established research centres on "global law" and entered "global partnerships" with foreign

institutions.[2] Others have begun to offer courses on globalization and the law, on global governance, global lawyering and global security — amongst many other "global" offerings.[3] Many have introduced global perspectives into conventional courses, acting either on the initiative of interested faculty members or as the result of explicit academic planning decisions.[4] Law school conferences, books written by legal academics, even legal periodicals published by law schools are devoted entirely to exploring the impact of globalization on law.[5] It is no coincidence that with the advent of globalization, some of our best students decide to seek careers with global law firms or that some of our best scholars focus their research efforts on influencing the outcome of global legal issues.

So globalization is a prominent new feature of legal education and scholarship.[6] But does this prove the optimists right or the pessimists? Does it demonstrate that law schools have retained agency, that their new, global curricula, syllabi, pedagogies, staffing strategies and

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[2] *E.g.* Hauser Global Law School (NYU - US); National Law School of Singapore; University of Navarra (Spain); Jindal Global Law School (India) amongst many others.

[3] *E.g.* Melbourne Law School (Australia); Warwick Law School (UK), Osgoode Hall Law School of York University (Canada); Universidade Catolica (Portugal); Rutgers Law School (US) amongst many others.

[4] *E.g.* Craig Scott, *A Core Curriculum for the Transnational Legal Education of JD and LLB Students: Surveying the Approach of the International, Comparative and Transnational Law Program at Osgoode Hall Law School,* 23 PENN STATE INTERNATIONAL LAW REVIEW (PENN ST. INT'L L. REV.) 757 (2005); Thomas Alexander Aleinikoff, *Law in a Globlal Context: Georgetown's Innovative First Year Program*, 24 PENN ST. INT'L. L. REV. 825 (2006); John E. Sexton, *Curricular Responses to Globalization*, 20 PENN ST. INT'L L. REV. 15 (2001-2002); *Nancy B. Rapoport, When Local IS Global: Consortium of Law Schools to Encourage Global Thinking*, 20 PENN. ST. INT'L L. REV. 19 (2001-2002); Larry Cata Backer, *Parallel Tracks?: Internationalizing the American Law School Curriculum in Light of the Principles in the Carnegie Foundation's Educating Lawyers*, available on SSRN at http://papers.ssrn.com/sol3 papers.cfm?abstract_id=1104098, last accessed 14 June 2009; Duncan Bentley and John Wade, *Special Methods and Tools for Educating the Transnational Lawyer*, 55 JOURNAL OF LEGAL EDUCATION (J. LEGAL EDUC.) 479 (2005); Michael Bogdan*, Is There a Curricular Core for the Transnational Lawyer?* 55 J. LEGAL EDUC. 484 (2005); for a description of a British school's ventures in global law teaching, see the description of University College London's Institute for Global Law at http://www.ucl.ac.uk/laws/global_law/, last accessed 14 June 2009 - amongst many others.

[5] Over a dozen conventional and online law-related English-language journals appear to be devoted entirely to the theme of globalization: Canadian Journal of Globalization; Global Law Review; Globalization; Global Social Policy; Human Rights and Globalization; Indiana Journal of Global Legal Studies; Journal of Global Ethics; Journal of Globalization, Competitiveness and Governability; Law, Social Justice and Global Development; Minnesota Journal of Global Trade; Richmond Journal of Global Law and Business; Washington University Global Studies Law Review. In addition numerous legal journals devoted to international and transnational law, as well as those without specialized mandates, are replete with articles on globalization.

[6] Of course, globalization is not *altogether* a new influence on legal education: British imperial legacies shaped the governments, economies, legal systems and universities of its ex-colonies; the Catholic educational and juristic traditions of France and Spain left their mark on the law faculties of Québec and Latin America; and American legal education and scholarship, in its many manifestations, has influenced the development of law schools throughout (and beyond) the English-speaking world since at least the late 19th century when the United States began its economic and political ascendancy. I am grateful to Roderick Macdonald for calling my attention to this important point.

research agendas are the result of a conscious choice to embrace globalization? Or does it confirm that law schools have indeed been forced to bend to the new realities of a global political economy?

C. Globalization of the Mind and its Implications for Law and Legal Education

Being a pessimist by nature, I tend to the latter view. My own sense is that we are experiencing what I call "globalization of the mind". Globalization is associated not only with a change in our material circumstances and relationships, and not just with the adaptation of public policy, legal practice and legal education to new patterns of economic activity. Rather, globalization involves a change in our social values, and in our fundamental understandings about what role law does play and should play in society. Globalization is, in other words, an ideology.

Beneath this ideology lies a bedrock assumption: that governments, which interfere with the free flow of goods, services, capital and information (but not people) impair their capacity to maintain a dynamic economy. There may be good reasons to question this assumption, and to reject the conventional wisdom; but to do so requires a degree of daring possessed by few governments, not including yours or mine. Instead, most focus on creating a business-friendly environment by deregulating markets, decreasing corporate taxes and privatizing certain public services. Such policies represent a significant reversal of the vaguely social-democratic impulse that dominated public policy making during the postwar period. Government then was meant to get involved in order to make things better; government now is meant to step aside for fear of making things worse.

My point is not that neo-liberal globalization is an unmitigated evil and that social democracy is an "unqualified human good". Rather it is that globalization of the mind — neo-liberal globalization of the mind — has helped to accomplish a fundamental shift in assumptions and values, and to entrench a "new normal" in legal education and scholarship.

The assumptions and values of this "new normal" can be summarized as follows: the transnational trumps the national; markets trump politics; law's mission is to make the world safe for markets; and finally, the best kind of law is law which permanently — constitutionally — disables the state's capacity for regulatory intervention. In all these respects, the "new normal" is very different from the "old normal" of the Keynesian welfare state. Consequently, I think one can fairly say that Thatcher's children — the students, lawyers and academic staff who came of age intellectually and professionally in the nineties — inhabit an ideological universe which differs from that of their predecessors, who came of age in the sixties or the thirties. The assumptions about that universe which they bring to their classrooms, common rooms and chambers, the optic within which they view legal issues, the scope and focus of their legal imaginations, what

they write as law teachers or read as law students, how they define themselves as legal actors: in all these respects, Thatcher's children have distanced themselves ideologically from their forbears. Globalization — considered not just as political economy but as ideology — accounts in large measure for that distancing.

Of course some of Thatcher's children have become rebellious. They have chosen to struggle against the prevailing political economy, to reject the "new normal" ideology of neo-liberal globalization, and to work for a world in which states and politics retain their importance, and in which markets are a fact of life, but not an end in themselves. Some of these rebellious children challenge globalization and neo-liberalism in all its manifestations. Some focus on specific issues of gender, race, poverty and the environment. And some — bless them — even believe that law is a useful strategy to achieve social justice. However, I am afraid that increasing numbers of legal actors — legislators, judges, senior civil servants, policy wonks, lobbyists, lawyers, legal academics and editorial writers — simply regard a globalized version of neo-liberal capitalism as the first principle of every nation's unwritten constitution.

This new constitutional *grundnorm* has a number of consequences, but I will mention only four.

First, and perhaps the most important, is that we have consciously or unconsciously adopted a particular version of the rule of law that emphasizes the protection of economic interests against encroachments by the state, rather than guaranteeing individuals their political rights, access to public goods or defence against abuses of private power. You'll all recall William Twining's legendary encounter with a student in Khartoum, who couldn't get the point of a torts case because he couldn't understand what a camel was doing in the London Zoo.[7] It will seem no less odd to future readers of the law reports that state law should once have been invoked by workers to protect their right to join unions, by poor persons to claim social benefits or by government agencies to regulate bus fares, land use or foreign exchange transactions.

Another consequence is that while today's law students and staff may still feel at home with domestic legislation and judicial pronouncements, their successors are likely to feel more comfortable with global legal institutions, doctrines and processes. To be sure, some of these will have been established through state action, but many will owe their origins to initiatives by transnational businesses, discursive and professional communities, NGOs and sectoral associations which set standards, settle disputes, impose sanctions, generate meaning, propagate values and confer legitimacy.

[7] WILLIAM TWINING, *The Camel in the Zoo*, in LAW IN CONTEXT: ENLARGING A DISCIPLINE, 26 (1997).

This brings me to a third sense in which "globalization" is having a profound effect on the way in which law is perceived, produced and consumed, with knock-on consequences for legal scholarship and education. According to William Scheuerman, "the process of space-time compression" associated with globalization "raises many fundamental questions for legal scholarship".[8] Scheuerman argues that globalization, together with technological change, has reshaped the constitutional matrix within which the three branches of government perform their functions.[9] It has disabled the legislature which cannot legislate in derogation of free trade, let alone debate in any serious way the detailed regimes by which foreign and domestic economic activity is to be regulated. This in turn has enhanced the power of the executive branch, which typically enjoys an open-ended parliamentary mandate to negotiate trade regimes, and to make critical decisions concerning fiscal and economic policies. And, he argues, it has enlarged the role of the judicial branch, which referees boundary disputes between the other two.

In a parallel development, established relations between central and regional governments have been upset by powerful tendencies set in motion by globalization. The survival of local cultures is threatened by transnational cultural flows; resource-based local economies are destabilized by the uncontrolled fluctuations of global commodity prices; subventions and supports provided by national governments to stimulate local industries and economies are vulnerable to attack as illicit trade subsidies. The result, understandably, is often local resentment, sometimes accompanied by calls for local autonomy or even secession and, at the least, for a veto by regional governments over decisions concerning culture, immigration, industrial policy and foreign trade. To the extent that states like Canada and the UK respond to these calls by shifting powers from the centre to the regions, globalization will have brought about a very substantial change in the structures of governance.

But not only is globalization effectively amending the constitutions of states by triggering the redistribution of powers amongst the different branches and levels of government, it is also subjecting national governments to entirely new constitutional constraints. Institutions of the European Union (EU) have acquired power to strike down, rewrite or mandate the enactment of national legislation, while non-governmental tribunals have acquired power under global economic treaties such as the World Trade Organization (WTO) or North American Free Trade Agreement (NAFTA) to neutralize or invalidate the laws of member states. International agencies such as Interpol, the World Bank and the

[8] William Scheuerman, *Reflexive Law and the Challenge of Globalization*, 9 JOURNAL OF POLITICAL PHILOSOPHY 81, 91 (2001).

[9] WILLIAM SCHEUERMAN, *LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME* (2004).

World Health Organization (WHO) now share responsibility with national governments for forestalling or responding to terrorism, economic perturbations, pandemics and environmental catastrophes. So too do private security firms, airlines, banks, hedge funds and drug companies.

Fourth and finally, globalization has effectively de-coupled the idea of law from the idea of the state. Of course, for some time now the assumption that state and law are intrinsically and invariably linked has been questioned by legal pluralists and other socio-legal scholars. However, their work has been largely driven by case studies of law in pre-modern communities, and in modern or post-modern businesses, neighbourhoods and workplaces. Because these non-state legal systems exist prior to the arrival of state law, or subject to its let and tolerance or in its shadow, they could be dismissed as merely pathological or aberrational, as not challenging the notion that states alone can and do make "real" law. However, recent studies of transnational corporations, commercial networks and business transactions seem to provide incontrovertible evidence that "law without the state" prevails even — perhaps especially — in the most privileged precincts of global business, finance, communications and transport.

Once we acknowledge that non-state normativity plays an important role in key areas of the economy, we will have to learn to accept its importance in other contexts as well. This is likely to precipitate a major crisis in legal education. If states do not after all enjoy a monopoly over the making, promulgation, administration and enforcement of law, law teachers and law students will have to start using a new mental map to navigate ordinary courses in contracts, criminal law, labour law and family law. And to do so, they will need a new repertoire of intellectual skills. After all, by whatever means we have traditionally taught students to "think like lawyers", we will have to do something different to teach them not to think like lawyers — or at least not like the lawyers we've been training up to this point. Instead of parsing judicial decisions, for example, they may have to peruse arbitration awards or observe mediators at work; instead of reading legislation, they may be asked to scrutinize corporate codes of conduct or consult ethnographic studies; and instead of being taught to fetishize fairness, rationality, predictability and clarity as law's contribution to social ordering, they may find themselves learning to value pragmatism, imagination, flexibility and ambiguity.

In summary, the merest scrutiny of law office dockets, law journal indices and law school syllabi will reveal that neo-liberal globalization has redefined the very concept of law itself, redrawn the map of law-making and law enforcement, revised legal practice and discourse and reconfigured legal scholarship and pedagogy.

D. The De-coupling of Law and State: The Rise of Trans-systemia

You may be disconcerted by this description of the likely future of legal education following the advent of the "new normal" and the decentering of the state. If so, you will be even more disconcerted by my next statement: "I have seen the future and it works". The first person to make such a claim in those precise words was apparently an American journalist, Lincoln Steffans, on the occasion of his return in 1921 from a protracted visit to the Soviet Union. The future that Steffans saw most assuredly didn't work, as he himself soon acknowledged. However, the future I have glimpsed — while no less revolutionary — is definitely more benign and possibly more long lasting. I refer to the new curriculum of McGill law school, in Montreal.

I. Transsystemic Legal Education at McGill

McGill decided about ten years ago, after a remarkably sophisticated and well-documented debate, to implement a unique polyjural or trans-systemic curriculum.[10] That is to say, individual courses and the curriculum as a whole consciously integrate civil and common law perspectives, domestic and international perspectives, the perspectives of state law and of non-state legal systems, and legal perspectives with those of other disciplines. Incidentally, all of this is done in both of Canada's official languages.

McGill's trans-systemic curriculum reflects, builds upon and reinforces the strong research interests of its staff in comparative and international law, legal pluralism, discourse analysis and intellectual history as well as in socio-legal fields such as sustainable development and medical ethics. Not by coincidence, these research interests all raise questions about the role of the state and of state law, and they do so in all the four senses I have mentioned, in light of globalization and neo-liberalism, and through the optic of inter-disciplinarity and legal theory. And, also not by coincidence, McGill is an English speaking university located in Quebec, a French-speaking province or (some say) "nation", where the character and identity of the state have been hotly debated for the past half century, and where trans-, sub- and non-state systems of law have flourished.

I want to make clear that McGill is not merely training law graduates for global law firms and enterprises, international agencies, transnational NGOs or other employers who might wish to hire young lawyers who are fluent in several languages and legal vernaculars. While many of its graduates do end up in just such careers, the architects of the new curriculum would strenuously deny that they were trying to prepare students to practice law in what they ironically refer to as "trans-systemia".

[10] The curriculum and its intellectual foundations and implications are described in a special issue of the McGILL LAW JOURNAL (McGILL L. J.) titled "Navigating the Transsystemic / Tracer le Transsystemique" released in 2005 (issue 50, volume 4, pages 701 - 1006), available online http://lawjournal.mcgill.ca/issues.php, last accessed 14 June 2009.

What then do they think they are doing? Clearly, McGill is attempting first and foremost to problematize the very notion of law itself. One former dean argues that the McGill law curriculum treats law as simply "a way of being alive".[11] Another claims that it is designed to bring students into "a sustained and humble dialog [sic] with otherness".[12] The present dean insists that the curriculum requires students to explore "what explains law as a social phenomenon, what is the nature of legal knowledge, what does it mean to think like a lawyer, [and] what it means to think like a citizen alive to law's symbolic and persuasive attributes".[13]

Of course, McGill's deans are not the only ones to articulate their faculty's ambitions in such expansive, if Delphic, terms. Most legal academics would say that they want to take their distance from conventional understandings of law. However, McGill deserves special mention because it has so directly and explicitly taken up the challenge of thinking about legal education "without the state". This is not to say that McGill's curriculum is perfect, that it succeeds in its own terms, or even that the curriculum on McGill's books resembles the curriculum in practice.[14] Nor would I argue that other faculties of law can or should imitate McGill. Indeed, I am not going to talk about the actual experience of legal education at McGill, but rather about the McGill curriculum understood as an ideal-type, as a thought experiment in what might happen to legal education in this era of globalization, neo liberalism and "law without the state".

Because the McGill curriculum is trans-systemic, it challenges the notion that law's logic is bounded, its values fixed, its processes ascertainable, and its outcomes predictable. Law in the McGill curriculum does not arrive on students' laptops neatly encoded according to juridical family or conceptual category. Instead, legal systems and categories collide with and penetrate each other, reinforce and refute each other, in unpredictable ways. Civil or common law, religious or secular law, domestic or international law, state law or some other kind, all form part of the open-textured, complex, heterogeneous normative universe which students must learn to inhabit. Law, for the McGill student, is therefore found not only in statute books and law reports; it is found everywhere, inscribed in private documents, embedded in custom, extruded from transactions or experienced as conventions of discourse and routines of daily life. Indeed, as claimed, the McGill curriculum — by acknowledging the infinite varieties of "law" — underscores the need for

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[11] Roderick Macdonald quoted in Nicholas Kasirer, *Bijuralism in Law's Empire and in Law's Cosmos*, 52 J. LEGAL EDUC. 29, 39 note 2 (2002).

[12] Yves-Marie Morissette, *McGill's Integrated Civil and Common Law Program*, 52 J. LEGAL. EDUC. 12, 22 (2002).

[13] Kasirer, *supra*, note 11 at 31.

[14] For my own modest reservations see Harry Arthurs, *Madly Off in One Direction: McGill's New Integrated, Polyjural, Transsystemic Law Programme*, 50 MCGILL L. J. 707 (2005) (part of the special issue mentioned in *supra*, note 10).

a "dialog with otherness". It denies students the comfort of the familiar: it asks them to imagine law as if they were someone else. Even law's connection with justice cannot be taken for granted by McGill law students; law sometimes empowers, sometimes oppresses and sometimes seems to do not much at all. This is a curriculum, in short, which assumes law to be radically indeterminate. At McGill, to reiterate, law is "a way of being alive".

II. Teaching in Transystemia

A curriculum built on the premise of law's radical indeterminacy may be exhilarating for us as legal scholars; but for us as legal pedagogues, it poses great challenges. In this last section of my talk, I want to explore those challenges.

The first has to do with what our students want from us. Meeting student expectations today is more important than we might prefer, given that the financial wellbeing of our law schools depends increasingly on our ability to persuade students to enrol here rather than there, to pay us significant fees and to incur debt to do so, and to signal their satisfaction by responding to surveys and making a success of their careers. And meeting student expectations is not only more important; it is more difficult, too, given that the "new normal" of the current generation of students puts them at odds with many of our own assumptions and values. Nonetheless, successful pedagogy requires that we somehow address student expectations — whether we meekly cater to them or boldly seek to change them.

What do law students want? They may begin with different career aspirations, bring different learning styles to the classroom and espouse different political views. But I would argue strongly that most law students want predictability. They want to see a clear point to their studies and a fixed purpose to their lives; they want structures, they want rules. They want, in other words, precisely what the McGill curriculum is designed not to give them.

How to square this circle? One way is to give them what they want. We all do this to some extent, and have developed standard justifications for doing so. Much of conventional legal life is in fact not that unpredictable, we tell ourselves: state law ends up punishing many if not most criminals, tortfeasors and contract breakers. State legal systems are not that permeable, truth to tell: quoting the Talmud, citing a Korean statute or relying on an ethnography of disputing in poor neighbourhoods will not win many victories in British or Canadian courtrooms. Justice isn't that irrelevant to legal rules or outcomes, we cheerfully acknowledge: if nothing else, impassioned appeals to justice have great potential to mobilize policy makers and persuade judges. And finally, agnosticism about the sustainability of law's empire isn't that useful as a pedagogic strategy; students too easily confuse it with cynicism. But for all that such concessions to student angst are warranted, they describe a strategy of "stoop to conquer".

A second approach is somewhat more edifying. Law schools like McGill are able to engage in "niche marketing". That is, they try to ensure that the students they attract are those most likely to feel at home in the pedagogic environment they offer. There is much to recommend this approach. It is honest; it ensures that students and faculty share a sense of common purpose; and it helps to more closely align pedagogic philosophy and pedagogic practice. On the other hand, niche marketing has its drawbacks. It assumes that prospective students have adequate knowledge and can make meaningful choices; it represents an attempt to impose closure on an approach to law whose distinguishing characteristic is supposed to be its openness; and it smacks a bit of incest.

A third approach — far more difficult, but far more satisfying — is to engage students in serious conversations which will free them from the tyranny of rules. This requires that we adopt a certain posture in the classroom. First, we must give students confidence that their experiences of family and school, and their encounters with people, culture and work is somehow relevant to their legal studies. This will provide them with a vantage point from which to begin to question the wisdom dispensed by judges, legal texts and ourselves. Second, we have to convince them that despite our own comprehensive knowledge of law, sociology, philosophy, politics, economics, history, astrology, sport and sex, we still value questions more than answers. Third, we must show them how to use their newfound confidence not just to challenge the instructor and interrogate the materials being taught, but to dare to ask questions of themselves. And finally, we must help them get used to the fact that they are embarking on a course of study, and ultimately on a career, that will require them to live at ease with multiple truths, irresolvable conflicts, abundant ambiguities and ironies galore.

Whatever its other merits, it seems to me that the McGill curriculum is admirably designed for this last approach to teaching. It is - you will conclude and I will confess — my kind of curriculum and my kind of teaching. Does this - I ask you — make me an optimist after all?

SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

The Law School, the Market and the New Knowledge Economy*

Margaret Thornton[**]

A. Introduction

Until recently, Australia was firmly committed to the idea of higher education as a public good. The swing from social liberalism to neoliberalism has seen a rejection of this basic principle in favor of values associated with the market. Knowledge, education and credentialism have become highly desirable in the information age, but treating them as tradable commodities has profound repercussions for what is taught and how it is taught. Most significantly, we have moved to a mass education system where the focus is on applied and vocational knowledge.[1] Within this new paradigm, law, business, information technology, hospitality and tourism courses have proliferated.

This paper considers how changes in higher education are impacting on the discipline of law, causing the critical scholarly space to contract in favor of that which is market-based and applied. The charging of high fees has transformed the delicate relationship between

*This paper is part of a larger study of the impact of neoliberalism on the legal academy. It was formerly published in the Legal Education Review Journal in 2007. I acknowledge the financial support of the Australian Research Council, which enabled interviews to be conducted with a range of academics in all Australian and New Zealand public university law schools, together with selected law schools in the UK and Canada. Warm thanks are extended to Dr. Jan Doust for assisting with the conduct of interviews and Dr. Chris Atmore for research assistance. See, Margaret Thornton, *Among the Ruins: Law in the Neo-Liberal Academy*, 20 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 3 (2001); Margaret Thornton, *The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy*, 8 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 37 (2001); Margaret Thornton, *Corrosive Leadership (Or Bullying by Another Name): A Corollary of the Corporatised Academy?*, AUSTRALIAN JOURNAL OF LABOUR LAW 161 (2004); Margaret Thornton, *Neo-liberal Melancholia: The Case of Feminist Legal Scholarship*, 20 AUSTRALIAN FEMINIST LAW JOURNAL 7 (2004); Margaret Thornton, *The Idea of the University and the Contemporary Legal Academy* 26 SYDNEY LAW REVIEW 481 (2004); Margaret Thornton, *Gothic Horror in the Legal Academy* 14 SOCIAL & LEGAL STUDIES 267 (2005).

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[1] Robin Usher, *Imposing Structure, Enabling Play: New Knowledge Production and the "Real World" University* in WORKING KNOWLEDGE: THE NEW VOCATIONALISM AND HIGHER EDUCATION, 99 (Colin Symes and John McIntyre eds., 2000). The greater prestige of vocational courses is by no means new. Dunbabin states that this was also the case as far back as the 13th Century. See Jean Dunbabin, *Universities c. 1150 - c. 1350* in THE IDEA OF A UNIVERSITY, 34 (David Smith and Anne Karin Langslow eds., 1999).

student and teacher into one of 'customer' and 'service provider'.[2] Changes in pedagogy, modes of delivery and assessment have all contributed to a narrowing of the curriculum in a way that supports the market. I will briefly illustrate the way the transformation has occurred and consider its effect on legal education.

This study is based on interviews with academics in Australian public university law schools. Interviews were conducted with up to six academics from each school.[3] Participants included both senior and junior, and male and female academics, as well as the dean or head of the school. They were asked to comment on their perception of change within the legal academy since the Dawkins reforms in 1988 with respect to curriculum, pedagogy and research, as well as the student body and their own lives as academics. Participants are referred to generically by position, and law schools by classification, in order to maintain confidentiality. The typology of schools includes four classifications according to age. They are the Sandstones (the original State university law schools); the Redbricks (that emerged post-World War II); the 3rd Generations (that emerged in the period of economic growth 1970s to 1990s); and the News (that generally emerged from the Dawkins reforms in 1988).[4]

B. The New Knowledge Economy

Under neoliberalism, increasingly equated with its extreme form of market fundamentalism,[5] higher education has been reconceptualized as a private good for which users pay.[6] Students choose their educational 'product' according to the brand name of a

[2] The ramifications of consumerism in higher education are explored in Patty Kamvounias and Sally Varnham, *Getting what they paid for: Consumer Rights of Students in Higher Education* 15 GRIFFITH LAW REVIEW 306 (2006).

[3] Interviews were not conducted at La Trobe University, where I was employed at the time.

[4] I have adapted the typology of Simon Marginson and Mark Considine, *The Enterprise University: Power, Governance and Reinvention in Australia* (2000) 15-16. While they include five classifications: the 'Sandstones', the 'Redbricks', the 'Gumtrees', the 'Unitechs' and the 'New Universities', I have reduced this to four, as I felt that participants in the two Unitechs with law schools could be too easily identified. Also, the Unitech law schools are older than the News but the Unitechs did not become universities until the Dawkins reforms, so I have included them with the News. There is therefore some slippage between categories. Law schools were also introduced into some Redbrick and 3rd Generation institutions at the same time as the New Universities were established post-1988. Research was conducted in the following Australian law schools: *Sandstones* – Universities of Adelaide, Melbourne, Queensland, Sydney, Tasmania and Western Australia; *Redbricks* – ANU, Monash, New England, UNSW; *3rd Generation* – James Cook, Deakin, Flinders, Griffith, Macquarie, Murdoch, Newcastle, Wollongong; *News* – Charles Darwin, QUT, Southern Cross, University of Canberra, UTS, UWS and Victoria University. Comparative research was also undertaken in the UK, Canada and New Zealand, which is not included in this article.

[5] Kevin Rudd, *Child of Hayek*, THE AUSTRALIAN 20 October 2006, 12.

[6] The Australian Government currently provides around AUD$1,600 pa per capita towards a law place, the lowest on a 10-point disciplinary scale (See Australia, Department of Education, Science and Technology

university, rather than according to the excellence of the education. It is believed that the brand name associated with credentialism will enable the graduate to compete for high rewards within a volatile labor market. The high cost of a university education, whether in the form of HECS (Higher Education Contribution Scheme) or full fees, also has the effect of encouraging students to pursue highly remunerative careers on the corporate track in order to repay their education debt.[7] A user-pays philosophy discourages students from pursuing public interest employment, because such work is normally not sufficiently well paid to service a substantial education debt.[8]

I emphasize that the central role now being played by the market in higher education emanates from government policy; there is no invisible hand at work here. The vastly increased percentage of students undergoing a university education is expected to augment the supply of new knowledge workers to ensure that Australia remains globally competitive.[9] The country can no longer rely on primary production for its prosperity.[10] The reforms associated with the ending of the binary divide in higher education in 1988 were one prong of the new strategy.[11] The former colleges of advanced education (teaching institutions that did not conduct research) were declared to be universities overnight. Despite the dramatic expansion in the higher education sector that resulted, government

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<http:www.goingtouni.gov.au> at 8 December 2007. This means that most law students have to pay more than AUD$8,000 pa themselves for what purports to be a government-funded place, and three times or more than that for a full-fee place (There is currently no cap on what a university can charge).

[7] In Australia, a government-initiated loans scheme covers both government-funded (FEE-HECS) and full-fee places (FEE-HELP). The loans scheme enables students to begin repayment only when their income reaches a certain threshold, currently approximately AUD$36,000. The money is then recovered through the taxation system. This loans system (euphemistically termed a 'contribution') has softened the impact of the shift from free higher education (1972-89) to a user-pays system, even though there has been a gradual increase in fees over time.

[8] A United States study has shown that the rising cost of law school tuition narrows graduate options. See Equal Justice Works, National Association for Law Placement (NALP), Partnership for Public Service, *From Paper Chase to Money Chase: Law School Debt Diverts Road to Public Service* (2002). The findings for this study were based on responses received from 1,622 graduating law students from 117 law schools. For a useful Canadian study on the impact of the rising cost of tuition fees, see Faculty of Law, University of British Columbia, *Legal Education Project* (2005) available at: <http://www.law.ubc.ca/files/pdf/news/2005/feb/LeapReport.pdf>.

[9] The impact of and response to the market has been similar in other Western countries. See Dietmar Braun and François-Xavier Merrien (eds.), TOWARDS A NEW MODEL OF GOVERNANCE FOR UNIVERSITIES? A COMPARATIVE VIEW (1999). Despite a long tradition of private universities, tertiary education in the United States has not been immune from the chill winds of neoliberalism either. See, *e.g.*, Henry A Giroux, *Pedagogy of the Depressed: Beyond the New Politics of Cynicism*, 2000, available at: <http://www.gseis.ucla.edu/courses/ed253a/GirouxDepressed02.htm>.

[10] Catherine Casey, *A Knowledge Economy and a Learning Society: A Comparative Analysis of New Zealand and Australian Experiences*, 36 COMPARE 343 (2006).

[11] Hon. John S. Dawkins, *Higher Education: A Policy Statement*, (White Paper, Australia, 1988)

funding was not proportionately increased. In fact, it actually began to decrease.[12] Starved of basic infrastructural funding, all universities, not just the News, were compelled to enter the market, replicating the imperatives confronting public sector institutions generally.

In addition to financial pressures, increasing numbers of students and perennial changes of policy direction, universities now face competition from non-traditional producers and purveyors of knowledge. The shift from state responsibility to the market includes the opening up of higher education to for-profit providers.[13] Far from feeling the need to continue to safeguard the idea of 'the public' in the public university, neoliberal governments have no compunction in exposing universities to the full force of the market by fostering competition within the sector. In this regard, the federal Government has followed the recommendations of the Hilmer Report on competition policy.[14] The introduction of for-profit providers of higher education is a dramatic development for, until recently, Australian universities were exclusively *not*-for-profit institutions.[15] That is, they represented the mainstay of the public good. The new for-profit institutions may come from anywhere in the world, which points to the linkage between globalization and neoliberalism. In this regard, Australia is emulating the 'Washington Consensus,' whereby the United States has actively promoted two powerful international agencies in Washington − the World Bank and the International Monetary Fund − in respect of national economic policy.[16] The introduction of the market to public education has turned universities upside-down.

The licensing and franchising of courses foreshadows the establishment of multinational for-profit universities, in the hope that substantial profits might be made by selling mass-produced education globally. If offered electronically, the infrastructural costs of delivery

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[12] Over a period of approximately 20 years from the early 1980s to the early 2000s, government expenditure on higher education in Australia fell from approximately 90 per cent to 38 per cent. See AVCC, *Key Data on Higher Education* (2004).

[13] Department of Education, Science and Training, Australia, *Building University Diversity: Future Approval and Accreditation Processes for Australian Higher Education*, (2005) available at: http://www.dest.gov.au/NR/rdonlyres/72F201EE-4D84-442F-9E92-C6968A27C818/2548/building_diversity.pdf.

[14] Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (Hilmer Report) (1993). The recommendations were incorporated into legislation soon afterwards. See *Competition Policy Reform Act 1995* (Cth). For a thoroughgoing critique of competition policy in the context of the contemporary university, see Kathryn McMahon, *Universities and Market Discourse* 27 MONASH UNIVERSITY LAW REVIEW 105 (2001).

[15] While formally conceptualized as for-profit, Melbourne University Private was a disaster in that respect, costing Melbourne University (Public) millions of dollars. For an analysis of this university's dalliance with the market, see JOHN CAIN AND JOHN HEWITT, OFF COURSE: FROM PUBLIC PLACE TO MARKETPLACE AT MELBOURNE UNIVERSITY (2004).

[16] Harry Arthurs, *The State We're In: Legal Education in Canada's New Political Economy*, 20 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 35 (2001).

would be minimal. If torts, McDonalds style, could be franchised throughout the common law world, there would need to be only one provider – preferably from a North American Ivy League university. Whether courses are offered electronically or not, higher education has become a major export industry for Australia, amounting to billions of dollars per annum, thereby precluding a return to the way things were.

Globalization of culture has brought with it a homogenization of commodities and a similar propensity to standardize is occurring within the academy.[17] The no-frills McDonalds torts package (substitute any core subject) could be expected to concentrate on communicating basic information in preference to critique and reflexivity. Paradoxically, competition policy emphasizes the distinctiveness of a brand name, while encouraging the standardization of the generic product – as with hamburgers or breakfast foods. This propensity in favor of standardization, aphoristically referred to as 'McDonaldisation',[18] induces a lowest common denominator approach, while marketing hype emphasizes a specious distinctiveness that is designed to appeal to prospective customers.

C. Neoliberal Legal Knowledge

While considerable attention has been directed to the transformative impact of the market on the humanities and the sciences,[19] comparatively little attention has been paid to the discipline of law.[20] Along with what are perceived to be its cognate disciplines – business and informatics – law appears to be thriving because of the virtually unstoppable demand for student places. The legal labor market has expanded because lawyers typify the new

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[17] SHEILA SLAUGHTER AND LARRY L. LESLIE, ACADEMIC CAPITALISM, POLITICS, POLICIES AND THE ENTREPRENEURIAL UNIVERSITY (1997).

[18] GEORGE RITZER, THE MCDONALDIZATION OF SOCIETY: AN INVESTIGATION INTO THE CHANGING NATURE OF CONTEMPORARY SOCIETY (2000).

[19] See *e.g.*, BILL READINGS, THE UNIVERSITY IN RUINS (1996); Tony Coady (ed.), WHY UNIVERSITIES MATTER: A CONVERSATION ABOUT VALUES, MEANS AND DIRECTIONS (2000); Simon Cooper, John Hinkson and Geoff Sharp (eds.), SCHOLARS AND ENTREPRENEURS (2002).

[20] Exceptions include, Vivienne Brand, *Decline in the Reform of Law Teaching?: The Impact of Policy Reforms in Tertiary Education*, 10 *Legal Education Review* 109 (1999); Richard Collier, "*We're All Socio-Legal Now?" Legal Education, Scholarship and the "Global Knowledge Economy" – Reflections on the UK Experience*, 26 SYDNEY LAW REVIEW 503(2004); Nickolas J James, *Power-Knowledge in Australian Legal Education: Corporatism's Reign*, 26 SYDNEY LAW REVIEW 587(2004); Andrew Goldsmith, *Why should Law matter? Towards a Clinical Model of Legal Education*, 25 UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 721(2002); Richard Collier, *The Changing University and the (Legal) Academic Career – Rethinking the Relationship between Women, Men and the 'Private Life' of the Law School*, 22 LEGAL STUDIES 1(2002); See, *supra*, 18; Harry Arthurs, *The World turned upside down: Are Changes in Political Economy and Legal Practice transforming Legal Education and Scholarship, or Vice Versa?*, 8 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 11(2001); W. Wesley Pue, *Globalization and Legal Education: Views from the Outside-in*, 8 INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION 87(2001).

knowledge workers needed to facilitate the global economy. They are essential to devise innovative contracts and ways of circumventing regulatory obstacles at both the national and the international levels. Maureen Cain's description of lawyers as the '*par excellence* institutional inventors'[21] captures their centrality to a dynamic global market economy.

The demand for law places is dramatically illustrated by the fact that in less than two decades − since the creation of the unified system of higher education − the number of law schools in Australia has increased from twelve to thirty two, with more waiting in the wings.[22] In terms of numbers of students, there were 11,254 enrolled in law in 1984,[23] compared with 36,331 in law and legal studies in 2000.[24] In terms of degree completions, there were 1,932 in 1984 and 7,112 in 1999.[25]

Despite the dramatic expansion of law, it is my contention that not all facets of the discipline are uniformly privileged. The legal academy is divided in the same way as other parts of the contemporary university. On the one hand, those branches of law thought to facilitate business are privileged. In contrast, those aspects associated with social justice, theory and critique are perceived as having little use value within the market paradigm, thereby rendering them dispensable. In addition, broad interdisciplinary and theoretical understandings of legal studies that encompass a critical component, such as legal philosophy, jurisprudence or sociology of law, have become increasingly marginalized. Critique entails a refusal to accept the objects of knowledge as unproblematic; it

[21] Maureen Cain, *The Symbol Traders* in LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION 31(Maureen Cain and Christine B. Harrington eds., 1994).

[22] The University of South Australia is the most recent to announce the establishment of a law school. Other jurisdictions have also experienced a notable increase. The UK, which ended its binary system in 1992, had 85 law schools in 2000, compared with 48 in 1975. See Anthony Bradney and Fiona Cownie, *British University Law Schools in the Twenty-first Century* in, LAW'S FUTURE(S): BRITISH LEGAL DEVELOPMENTS IN THE 21ST CENTURY 1-2 (David Hayton ed., 2000). In contrast, both New Zealand and Canada have remained static, with five and 21 schools respectively.

[23] DENNIS PEARCE, ENID CAMPBELL AND DON HARDING, AUSTRALIAN LAW SCHOOLS: A DISCIPLINE ASSESSMENT FOR THE COMMONWEALTH TERTIARY EDUCATION COMMISSION, vol. 2 447(1987).

[24] Department of Education, Training and Youth Affairs, Australia, *Higher Education Students Time Series Tables: Selected Higher Education Statistics 2000*, available at: <http://www.dest.gov.au/NR/rdonlyres/AE11F01D-E517-4BF7-8ECA-8553C31EF206/2481/timeseries00.pdf>.

[25] *Id*. These figures do not include students enrolled in the Legal Practitioners Admission Board course which is offered in association with the Law Extension Committee of the University of Sydney and awards a Diploma of Law that is recognized for the purposes of admission. In 2006, there were 2,594 students enrolled, <http://www.lawlink.nsw.gov.au/lawlink/lpab/ll_lpab.nsf/vwFiles/Pass%20Fail%20stats%20Sept%202006.pdf/$file/Pass%20Fail%20stats%20Sept%202006.pdf> at 8 December 2007.

recognizes that doubts always exist.[26] Critique can be discomfiting because it has the potential to illuminate the dark underside of laws that sustain global capitalism, for example.[27] The shift in favor of offerings concerned primarily with the market and vocationalism[28] means that the liberal facets of the law school, which the legal academy has been keen to assert in order to enhance the standing of the discipline within the university community,[29] is once again under a cloud.[30] While I agree with Nicholas James that radical discourses have generally been marginalized within Australian law schools,[31] I suggest that the love affair with the market has affected mainstream jurisprudence, legal history and liberal law reform also. It might be noted that universities, particularly the newer ones, are promoting the relationship between law and business, as though it were natural, as may be seen by the propensity to amalgamate schools of law with business and management in restructured mega-faculties. I interpolate here that not all law graduates go into traditional legal practice, and certainly not corporate law, despite the pervasiveness of the business rhetoric.[32]

Social liberalism, in conjunction with the modernization of legal education, encouraged students to pay heed to context and question doctrine. As a result, law schools from the 1970s began to transcend a narrow technocratic approach with the aim of developing well-rounded lawyers, shaped by the insights of the humanities and social sciences. However, the reality is a little more complex, as Anthony Bradney notes in his study of the liberal law school in Britain.[33] Although the 'liberal' descriptor is not normally used in the Australian

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[26] Duncanson explored the discomforting role of critique in legal education some years ago, a discomfort that has been exacerbated since by the increasing corporatization of universities. See Ian Duncanson, *Legal Education and the Possibility of Critique: An Australian Perspective*, 8 CANADIAN JOURNAL OF LAW AND SOCIETY 59(1993).

[27] I have written elsewhere about the process of desensitization to which law students are subjected. Margaret Thornton: *Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same*, 36 OSGOODE HALL LAW JOURNAL 369 (1998).

[28] Nickolas James identifies six discourses, or ideologies, underpinning Australian legal education, namely, doctrinalism, vocationalism, corporatism, liberalism, pedagogicalism and radicalism. Each discourse is an expression of power in perpetual competition with the others for dominance. See Nickolas J. James, *Australian Legal Education and the Instability of Critique*, (2004) 28 MELBOURNE UNIVERSITY LAW REVIEW 375.

[29] Charles Sampford and Sophie Blencowe, *Context and Challenges of Australian Legal Education* in, NEW FOUNDATIONS IN LEGAL EDUCATION 8 (John Goldring, Charles Sampford and Ralph Simmonds eds., 1998).

[30] This contradiction is addressed by Brand, *supra*, note 20.

[31] Nickolas J. James, *The Marginalisation of Radical Discourses in Australian Legal Education*, 16 LEGAL EDUCATION REVIEW 55 (2006).

[32] The figure is difficult to compute precisely in Australia because a practising certificate is unnecessary for many positions, such as in-house corporate counsel. A study by Karras and Roper in 2000 found that approximately 80 per cent of Australian graduates were in law-related employment. See MARIA KARRAS AND CHRISTOPHER ROPER, THE CAREER DESTINATION OF AUSTRALIAN LAW GRADUATES (2000).

[33] ANTHONY BRADNEY, CONVERSATIONS, CHOICES AND CHANCES: THE LIBERAL LAW SCHOOL IN THE TWENTY-FIRST CENTURY (2003).

context, the phenomenon described by Bradney approximates the broader approach that began to emerge in various forms in the 1970s. Nevertheless, the role of the admitting authorities always constrains what is taught because admission to practice involves certification as to knowledge of doctrine, not knowledge of jurisprudence, radical critique or the social context in which law is located. The optional nature of these discourses reduces them to the status of dispensable 'frills' that a lecturer may include or discard at will. The role of admitting authorities has ensured that doctrinalism remains a constant in legal education although the *power* of doctrinal discourses are not constant, as James shows.[34] They wax and wane according to the times.

More academic and diverse approaches to legal scholarship began to emerge in Australia at the peak of social liberalism in the 1970s. This diversity was not peculiar to a particular school or schools, although UNSW, Monash and Macquarie were in the vanguard.[35] By the time of the Pearce Report in 1987,[36] a watershed in Australian legal education, we see acceptance of the view that law should at least be taught in its social context and that a critical pedagogy was desirable. This represented a sharp reaction against the sterile doctrinalism of the past,[37] although there was confusion as to just what ought to be included in the curriculum.[38] An increased interest in identity politics, diversity and social theory, including feminist, postmodern and postcolonial perspectives, caused a new cluster of subjects to appear.[39] These understandings of law sometimes moved from margin to mainstream in the form of perspectives on law in a foundational course. The aim was to sensitize students to new ways of thinking about social justice, power and 'the other' in society. There was also a consciousness that students should be educated rather than merely trained. Indeed, the Pearce Report engendered the idea that the law degree was to be the 'new Arts degree', but the sway of the professional underpinnings of the degree may have been underestimated.[40]

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[34] Nickolas James, *Australian Legal Education and the Instability of Critique*, 2, 375 MELBOURNE UNIVERSITY LAW REVIEW (2004) . See also the essays in Goldring, Sampford and Simmonds, *supra* note 29.

[35] Webber presents an account of the changes that occurred, with particular reference to the University of Sydney Law School. See Jeremy Webber, *Legal Research, the Law Schools and the Profession* 26 SYDNEY LAW REVIEW 565 (2004).

[36] Pearce, *supra* note 23.

[37] Nickolas J James, *A Brief History of Critique in Australian Legal Education*, 24 MELBOURNE UNIVERSITY LAW REVIEW 965(2000); James, *supra* note 31.

[38] Charles Sampford and David Wood, *Theoretical Dimensions of Legal Education*, in Goldring, Sampford and Simmonds, *supra* note 29, 102.

[39] Thornton, *The Demise of Diversity in Legal Education*, *supra* note *.

[40] Brand, *supra*, note 20, 128.

In light of law's responsiveness to contemporary socio-political trends, it is perhaps unsurprising to find that there has been something of a resiling from social justice and critique to accommodate the market turn. In fact, the critical space began to contract at the very moment the practices of the market became more insistent.[41] As neoliberalism established itself as the dominant political philosophy, a constellation of subjects believed to facilitate the market, including advanced contract, corporations, trade practices, competition policy, intellectual property and taxation law, taught from a doctrinal rather than a critical perspective, were favored. Sandra Rodgers notes in regard to Canadian legal education how social liberal discourse was similarly replaced with the 'vocabulary of business'.[42] Of course, a market economy has always privileged subjects oriented towards commerce and property, a leaning that received a boost with the expansion of legal practice in the 1970s and 80s,[43] but the neoliberal turn of the 1990s and the 2000s has clinched its supremacy and the marginalization of alternative discourses. The teaching of market-based knowledge by law schools satisfies the needs of the labor market and is believed to secure the approbation of law firms. It is also deemed advantageous for students facing uncertain futures:

> There's been a lot of discussion in the school about how we can make our students more marketable to the profession, particularly the big law firms, and just yesterday there was an agreement to change our course structure to include more compulsory commercial law units…So that's a pressure, not so much for the purpose of getting funding but for the purpose of getting our students more jobs in the big firms (Acting Head of School, fem, New).

The substantial education debts confronting students also serve to hasten the sloughing off of a social justice and a critical orientation.[44] The high cost of a legal education induces a narrow instrumental view of law and occludes its imaginative and reformist potential. The need for students to work while studying,[45] with one eye to managing debt, has

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[41] *Id*. Brand similarly observes that the recommendations of the Pearce Report become irrelevant almost immediately. For a follow-up on the impact of the Pearce Report in the face of the Dawkins reforms and declining resources, see Craig McInnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (1994).

[42] Sandra Rodgers, *Legal Education: Is it in Crisis?* (Paper presented at Workshop on the Future of Canadian Legal Education, University of Manitoba, 3-4 May, 1999) available at: <http://www.umanitoba.ca/Law/LRI/Legal_education/rogers.htm>.

[43] Michael Chesterman, *Professional Responses to New Law Schools* in Goldring, Sampford and Simmonds, *supra*, note 29, 204.

[44] See also Equal Justice Works, *supra*, note 8.

[45] Australian undergraduates enrolled in full-time courses now undertake an average of 15 hours paid work per week. See CRAIG MCINNESS AND ROBIN HARTLEY, COMMONWEALTH OF AUSTRALIA, MANAGING STUDY AND WORK: THE IMPACT OF FULL-TIME STUDY AND PAID WORK ON THE UNDERGRADUATE EXPERIENCE IN AUSTRALIAN UNIVERSITIES (2002)

encouraged a minimalist approach to credentialism so that two-year law degrees may now be offered instead of three, four or five-year programmes.[46] Truncated courses inevitably focus on basic doctrine. When a choice has to be made, the social is deemed to be dispensable because its inclusion is not specified by the admitting authorities. Separating law from its socio-political context reifies the positivistic myth that law is autonomous and disconnected from the social forces that animate it. A depoliticized rules-oriented approach belies the play of power beneath the surface.[47] Thus, in the case of *Individual A versus Corporation B*, B appears to win because of application of the rule, rather than because it had a monopoly over the evidence, in addition to having access to unlimited legal resources. A renewed emphasis on doctrine with its façade of neutrality therefore comports very well with market liberalism. The ambivalence surrounding the theoretical and the critical allows them to be shed relatively easily when convenient − despite the best endeavors of committed legal scholars. Feminist legal theory is an example of an area of critical scholarship that experienced a brief flowering and is now claimed to have had little effect on the law curriculum as a whole.[48] Intellectual diversity encouraged tentative moves in favor of interdisciplinary scholarship, but the intractability of the belief that authenticity in law requires a lawyer's point of view has served to confine such approaches to the periphery of the law curriculum.[49]

<http://www.dest.gov.au/sectors/higher_education/publications_resources/profiles/managing_study_and_work.htm >

[46] See *e.g.*, Melbourne University's JD is a 2-year full-fee degree for graduates. Monash University Law School similarly has a two-year LLM, and Deakin University Law School a 2-year LLB. The University of Melbourne has restructured its law degree to make it a graduate degree for all students in 2008. In other law schools, a trend away from the typical combined degree back to a standalone law degree is discernible. See Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report commissioned by the Australian Universities Teaching Committee (AUTC)* (2003) 67-69.

[47] The work of Galanter has become a classic in the way it exposes the role of corporate power within a formally equal adversarial system. See Marc Galanter, *Why the "Haves" come out ahead: Speculations on the Limits of Legal Change* LAW & SOCIETY REVIEW 4 (1974-75). A primary aim of the Critical Legal Studies movement generally has been to expose the seeming invisibility of power within law. See, for example, the essays in David Kairys ed., THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (1982). CLS paved the way for a plethora of other critical and deconstructive movements in law which were keen to show that justice was not blind. See, for example, NGAIRE NAFFINE, LAW & THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE (1990).

[48] Johnstone and Vignaendra, *supra*, note 46. Nickolas James analyses the reasons for the marginalisation of radical scholarship in Australian legal education. See James, *supra*, note 30.

[49] Ian Duncanson, *Interdisciplinarity in the Law Discipline*, 5 GRIFFITH LAW REVIEW 77, 80 (1996); Ian Duncanson, *The Ends of Legal Studies*, 3 WEB JOURNAL OF CURRENT LEGAL ISSUES (1997), available at: <http:webjcli.ncl.ac.uk/1997/issue3/duncan3.html>. See also, John Wade, *Legal Education in Australia − Anomie, Angst, and Excellence*, 39 JOURNAL OF LEGAL EDUCATION 189, 192 (1989).

Law's renaissance as an intellectual discipline has not been eviscerated overnight, but the savagery of government cuts has meant that few law schools have been able to maintain their traditional range of optional offerings, as well as a commitment to small group teaching. Taking in more students was the typical response to budget shortfalls, but it simply exacerbated staff/student ratios and compelled changes in the range of offerings and modes of delivery. Charles Sampford recounts how he and Christine Parker contacted all law schools in 1993 to ascertain estimates of the number of law students they proposed to enroll in the next five years.[50] Very few planned to increase their intakes, and some were even proposing to reduce their numbers. A change of government and the slashing of university operating grants induced a completely different scenario, with some of the newer schools exponentially increasing their student intake over the ensuing decade.

From what was once a remarkably flat system, the introduction of competition policy has brought about clear divisions between institutions. Most of the Sandstones and the Redbricks are doing quite well in the new regime because they are able to trade on their positional goods (augmented through public funding in the past) and metropolitan locations to attract full-fee payers, although there is little evidence of distinctiveness in their legal education. 'McDonaldization', in conjunction with the uniform admission rules, has induced a remarkable greyness among law schools.[51] Rob McQueen has epigrammatically referred to the phenomenon of replication that typifies law schools as 'the culture of the copy'.[52] Rather than developing curricular distinctiveness, the élite schools have been more concerned to enhance their research standing, with an eye to league table rankings.[53] Research not only augments positional goods that attracts high quality students, but is a valuable source of competitive funding. In this way, it serves to widen the gap between the Sandstones and the rest.

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[50] Charles Sampford, *The Panic over Numbers*, in Goldring, Sampford and Simmonds, *supra*, note 29, 70.

[51] Curricular uniformity is a characteristic of common law jurisdictions. See, *e.g.*, William Twining, *Rethinking Law Schools*, 21 LAW & SOCIAL INQUIRY 1007 (1996). Rodgers notes that the twenty-one Canadian law schools all offer more or less the same things. See Rodgers, *supra* note 42.

[52] Rob McQueen, *The Nike Law School (or) Branding and its Discontents in Legal Education*, (Paper presented at the W G Hart Legal Education Workshop, London, 26-28 June 2001).

[53] Despite strong criticism of crudity as a measurement of quality and their anti-diversity propensity, league tables have quickly established themselves as an inevitable dimension of the modern university landscape. See, *e.g.*, Gavin Moodie, *The Research Race*,' 2 JOURNAL OF THE PUBLIC UNIVERSITY 3 (2005), available at: <http://www.publicuni.org/jrnl/volume/2/journal_2_race.html>. Law school rankings have also been subject to trenchant critique; Margot E Young, *Making and breaking Rank: Some Thoughts on recent Canadian Law School Surveys*, 20 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 311(2001); D A Thomas, *The Law School Rankings are harmful Deceptions: A Response to those who praise the Rankings and Suggestions for a better Approach to evaluating Law Schools*, 40 HOUSTON LAW REVIEW 419 (2003).

The 3rd Generations are caught in the middle. They are struggling to be accepted as research-active institutions but, without the advantage of brand name and capital reserves to fall back on, they have had to take in large numbers of students, which jeopardizes their research efforts. At least one Australian law school has abandoned its critical and social justice strengths in favor of business law, in the belief that this would attract more students. [54]

The position of the News is generally invidious. On becoming universities, they expended considerable energy in enhancing their research capability, but research has had to take second place to teaching as they struggled to make ends meet because student places are a more reliable source of income for them. Nevertheless, they are left with the weaker domestic students after the pool has been cherry-picked by those further up the status ladder because they frequently lack both the positional goods and the geographical location to be competitive. While they might choose to rely on overseas students as a source of full-fee income, the English language skills of many of these students are academically unsophisticated, a factor that is contributing to the technocratic and rule-based approach to legal education.[55] While the News had the greatest potential for diversity and innovation, this has been curtailed, as predicted by McInnes and Marginson, by the fact that they have the least potential for market share.[56]

D. Pedagogical Practices

I. Prepackaged Knowledge

As for the humanities and social sciences generally, effective teaching in law requires interrogation and discussion of the subject matter. The idea of the 'sage on the stage' presenting a turgid monologue to students who passively ingest what is said without any opportunity for question or debate has long been rejected by educationists as an effective form of pedagogy.[57] In the 1970s, 80s and 90s, as a result of attempts to modernize and liberalize legal education, a conscious endeavor was made to reject the passive pedagogy and the transmission of frozen knowledge. Rather than the 'sage on the stage', the law

[54] For a case study of the trajectory of change in the School of Law and Legal Studies at La Trobe University, see Margaret Thornton, *The Dissolution of the Social in the Legal Academy*, 25 AUSTRALIAN FEMINIST LAW JOURNAL 3 (2006).

[55] Thornton, *supra*, note 27.

[56] McInnis and Marginson, *supra*, note 41.

[57] See *e.g.*, M J Dunkin, *A Review of Research on Lecturing* 2 HIGHER EDUCATION RESEARCH AND DEVELOPMENT 63 (1983); GEORGE BROWN AND MADELEINE ATKINS, EFFECTIVE TEACHING IN HIGHER EDUCATION (1988); NIRA HATIVA, TEACHING FOR EFFECTIVE LEARNING IN HIGHER EDUCATION (2000). See also, Mary Keyes and Richard Johnstone, *Changing Legal Education: Rhetoric, Reality and Prospects for the Future*, 26 SYDNEY LAW REVIEW 537 (2004).

teacher began to see him or herself as a facilitator of discussion. Students were obliged to think through the issues for themselves by (commonly) reading set materials for class and being assessed on their oral performance in class. As a result of what James refers to as 'pedagogicalism',[58] the focus shifted from the substance of the knowledge to the form in which it was purveyed. These new pedagogies encouraged a variety of flexible methods which were employed to encourage a dialogic approach to stimulate debate and discourage the belief that law provided 'right' answers.

'Massification' and under-funding have caused a reversion to an unedifying chalk and talk pedagogy in most institutions, albeit that the chalk has been replaced with Powerpoint. Some academics held out as long as they could against the return of lectures with their propensity to stifle the questioning voice, but were forced to capitulate with the unmanageable expansion in numbers:

> About five years ago – and this is what got us into financial trouble – we introduced small group teaching…Instead of a large lecture and the odd tutorial, classes would be taught in seminars of 30-35. It was far more labor intensive to teach people in those small groups and, ultimately, I think we discovered we were soon bankrupt because there was no extra money coming from the university to us for doing that. We had this problem of having these extra people on the payroll and not enough money to pay everyone…We've ended up instituting small group teaching in the first two units. Even though the master plan was that it was going to flow right throughout the whole law school, it became clear that was impossible…What happens in the later years in the compulsory units is that they go back to that big lecture plus tutorial (AsPro, male, Sandstone).

Effective learning is marginalized in the swing back to lectures, despite the contemporary focus on teaching 'quality'.[59] Two and even three-hour lectures are highly questionable in an era where students are accustomed to 90-second media sound-bytes. Indeed, it is unimaginable that lecturers themselves would tolerate their peers presenting two or three-hour papers at conferences. Lectures mean that one academic can 'teach' 500 students simultaneously, and possibly many more in distant sites through on-line transmission and video-link. There appears to be wide acceptance of the return to a lecture-based pedagogy in the name of efficiency. The focus of these face-to-face marathons is on coverage and endurance:

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[58] James, *supra*, note 20.

[59] Universities are subject to audit on a five-year cycle by the Australian Universities Quality Agency (AUQA): <http://www.auqa.edu.au/aboutauqa>.

> They're exhausting and by the end of yesterday, I had covered too much material but I felt I had to get this material covered for the purposes of the course. I'm not the only person teaching the course so you know you've got to keep in step with the other teachers. By the end of it, there's no doubt that nothing was going in, but there I was up the front going through the motions to get through the material, and it's a 3pm-5pm time slot, so looking at almost glazed eyes by the last half hour (Snr Lecturer, male, Redbrick).

The concept of 'coverage', fostered by the admitting authorities in respect of specified areas of knowledge, underpins the justification for lectures. This style of pedagogy encourages the transmission of prepackaged knowledge for recording, memorizing and regurgitation. The one-way flow of knowledge necessarily stifles critical and independent thought:

> The first thing I noticed when I came here was being dictated a case note…I sat and dutifully took notes in the lecture, went away and read the case and thought, well, I must be missing something because everything they've said is in here and everything I got out of that is in my notes. What's going on here because I wasn't used to that? I mean no one sat down and said, 'Jane Austen is about this' (Assoc Lecturer, male, New).
>
> They don't want to read cases because the lecturing style gives you a perfect case. Why would you? (Lecturer, fem, New).
>
> Well, I've yet to teach legal theory here. It is a compulsory course, so I've heard that there can be quite a lot of resistance by law students because it doesn't seem relevant…and the other thing is I'm used to teaching legal theory in a seminar context. Here, the class is going to be 300 and there's going to be two lecture groups – two lectures a week and one tutorial and I'm quite alarmed about teaching legal theory by pontificating from the front (Sen Lecturer, male, Redbrick).

The movement away from small group teaching to large lectures also subtly favors a doctrinal approach over questioning and reflection. Students believe they are getting value for money if their teachers provide them with information; they are not interested in hearing the views of other students in class discussion.[60] Not only is interaction difficult in a large lecture theatre, but there is a tendency to go for the lowest common denominator approach because the lecturer is uncertain about the level of understanding within a heterogeneous group, particularly if there are substantial numbers of non-English speaking

[60] Johnstone and Vignaendra, *supra*, note 46, 271.

background (NESB) students. It usually means focusing on the transmission of information, not active learning. A lecturing pedagogy has become normalized because discussion of the values associated with legal education has largely disappeared in the face of market discourse.[61] Hence, law schools become complicit in reifying the values of the market as students are prepared for life as good technocratic lawyers on the corporate track. While the majority of students will not be employed by the corporate firms, this sector nevertheless remains a powerful, albeit tacit, driver of the law curriculum because of its status in the legal labor market.

I do not wish to diminish the efforts of those committed academics and law schools that have endeavored to hold on to a critical pedagogy. Indeed, quite a few law schools include critical thinking in their mission statements, as summarized by Johnstone and Vignaendra in their AUTC report in 2003.[62] The report sought to document a 'best practice' approach to law school pedagogy in the face of contemporary constraints. Individual academics have also written about innovative teaching strategies they have devised.[63] Ultimately, however, most have acceded to the pressures and capitulated. Sometimes, changed practices, such as moving from small group teaching to lectures has been imposed upon them from above.

II. Flexible Delivery

The 'flexible delivery' of courses suits the customers of legal education. I have already referred to electronic delivery, with its ability to beam anything anywhere at any time. The shift to intensive or 'block' mode, in which an entire subject is taught full-time in one or two weeks, or over two weekends, has become increasingly popular − with staff as well as students:

> It enables people to manage their teaching load flexibly; it allows students to manage their educational loads flexibly; it also allows students to get out faster, which is a big motive (AsPro, fem, 3rd Generation).

This mode of delivery had its genesis in coursework masters programmes and was designed to appeal to students in full-time work who found it difficult to attend campus regularly. When the numbers began to drop off, viability of the subjects was retained by

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[61] Goldsmith, *supra*, note 20, 726. But see Johnstone and Vignaendra, *supra*, note 46.

[62] Johnstone and Vignaendra, *supra*, note 46, ch 4.

[63] See *e.g.*, Elizabeth Handsley, Gary Davis and Mark Israel, *Law School Lemonade: Or can you turn External Pressures into Educational Advantages?*, 14 GRIFFITH LAW REVIEW 108 (2005). While the negative dimensions of the current climate suggest the sourness of lemons, the input of academic creativity is the sugar that produces lemonade. While the authors' course in constitutional law was contracted, they developed a valuable alternate pedagogy through the formation of student teams that fostered collaborative and oral skills.

making them available to undergraduate students in the winter or summer breaks. Such courses are generally offered on a full-fee basis as a way of boosting ailing coffers.

Unsurprisingly, there is a well founded perception among students that intensives are easier. How could it be otherwise? They invariably involve less time in which serious critical work can be undertaken. It is impossible to imagine how a deep approach to learning,[64] involving reflection and critique, could be achieved in a week, compared with three months in a conventional semester unit. Clearly, there is little opportunity in which to read, let alone reflect on the significance of the knowledge being taught. The popularity of such courses, together with the money they make, deflects attention away from their negative aspects.

III. Assessment

The traditional means of assessing law students is by final examination, a mode that is peculiarly suited to the cramming and regurgitation of doctrine, the paradigm of passive learning. Continuous assessment, including class participation and research essays, was a corollary of social liberalism and the development of a student-oriented, active learning approach in which the student took responsibility for acquiring knowledge, interrogating it, assimilating it and applying it. As with the curriculum and pedagogy, commodification has induced an economically rationalist approach towards assessment. Even reflective essays are now deemed to take too long for students to research and write up; they cannot be subsumed into the neat portfolio of orthodox legal knowledge that the 'customers' prefer. Even the word 'essay' carries such a weight of baggage that some participants said that they no longer used it. Nevertheless, as Martha Nussbaum points out, it is through writing essays, not examinations, that students acquire the skill of mounting careful arguments.[65] 'Massification' and the increased staff/student ratio have compelled a reversion to examinations as the primary form of assessment. The increase in plagiarism[66] may be raised as a justification:

[64] The best in-depth study of learning in law is MARLENE LE BRUN AND RICHARD JOHNSTONE, THE QUIET (R)EVOLUTION: IMPROVING STUDENT LEARNING IN LAW 59-61 (1994).

[65] Martha C Nussbaum, *Cultivating Humanity in Legal Education*, 70 UNIVERSITY OF CHICAGO LAW REVIEW 265, 273 (2003).

[66] See *e.g.*, Justin Zobel, "*Uni Cheats Racket": A Case Study in Plagiarism Investigation*, (Paper presented at the Sixth Australasian Computing Education Conference, Dunedin,2004) 30 CONFERENCES IN RESEARCH AND PRACTICE IN INFORMATION TECHNOLOGY (2004). So widespread and sophisticated has plagiarism become that there is now a journal dedicated to it. See *Plagiary: Cross-Disciplinary Studies in Plagiarism, Fabrication and Falsification*, available at: <http:www.plagiary.org>.

> There is less emphasis, I would have to say, on research assignments, that is, the written assignments are more likely to be problem-based and are more likely to be a synthesis of available material rather than research. That is very much a matter of reduced library resources, reduced student time commitment and our inability to supervise, and a lot of it has to do with plagiarism…Students come out with less research skills – you know that thing of going out and doing something on your own, but also getting some supervision, is lost. It was only available to a few anyway, but it's available to fewer (AsPro, fem, 3rd Generation).

Perhaps most significant from the perspective of academics is the intractability of the workloads issue that has caused even the most dedicated academics to question whether they should persevere with research essays:

> Because I have 120 students that I am dealing with by myself, I changed the assessment from examination *or* research essay to three 2,000 word pieces…This means that I have spent a large number of Sundays marking the continuous assessment essays…Yesterday, we discussed whether it was possible to deliver options within each subject and whether we should move to exams (Snr Lecturer, fem, Sandstone).

> Instead of 60 pieces of work to mark, we've now got 100…We might have a theoretical piece in the first session of property, but I'm going to have to do away with that now. I'm marking them all and there will just have to be a problem that I can mark quickly rather than a theoretical piece that takes a lot longer to mark (Lecturer, male, 3rd Generation).

Even if a research essay is offered as an option in lieu of an examination, students generally prefer not to do it:

> Essays are optional for the students. Not many take them up, probably a dozen a year out of 250 students – a very low percentage. When we made assignments optional, we were criticized for doing so because they claimed they wanted more experience with legal writing, though we don't actually see evidence of them taking up that option. However, in response to the criticism, we've introduced compulsory assignments into five units across the years so that they do get experience (Acting Head of School, fem, 3rd Generation).

It is clear that the writing of critical essays is no longer perceived to be a non-negotiable element of law school culture. A focus on doctrinalism, known knowledge and 'right answers' has replaced the questioning voice. If an essay is required, students struggle with it because it runs counter to the pervasive culture of technocentrism:

> I give students a piece of research and I ask them to write a critical review and then I ask them to write an essay about issues to do with research. For instance, I have an essay question where I say, is there, can there be a feminist methodology, or what does this entail, or whatever…The book review stresses students because they have never been asked to assess, to critically think about a piece of work. Usually they just regurgitate. They perform marvelously on it, but we always have complaints, very stressed students. Then, I have an assignment where I really ask them to think. I give them the option of coming back to me with essay topics and usually they come back and say, I am interested in this topic, can you come up with a question for me to answer. They struggle, and most of my students already have degrees and I have the top students…but they still find it very stressful to actually deal with a broader theoretical essay topic (Research Fellow, fem, 3rd Generation).

As a result of abolishing essays altogether or making them optional, it is now possible for a student to go through law school without having done a single research paper. Snapshots of knowledge – short opinions, hypothetical problems and tests – are the order of the day, all of which favor the acquisition of information, which accords with the applied focus in the ascendancy. Generally speaking, these modes of assessment test memory of orthodox knowledge that delimits students' horizons and discourages critical thinking. Usually, it is only the 'is' of law that is of interest, not what 'ought to be'. Challenging questions of a philosophical and ethical nature tend to be neglected because 'they are not in the exam'. What is more, they are not specified by the admitting authorities. It can therefore be seen how pedagogical as well as curricular sites induce depoliticization in accordance with the neoliberal agenda.

E. Declining Standards

There has been a decline in faith in the institutions of civil society in the West, which includes universities.[67] This is manifest in the popular discourse of anti-elitism,[68] which has become more overt with the ascendancy of neoliberalism, with its conservative as well as its applied philosophy. These socio-political factors have undoubtedly contributed to the fact that the preponderance of law students are less engaged with their study as an

[67] See *e.g.*, Raymond Gaita, *Breach of Trust: Truth, Morality and Politics*, 16 QUARTERLY ESSAY 1(2004); Onora O'Neill, *A Question of Trust* (BBC Reith Lectures, 2002); Henry A Giroux, *Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere*, 72 HARVARD EDUCATIONAL REVIEW 425(2002); RICHARD SENNETT, THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM (1999); Readings, *supra*, note 19.

[68] Marian Sawer and Barry Hindess (eds.), US AND THEM: ANTI-ELITISM IN AUSTRALIA (2004).

intellectual experience than they once were. They are cynical about the fact that they themselves are valued by universities primarily for the money they bring with them. Their experience is also shaped by the fact that most are working, they are accruing substantial debts and they want a well paid job as soon as possible. The university has become less a site of education and intellectual growth for them than a place of training and credentialism, justifying whatever shortcuts are available.

As neoliberal governments have forced universities to become market players, they have been compelled to respond to the power of the consumers. The twin variables of 'massification' and under-funding have inevitably affected not just the content and pedagogy of legal education, but also the caliber of the student body:

> I was coordinating a first year subject when the university decided to go from a couple of hundred students to somewhere between 500 and 700…There's an inevitable drag which comes, not from individual markers consciously dumbing down, but from the gravitational pull of adding more numbers from the lower end (Prof, male, New).
>
> There's a desperate attempt by our colleagues to maintain content and standard, but a growing realization that it can't be done and, more in sorrow than anger, we ditch things. Mooting electives are just so time-consuming…The tail is getting longer, that's my feeling. Whereas you'd have maybe four or five students in a group of 25 that were marginal, that's now creeping up to maybe 10 or 15, so you have this disjointed group where one section is operating at a high level, taking the most advantage of their legal education and the rest who just want a certificate (Snr Lecturer, male, Sandstone).

'Massification' is a vexed issue in the context of standards, as it merges with the more positive concept of 'democratization', which has undeniably accorded opportunities to many who would have been denied access in the past. The result is a much more diverse student body.[69] However, diversity is not simply a question of gender, race and class, but also goes to ability and how well prepared students are for university study. Sheer numbers preclude academics from devoting the time to pastoral care that they once could. Instead of offering remedial assistance to those who might need it, the favored course has been for law schools to adapt their teaching. The lowering of standards has affected the Sandstones, the Redbricks and the 3rd Generations, as well as the News. Once students appreciate the extent of their consumer power, they recognize that they are able to influence what is taught and how it is taught:

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[69] For valuable research on the relationship between New universities and diversity within the student body in the UK, see Hilary Sommerlad, *Researching and Theorizing the Processes of Professional Identity Formation*, 34 JOURNAL OF LAW AND SOCIETY 190 (2007).

> Because they are putting out money and their parents are putting out money, they have high expectations as to what they are going to get and I think it's also been a policy generally within university that they want to keep the students happy. They are the customers and I think the standard of our teaching is not as high and intense as it was ten or fifteen years ago, which was on a completely different level. We now have to reduce those lectures to much simpler material; the concrete stuff is being left out of the course because it's hard. The students don't want to do anything that is too hard…They want it all handed to them; they want a summary of the cases; they want a summary of the lecture notes; they want a very easy textbook to read. They have stopped reading cases so I do case notes (Snr Lecturer, fem, Sandstone).

If the pedagogy moves away from small groups to large lectures; if the time of a course is reduced from a semester to a week; and if the assessment changes from reflective research-based essays to the regurgitation of known knowledge in exams, or even computer-based multiple choice tests, law lecturers aver that it is not their fault, for the explanation lies elsewhere. The general public evinces concern about the deliberate manipulation of entry scores and pass marks if it appears that access is arbitrary and inequitable, but there is little concern for the systemic inequities arising from the structural effects of the market on the curriculum and pedagogy. The former is understood as corruption, while the latter is accepted as evidence of the normal workings of the market. It may be hard to tell the difference; the market has a habit of skewing good ethical practice.

Some participants adverted to being pressured by their university international offices to accept potential full-fee students whom the school had rejected. There were also accounts of pressure to lower the tertiary entry scores for domestic students and subsequent complaints when university failure rates were too high. The lowering of entry scores has been effected to attract full-fee students, who are otherwise unable to meet competitive entry requirements.[70] Courses involving full-fee paying students have generated tales of preferential treatment, marking scams and 'dumbing down' for some years.[71]

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[70] One law school is quoted as having a TER of 97.05 for a HECS-based Commerce/Law place, compared with 81.45 for a full-fee place. See Adam Morton, *Uni Entry System "undermined" by Late Transfers: Union Concern over Queue-jumping*, THE AGE, 29 January 2007, 5.

[71] The dismissal of Associate Professor Ted Steele by the University of Wollongong following allegations of 'soft marking' has become something of a *cause celebre.* See Patrick Lawnham, *Strike at Steele Stalls*, THE AUSTRALIAN, 15 May 2002, 43; Brian Martin, *Justice Ignited: The Dynamics of Backfire* (2006). See also, Senate Employment, Workplace Relations, Small Business and Education References Committee, Australia, *Universities in Crisis* (2001) 150-60.

Also questionable is the fact that students admitted on a full-fee basis may be able to transfer to a government-funded place after a year or so, thereby circumventing the high entry requirements for law. While the extension of the income-contingent FEE-HELP system[72] carries an aura of egalitarianism with it, in that it is designed to ensure full-fee programmes are not available exclusively to the rich, it has resulted in increasing numbers of less prepared students straining the quality of legal education because the ability to pay rather than academic excellence has become the significant criterion for entry. Regulatory agencies and internal measures for auditing quality control of teaching have been established specifically to assuage public concern about the falling standards.[73] However, if students are now customers who pay substantial fees for a 'product', is it ethical to fail them?

Rather than embarking on an intellectual journey of discovery, students now see themselves as the passive recipients of a course of pre-digested information, which will guarantee passing grades and receipt of a testamur. It is no longer the norm that they should go off and research a topic, form an opinion and then come along to class and defend a position. Despite the increased rhetoric pertaining to quality teaching and student-focused learning, 'there is the idea that a good teacher will give an answer, whereas a bad teacher will make you do your own work' (Lecturer, fem, New). The idea of the student-customer purchasing a product with minimum effort has replaced the understanding of a degree having to be earned. Unsurprisingly, black letter law is all the students want to hear,[74] because that is all that is necessary to satisfy the admitting authorities.

Paradoxically, quality assessment exercises may actually hasten the imperative in favor of diluted, pre-packaged knowledge, as expecting students to think for themselves can lead to low teaching evaluations:

> I have no doubt that the best way to get better student assessments, which then feeds into your promotion capacities, is to prepackage your material. I try and challenge them and I know that probably compromises the popularity approach to student teaching and learning assessments, but I try to resist the prepackage thing, although I know some of my colleagues don't. It's easy to put your lecture notes up on the web under the guise that when they come to the seminar, they've read everything and there will be this exciting dynamic exchange. Well, that doesn't happen; they

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[72] See *supra*, note 7.

[73] MICHAEL POWER, THE AUDIT SOCIETY: RITUALS OF VERIFICATION (1997).

[74] Brand, *supra*, note 20, 139.

> don't even read your summaries of cases, let alone the cases themselves (Snr Lecturer, male, Sandstone).

The market has also induced grade inflation. Students expect top grades in exchange for the high price they are paying, and they will harass their lecturers for more marks, even when the work is mediocre. They are also much more likely to pursue formal avenues of appeal as a corollary of their consumer rights. Participants everywhere adverted to the way complaints had proliferated within a rights-driven framework. If students have not received a high grade, the inference is that they have been badly taught. Law schools may capitulate because they cannot afford to have their brand name tarnished by aggrieved students going public with their complaints. A culture of complaint has been fostered by a consumerist society and it is inevitable that it would infect the academy once higher education had been commodified:

> Most of the students are sitting in jobs where their customers are cranky and complaining. They might be working in call centers, stores, or the tax office where they are constantly dealing with complaints from people with expectations of prompt service and they are constantly being told that the customer is right. They are constantly being told by the university, they are consumers…'Well, I spend all day in a call centre having customers ring up. I'm a customer of the university and I'm going to exercise my rights' (AsPro, male, New).

For the most part, the lowest common denominator approach to credentialism not only suits today's undergraduates because it entails comparatively little effort on their part, but it also suits the prevailing market mentality. Ticking a box, or pressing a computer button in response to multiple choice questions can provide slick and superficial answers, but it cannot grapple with the multifaceted and conflictual ethical problems that inhere within the market. The technocratic approach comports with the vacuous notion of excellence, described by Bill Readings as having been disconnected from reason and culture, which formerly gave it meaning in the context of the university.[75] Not only does the teaching of technocratic law induce conformity according to the market ethos,[76] it suppresses the questioning voice regarding law's role in facilitating dubious practices within the market. The technocratic or applied approach thereby induces a kind of intellectual myopia that desensitizes students to the ramifications of social justice.[77]

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[75] Readings, *supra*, note 19.

[76] Thornton, *supra*, n *.

[77] W. Bachman, Law v. Life: What Lawyers are afraid to say about the legal profession (1995).

Universities and academics are complicit in the new regime. The paradox of more students and less funding translates into everyone having to do more with less. Workloads have increased – in terms of number of hours of face-to-face teaching, class sizes and pieces of work to be assessed. Academics also face pressure to be entrepreneurs and active researchers, as well as the need to deal with endless administrivia and changing modes of audit and accountability:

> Something I have noticed, particularly over the last two years, has been an increased bureaucratization of teaching and learning so, in the name of accountability, staff are increasingly being asked to teach in the same way, with the same structure, so that universities' quality assurance concerns are taken care of. At this university, they have just started to go down the path of outcome-based learning which our secondary schools have done for a while (AsPro, fem, Sandstone).

Law generates comparatively little research money via industry linkages compared with, say, science and engineering. However, the discipline seeks to make up for its deficient entrepreneurialism by training ever increasing numbers of legal technocrats to serve the new knowledge economy. Law is attractive to universities because it is known to bring in good quality students and, most significantly, it is widely believed that it can be offered 'on the cheap'.[78] The fiction purveyed by university managers is that all that is needed is a few lecturers, who can transmit orthodox legal knowledge *en masse*, and a few law books, although even those are becoming optional with reliance on electronic data bases. Thus, apart from its ideological role in supporting the new knowledge economy, the law discipline is viewed as a useful mulch cow by universities because it can help sustain research-intensive disciplines, such as medical technology, science and engineering, which require expensive infrastructure.[79]

Auditing mechanisms emphasize teaching quality, but there is far more attention paid to research as substantial financial benefits flow to institutions from its production. More particularly, the primary focus is on securing 'inputs', that is, competitive grant income, rather than 'outputs' from the research, unless valuable patents are likely to eventuate. Cutting corners in teaching is therefore a corollary of the increasing emphasis on research.

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[78] No precise data is available to support the contention that it is cheaper to teach law students than social science students. Indeed a study conducted in Melbourne in 1989 found to the contrary. See the reference to a study by R A Williams, *Relative Teaching Costs in Higher Education: Selected Victorian Institutions* (1989) and discussed by Goldsmith, above n 20, 732.

[79] The underfunding of law schools *vis-á-vis* other university disciplines has been a constant refrain. The Pearce Committee Report, above n 23, ch 16, addressed this issue in detail. As a result, law schools were able to improve their position. The publication of the Pearce Report, however, only just preceded the Dawkins reforms so that the improved conditions were shortlived for some insitutions. See, for example, Council of Australian Law Deans (CALD), *The Funding of Law Schools: Resource Document for Deans* (2000).

Despite law's averred weakness in attracting research funds – and securing patents – the discipline is anxious not to be relegated to 'teaching only' status, an image it has sought valiantly to avoid. Consequently, the desire to be research active and attract research funding is another driver of contemporary teaching practice.

Managerialism is the new site of governmentality, a concept identified by Foucault as a form of disciplinary power involving systems of expertise and technology for the purpose of political control.[80] What is significant about the concept of governmentality is that it includes disciplining the self, not just others. That is, the managed (academics) soon internalize the behavior of those who are watching them so that they become their own guardians.[81] Similarly, the watchers (the managers) are thoroughly imbued with the institutional ordering and new disciplinary regimes.

Managerialism is the central mechanism for ensuring that new knowledge is mediated and harnessed by the state.[82] Bureaucratic knowledge rather than legal scholarship now occupies the dominant position within the corporate university. Reflecting this crucial change, senior line managers have quickly become the élite within universities, replacing professors.[83] The task of line managers in the new corporatized university is to appraise academics regularly in order to ensure that they are 'productive'. This is evaluated in terms of what Lyotard terms 'performativity'; a practice he defines as the process of 'optimization of the relationship between input and output'.[84] However, everything that academics do is not equally valued. Quantifiable outputs that are easily measured, such as numbers of research grants, publications, PhD completions and classes taught are likely to be rated more highly than intangible goods, such as thinking, which is deemed to be unproductive within a per formative environment.[85] Pastoral care, which is also not

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[80] Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality, with Two Lectures by and an Interview with Michel Foucault* (1991).

[81] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 207 (Alan Sheridan trans., 1991)

[82] The new approaches to the governance of universities emerges from New Public Administration (NPM), a constellation of ideas associated with reform of public administration in the UK, but borrowed from the private sector, and now accepted by neoliberal governments everywhere as rational, non-partisan and pragmatic. See *e.g.*, PETER SELF, GOVERNMENT BY THE MARKET? THE POLITICS OF PUBLIC CHOICE (1993); Kathleen D Hall, *Science, Globalization, and Educational Governance: The Political Rationalities of the New Managerialism* 12 *Indiana Journal of Global Legal Studies* 158(2005).

[83] Alfonso Borrero B Cabal, *The University as an Institution Today* (1993). The Higher Education section of *The Australian* frequently has articles adverting to the widening salary disparity between academics and those at the senior executive level. See *e.g.*, Dorothy Illing and Milanda Rout, *Survey finds big Rewards for VCs*, THE AUSTRALIAN, 4 July 2007, 21.

[84] JEAN L LYOTARD, THE POST MODERN CONDITION: A REPORT ON KNOWLEDGE (1984) 11.

[85] Readings, *supra*, note 19, 175.

calculable and which is conventionally assigned to women in the private sphere, is deemed to lack value as it does not fit into a per formative box.[86]

Academics that resist the new per formative imperatives are quickly sidelined. Codes of conduct allow formal disciplinary proceedings to be commenced against those alleged to have committed such infractions as raising questions about the propriety of altering grades on non-academic grounds, or exposing other examples of systemic and petty corruption that thrive behind the closed doors of the 'enterprise university'.[87] The scapegoating of dissidents and whistleblowers sends a powerful message to colleagues who might be wavering. They know that everyone is dispensable – in favor of someone younger and cheaper. The trend in favor of casualization illustrates the point. It not only means cost-savings, but also the employment of staff with little loyalty or commitment. Casual staff are employed to fill teaching gaps, not to be critical. They may be postgraduate students aspiring to academic careers, in which case their future is contingent on the good graces of managers (sometime senior academics).[88] Like docile workers on the assembly line, they are expected to serve the corporate mission without question if they wish to keep their jobs. The threat of redundancy, which hangs like a Damoclean sword over academic workers in the prevailing culture of insecurity, is a very effective weapon in ensuring compliance with the values of the neoliberal legal academy, but it does not guarantee loyalty to the institution:

> When a senior academic today talked about sacking people…I didn't see [my job] as being permanent any more. I like the job and I would like to stay here but I don't necessarily see it as the kind of place where I'd like to work (Snr Lect, fem, 3rd Generation).

F. Conclusion

Through higher education policies, the state is reshaping legal education in Australia. While 'massification' has resulted in many more lawyers being produced, they are being trained to serve the new knowledge economy and make Australia competitive on the world stage. The blunting of law students' critical sensibilities through the contraction of theoretical and social justice subjects is designed to maximize profits. The move to a user-pays

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[86] For an insightful consideration of the way the corporatized academy is effecting a remasculinisation of the legal academy, see Richard Collier, *The Changing University and the (Legal) Academic Career – Rethinking the Relationship between Women, Men and the 'Private Life' of the Law School* 22 LEGAL STUDIES 1 (2002).

[87] Marginson and Considine, *supra*, note 4.

[88] Gilliam Cowlishaw presents a frank account of what happens to a postgraduate student who is not deemed to be sufficiently docile. See Gillian Cowlishaw, 'On being awarded an Australian Professorial Fellowship' (2007) 22 AUSTRALIAN FEMINIST STUDIES 15.

philosophy of higher education ensures that cash-strapped law schools, as well as students, have a vested interest in the instantiation of the new regime. Competition between law schools, institutionalized through league tables discourages collaboration, even though it would be economically rational for them to collaborate. The focus tends to be on what is going to enhance a school's competitive advantage in the market and its position on league tables, not what is best for the discipline as a whole. Academic freedom, the *leitmotif* of the *idea* of the university, can no longer be relied upon as a source of resistance and critique. In the transformed university, it has been replaced with new forms of managerialism and audit that operate to ensure compliance and conformity on the part of academics.

I agree with Andrew Goldsmith that legal education is 'in crisis',[89] but can it be resuscitated? As the market has insidiously entered the soul of contemporary society, it is impossible to hold any one individual or entity responsible for the state of things. I have shown how the market discourse operates in various sites, which renders resistance difficult, if not impossible. The ideology of the market has so quickly normalized itself that a revolution would be required to supplant it. The multiple individual and institutional financial benefits that flow from the market effectively smother any objections about the current impoverishment of legal education.

Nietzsche's notion of *ressentiment*, which refers to the desire by the powerless to retaliate by inflicting pain,[90] may offer a way forward, despite its negative overtones. Wendy Brown invokes the concept of r*essentiment* to explain the paradoxes of liberalism.[91] When social liberalism, with its commitment to collective good, equality and social welfare, is in the ascendancy, it engenders *ressentiment* on the part of the rich and powerful who feel that their power is attenuated. They then attack and demean social liberalism as a sanctuary for the slothful and the indolent until neoliberal discourse with its central market values of entrepreneurialism and promotion of the self take over. Conversely, when neoliberalism is in the ascendancy, it breeds *ressentiment* on the part of those committed to social justice, equality and collective good.

The metaphor of the pendulum may appear somewhat simplistic in light of the complexities of globalization and the inequality of the power relations between the two poles, but it also provides a ray of hope. If the *ressentiment* of the opponents of neoliberalism is great enough, there could be a reversion to some form of social liberalism, which includes the idea of the university as a public good. The trouble is that, at this stage, the pendulum shows no sign of swinging unaided, despite the damage that is being

[89] Goldsmith, *supra,* note 20, 721.

[90] Friedrich Nietzsche, *On the Genealogy of Morals* (Walter Kaufmann and R J Hollingdale trans, 1967 ed).

[91] Wendy Brown, *States of Injury: Power and Freedom in late Modernity* (1995) 66-67.

wrought. Rather than meekly averting our gaze, I suggest that academics need to stand up and start pushing before even more depredations occur. Otherwise, we will be complicit in producing a generation of lawyers who fit rather too well the avaricious and amoral caricature.

ICT in Legal Education

By Antoinette J. Muntjewerff[*]

A. Introduction

The Bologna Declaration (1999) started a process of reforming European higher education. The major aim of the declaration was to construct a single European Higher Education Area by 2010,

> "..through increased compatibility and comparability of higher education systems in order to facilitate internal mobility for students, graduates and higher education institution staff members, but also to make European higher education more recognisable and attractive to students and scholars from outside Europe."[1]

The introduction of the bachelor-master system should give an impulse for curriculum innovation, where the idea was that more joint education projects between higher education institutions would emerge. Also prominent in the introduction of the bachelor master system was to improve student mobility.

The key concept in the Bologna process obviously is 'internationalisation'. However, it appears that one of the major tools in achieving this aim, being the use of Information and Communication Technology (ICT) has been ignored.[2] ICT can be used to support the educational content, the educational process as well as the organization and administration of education.

The use of ICT in education is often referred to as e-learning. The European Committee defines the concept of e-learning as:

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[1] *See* WESTERHEIJDEN ET. AL., NEW DEGREES IN THE NETHERLANDS. EVALUATION OF THE BACHELOR-MASTER STRUCTURE AND ACCREDITATION IN DUTCH HIGHER EDUCATION 53 (2008).

[2] *See* WESTERHEIJDEN ET. AL (2008); KRISTEN, EVALUATIE VAN HET BACHELORPROGRAMMA VAN DE FACULTEIT DER RECHTSGELEERDHEID VAN DE UNIVERSITEIT VAN AMSTERDAM (2006); FRENKEN ET. AL., INTERNATIONALISERING, ONDERWIJS EN ICT IN LEIDEN. ICLON RAPPORT NR 149 (2005); ICT IN HET HOGER ONDERWIJS (Frencken et. al. Eds., 2002).

> "the use of new multimedia technology and the internet to enhance the quality of learning by enabling access to means and services as well as enable exchange and cooperation over distance".[3]

To define a specific use of ICT, Frencken, Smits & Wisbrun developed a model for internationalization and education. Their recommendations for enhancing internationalization included pilot projects for on-line cooperation between students from different universities, technical recommendations regarding the use of international standards, study the possibility of examination through the internet, and developing and exchanging content.[4]

In this paper the focus is on developing e-content for legal higher education. The HYPATIA Research Program for principled and structured design of e-content for legal education is described.[5]

HYPATIA is a research agenda and a methodology for principled and structured design of material for learning law effectively and efficiently.

The HYPATIA research is interdisciplinary, which applies findings from researches on learning and instruction, computer science, and legal science (Figure 1). In addition, the HYPATIA research contributes findings to these fields as well.

[3] GUTIERREZ-DIAZ available at: www.elearningeuropa.info

[4] *See* FRENKEN ET. AL (2005).

[5] The research program is named after Hypatia of Alexandria. Hypatia had a passion for knowledge. She traveled widely and corresponded with people all over the Mediterranean. She taught mathematics and natural philosophy. She is credited with the authorship of three major treatises on geometry and algebra and one on astronomy. She invented several tools: an instrument for distilling water, an instrument to measure the specific gravity of water, an astrolabe and a planisphere. *See* MARIA DZIELSKA, HYPATIA OF ALEXANDRA (1995).

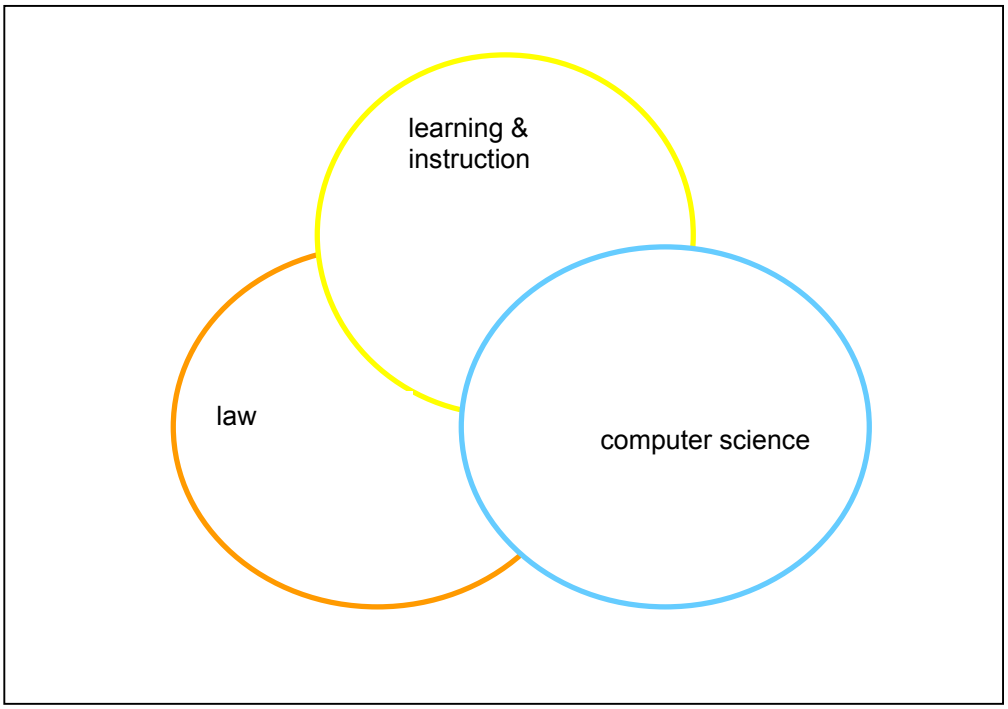

Figure 1: An interdisciplinary field

The aim of the HYPATIA research is to design electronic materials for law students to learn law[6].

B. Electronic legal education

Electronic legal education involves the use of information, communication and instructional technologies to enhance students learning of law and to provide law teachers with environments and tools for teaching law.

[6] The emphasis is on institutionalized learning and instruction, being learning and instruction organized and accredited within an institution as a school or a university. Life long learning, internationalized adult education (see for instance the Grundtvig program available at: www.europeesplatform.nl) or the program 'e-learning for judges' available at: http://www.iom.fi/content/view/184/8/ are examples of learning and instruction using ICT where the learning does not take place within the organizational and accreditational boundaries of an institute.

Since the beginning of the Eighties these types of technologies were introduced in legal education at Law schools and Law faculties in Europe. The first applications in this field were databanks of statutes and precedents; soon to be followed by computer assisted instructional programs.[7]

Although these materials are available, they are not widely used in legal education.

The situation in the Netherlands is that the available applications are either only used at the faculties that produced them or not used at all.

With the fast growth of the Internet many Law schools and Law faculties are moving their education and training into the web environment. The web environment enables a more integrated approach of using the technologies in legal education. It also enables teachers to assemble, store and (re) use materials for teaching law. More importantly, it may open new ways of teaching and learning law, for example, by providing students with an environment in which they can manage legal information and legal knowledge for their personal and professional use.

With the introduction of Electronic Learning Environments (ELO's) at the Law Faculties in the Netherlands, started around 1996, there is a growing demand for electronic materials for learning the law. There are new opportunities for (re) using existing applications and designing new electronic materials.

To transform these expectations and possibilities into electronic materials for the effective and efficient learning of law requires a principled and structured design approach: the design of these materials should be based on research outcomes.[8]

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[7] *See*, HAFT ET. AL, A NATURAL LANGUAGE BASED LEGAL EXPERT SYSTEM FOR CONSULTATION AND TUTORING – THE LEX PROJECT (1987); Fokke Fernhout et. al., *OBLIGATIO: computer simulatie van juridische casus, in* LEREN STUDEREN IN HET HOGER ONDERWIJS. PERSPECTIEVEN VOOR INTEGRATI E (de Grave & Nuy eds., 1987);

George Span, *De computer als tutor*, *in* COMPUTER-ONDERSTEUND ONDERWIJS IN DE JURIDISCHE DISCIPLINE.(Beek, Boerma, & Hurts eds., 1988); TOM ROUTEN, COMPLEX INPUT: A PRACTICAL WAY OF INCREASING THE BANDWITH FOR FEEDBACK AND STUDENT MODELLING IN A STATUTE-BASED TUTORING SYSTEM (1991); VINCENT ALEVEN, TEACHING CASE-BASED ARGUMENTATION THROUGH A MODEL AND EXAMPLES (1997); ROB NADOLSKI & JURGEN WORETSHOFER, HANDLEIDING CD-ROM-PROGRAMMA ARRONDISSEMENT ZOMERWEELDE (1998); PAUL MAHARG, THE DELICT GAME (1998); ANTOINETTE MUNTJEWERFF, AN INSTRUCTIONAL ENVIRONMENT FOR LEARNING TO SOLVE LEGAL CASES. PROSA (2000).

[8] *See* Antoinette Muntjewerff, *Principled and Structured design of Electronic Materials for Learning the Law*, *in* LEGAL KNOWLEDGE AND INFORMATION SYSTEMS, 133 (Trevor Bench-Capon, Aspasia Daskalopulu & Radboud Winkels eds., 2002); Antoinette Muntjewerff, *Effective and efficient learning of the law using models of legal knowledge and legal reasoning*, *in* IN HET LICHT VAN DEZE OVERWEGINGEN 209 (Eveline Feteris, Harm Kloosterhuis, Jose Plug & Jeanette Pontier eds., 2004); Antoinette Muntjewerff & Jeroen Leijen, *Unplugging Blackboard, in* KEY ISSUES IN THE DEVELOPMENT AND USE OF ICT IN LEGAL EDUCATION, 57 (Paul Maharg & Antoinette Muntjewerff eds., 2005); Paul Maharg & Antoinette Muntjewerff, *Through a Screen Darkly: Electronic Legal Education in Eur*ope, volume 36, number 3 THE LAW TEACHER. THE INTERNATIONAL JOURNAL OF LEGAL EDUCATION, 307 (2002); Paul Maharg & Antoinette

However, the research field of developing electronic materials for effectively and efficiently learning law is still in its infancy. Main reason for this is the fact that Law schools and Law faculties approach the development of instructional materials as teaching and not as research. Another reason is that the design of electronic materials for learning the law is by definition interdisciplinary and requires a close relation with both legal research and instructional research. Then there is the main difference between the Anglo-American legal system and the Continental legal system that makes the sharing of materials hard, blocking the formation of an international research community.

Finally, the few researchers in this area work rather isolated because there is no common research community. There is a need for a forum for researchers and developers of electronic materials for learning the law to define the research agenda, to be able to share research outcomes and electronic materials and to be able to apply research outcomes from relating fields such as Artificial Intelligence (AI) & Law and AI & Education to prevent re-inventing the wheel.

C. Principled and structured design of electronic materials

Principled and structured design involves three interrelated research streams: basic research, applied research and integration research (see Table 1).

basic research	*model construction*	*theoretical research*	*legal perspective knowledge*
engineering perspective		*empirical research*	
applied research	*materials construction* *remedies* *instructional model* *evaluation*		
integration	*classification* *selection*		

Table 1: Principled and structured design approach

Muntjewerff, *Key Issues in the Development and Use of ICT in Legal Education*, THE LAW TEACHER SPECIAL EDITION (2005).

Basic research is concerned with developing well-founded models of legal knowledge and legal reasoning to be learned by law students, examining the difficulties of law students with acquiring legal knowledge and legal skills and finding remedies to enhance effective and efficient learning of legal knowledge and legal skills.

Applied research is concerned with constructing applications for learning law. A principled design approach guides the process in such a way that difficulties and mistakes encountered during the design process may be accounted for.

Integration research is concerned with listing existing electronic materials using a classification and to make applications available for (re) use, in what is referred to as a ToolBox for learning the law.
Cooperation between researchers and developers in the field of Law & Educational Technology (BILETA, LETA, ELFA, ROL) is essential for realizing well-founded applications for learning law and using them in legal education[9].

We state that these new electronic materials should be planned, designed and evaluated in a well-founded and structured way by researchers and developers from the field of Law & Educational Technology.

I. Basic research

The aim of the basic research part is to (re) construct explicit models of legal knowledge and legal reasoning to be applied in electronic materials for learning law. These models are (re) constructed by way of both theoretical and empirical research. In the theoretical research component we explore, conceptualize and specify legal knowledge and legal reasoning in order to be able to (re) construct explicit models of legal knowledge and legal reasoning.

In the empirical research component studies are carried out to acquire insight in the way legal practitioners and legal scientists handle legal knowledge and in the way they use legal knowledge given a specific legal task. Besides that, studies are carried out to acquire insight in how law students handle legal knowledge and apply this knowledge in performing a legal task. The outcomes give indications about specific difficulties in acquiring and using legal knowledge.

Within the theoretical research component two perspectives are taken: a legal perspective and a knowledge engineering perspective. The legal perspective is that different legal

[9] BILETA available at: http://www.bileta.ac.uk/
LETA available at: www.leibnizcenter.org/~munt
ELFA available at: http://elfa-afde.eu/default.aspx
ROL available at: http://www.rechtenonline.nl

sources are examined to specify models of legal knowledge and legal reasoning. These legal sources are legal empirical research, legal educational practice, legal dogmatics, and legal theoretical research.

The knowledge engineering perspective within Artificial Intelligence & Law research aims at constructing models of legal knowledge and legal reasoning. As these models have to be executed by a computer these models require a high level of explicitness.

The model-based approach is the most articulated and structured approach resulting in well-founded problem solving methods for legal tasks. The legal equivalent of the model based approach, is the model based legal knowledge engineering approach.[10] Model-based legal knowledge engineering deals with modelling legal problem solving methods and modelling legal domain knowledge. The model-based approach involves the construction of a set of models of problem solving behavior where a system is a computational realization of these models.[11]

The models serve as a specification of what a system should be able to do, that is, they are specified on the knowledge level. The abstract character of this level also requires special specification languages to be able to express the models and to communicate them.

Within the model based legal knowledge engineering approach the emphasis at the moment seems to be more on legal knowledge.[12]

The emphasis is shifted from problem solving methods to the domain knowledge in search for structures that underlie the content of legal knowledge resulting in legal ontologies. Although this is very important, what we need is an integrated and explicit description of both the problem solving method and the legal knowledge.

Within the model based approach we therefore opt for the approach that describes the construction of a model of automated legal reasoning. We are interested in using the legal knowledge in performing a legal task. We want to reveal a structure of use in the legal sources. We therefore turn to a conceptual perspective where statutes are seen as

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[10] *See* ANDRE VALENTE, LEGAL KNOWLEDGE ENGINEERING (1995); NIENKE DEN HAAN, AUTOMATED LEGAL REASONING (1996); Nienke den Haan & Giovanni Sartor, *Model-based Legal Knowledge Engineering, in* MODEL-BASED LEGAL KNOWLEDGE ENGINEERING. 1037 (Brian Gaines ed., 1999).

[11] *See* Joost Breuker & Walter van de Velde, CommonKADS library for expertise modeling. Reusable problem solving components (1994); Valente, *supra* note 10; den Haan, *supra* note 10.

[12] DEN HAAN & SARTOR, *supra,* note 10.

artefacts constructed to perform certain functions. Such a functional viewpoint on legal knowledge is described in the functional ontology of law. [13]

As hypothesized by Valente (1995) core ontologies have a functional character and reflect the major reasoning or argument in a field. The functional perspective could be understood by the fact that fields are typically fields of practice. As a consequence, types of knowledge can be distinguished by their roles. These roles may also reflect that the predominant structure of reasoning is more speculative, but may, also, be conceived as that domain knowledge is a 'model of the system in the world' and that reasoning means some operation on this simulated system, or the construction of such a system. [14] A legal core ontology describes a coherent view on the legal domain.[15]

II. Applied research

In the applied research part, the electronic materials for efficiently and effectively learning law are designed in a principled and structured way, which implies that:

- the basic research results are used in arranging the electronic materials
- the models of legal knowledge and legal reasoning are used in the materials on the basis of insight on law student's specific difficulties in learning law remedies are constructed. The remedies are to be used in the design of the materials
- instructional design decisions are made on the basis of a global theory on learning and instruction.[16]

Thus the design process will result in a coherent and consistent instructional model and electronic materials are evaluated extensively (developmental testing and field testing).

III. Integration research

The need to be acquainted with existing tools is self-evident. However, it is necessary to come up with a classification scheme to be able to integrate these existing applications in a ToolBox. This classification is useful to make clear distinctions between types of applications and ways of realizing them. This division makes it easy to see what tools are

[13] VALENTE, *supra* note 10.

[14] William Clancey, *Model construction operators*, ARTIFICIAL INTELLIGENCE, 53, 1 – 115 (1992).

[15] See Thorne McCarthy, A language for legal discourse (1989); Pepijn Visser, Knowledge Specification for Multiple Legal Tasks. A Case Study of the Interaction Problem in the Legal Domain (1995); Robert van Kralingen, Frame-based Conceptual Models of Statute Law (1995).

[16] Summaries of 50 major theories of learning and instruction available at: http://tip.psychology.org/theories.html.

already available and what tools are still missing and needs to be constructed to fully cover all aspects of learning law.

The main idea is to have different types of electronic materials, which are needed for learning the law, available in a ToolBox. The ToolBox is then made available to law teachers and law students.

The electronic materials in the ToolBox are materials that cover a wide range of legal knowledge and legal skills. These materials help law students to become a skilled legal practitioners or legal scientists. Law students and law teachers may select the proper tools for learning or teaching. To be able to select the proper tools we also need to define selection criteria.

The proposed classification distinguishes between legal communication tools, legal information tools, and legal instructional tools (see Table 2).

- Legal communication tools are electronic materials that help to structure, organize and support communication in accomplishing a certain legal task (for instance, an online legal clinic, or legal negotiation)

- Legal information tools are electronic materials that contain legal data that are needed in order to carry out a certain legal task (for instance, databases of statutes, precedent or legal documents).

- Legal instructional tools are electronic materials needed for the effective and efficient acquisition of legal knowledge and legal skills. In short, instructional tools are electronic materials that instruct.

- With this we mean that the electronic materials are intended to support the learning of a certain body of knowledge or a certain (set of) skills. We classify instructional tools in three different categories: knowledge acquisition tools, training tools, and test tools.

- Knowledge acquisition tools are tools that support the learner in acquiring the meaning of concepts and the relations between concepts (for example, CALI modules).[17]

- Training tools are tools that use the acquired knowledge in performing a legal (problem solving) task.

[17] CALI available at: http://www.cali.org

- Test tools are tools that present the learner with assignments to test her knowledge and performance.

electronic materials for learning the law	legal communication tools	
	legal information tools	
tools/guiding systems	legal instructional tools	knowledge acquisition
		training tools/coaching systems
		test tools

Table 2: Classification of electronic materials for learning the law

D. Coaching systems

Most of the existing legal instructional materials are training tools or, as they are referred to in the AI & Education community, coaching systems.

A coaching system consists of an environment in which the student is enabled to perform the task to be learned or trained for. The coaching system monitors the activities of the student and outcomes of the student performance. It compares these with the required activities and outcomes. These systems therefore imply some normative view (as most teachers have).

A deviation is viewed as an error or inefficiency. When the coaching system encounters a deviation it subsequently diagnoses what may have caused it.

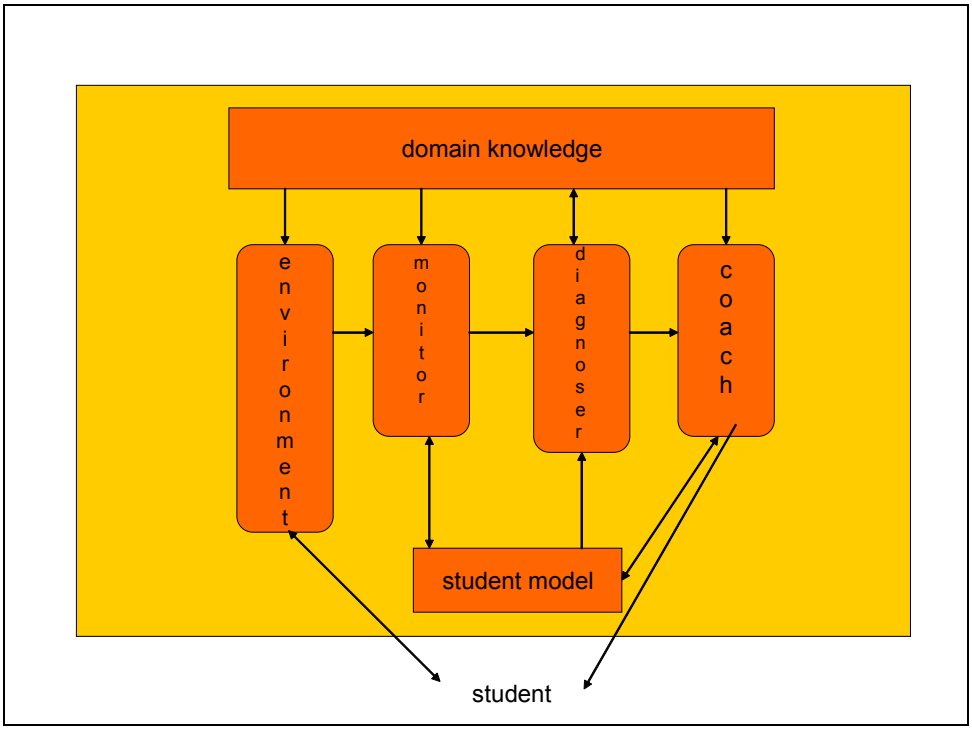

Figure 2: Coaching System

The following functional components are distinguished (Fig 2):

- An environment to enable the task to be learned or trained.
- A monitoring component to observe and interpret the student's behavior while she is performing the task and to identify that there is a deviation.
- A diagnoser to identify the cause of the deviation.
- A coach to assist and instruct the student[18]
- A student model. A repository where the information about the student is collected to built a model of the individual student.[19] The model keeps track of the changes in behavior and registers what the student is doing and how she does it.

[18] *See* Etienne Wenger, Artificial Intelligence and Tutoring Systems. Computational and Cognitive Approaches to the Communication of Knowledge (1987); Joost Breuker, EUROHELP: Developing Intelligent Help Systems (1990); Radboud Winkels, Exploring Intelligent Tutoring and Help (1992).

[19] *See* INTELLIGENT TUTORING SYSTEMS (Sleeman & Brown eds., 1982).

Coaching systems may differ in three major factors. The first factor is the degree of similarity of the training/learning environment in comparison with the real environment. The second factor is the degree of freedom the student has in performing the task. The third factor is the degree to which a coaching system is able to "understand" what the student is doing and what her results mean. We begin with a short introduction of each of these factors, starting with the environment, followed by the coaching strategies, and the representation of the domain knowledge.

I. Environment

A task is performed in some environment. This environment defines or instantiates some problem or goal to be achieved and specifies (makes explicit) the conditions (situation) in which this problem is to be solved or this goal is to be achieved. In summary: the environment is a task environment.

For real environments coaching systems are in fact "help" systems. Here a user performs a real life task being the task to be learned or trained in the real life setting. These coaching systems present to the user the real environment, not a simulation, and offer help to the user during task performance. Help systems are almost always coupled with other interactive computer systems, for instance they may support operators that monitor (industrial) chemical processes, or they may support users of applications as word processors.

A well-known example of the latter is EUROHELP.[20] In learning to acquire skill in using an interactive computer program, the user may recognize a need for some piece of information and so she may question available help facilities.

However, a user may not be aware of having a problem. EUROHELP is a help system that has also the capability of looking over the shoulder of the user, interpret her performance and offer active help accordingly. This active side of the help system is functionally almost identical to coaching systems. There is however, a subtle difference.

In a help system the user has the initiative in selecting a task, therefore a help system is by necessity opportunistic, i.e. this means that it cannot prescribe "exercises", but is engaged in "on the job" training. A help system can get into a coaching mode by prescribing a series of training tasks to the user, this happens when help is combined with teaching.

In general, however, the environment in a coaching system is not a real environment, but a representation of reality, i.e. a simulation.

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[20] BREUKER, *supra* note 18.

II. Coaching Strategies

A distinction is made between the environment and the coach. Where the environment simulates the problem situation that defines the task to be learned or trained, the coach sees to the learning or training of the skill to be acquired. The coach may vary on task performance that is required or allowed and, related, tutorial style.

Coaching systems vary in the degree of freedom the student has in performing the task. To start task performance the student is presented with an initial situation and a problem specification.

However, the tutorial style from thereon may vary from constrained to totally free.[21] In the constrained setting there is an explicit setting of the task. The task is differentiated into a task directed problem or exercise, the goal is stated and the sub-tasks that have to be carried out are traced. In a more free setting the student is presented with a situation. Without explicitly setting a task the coaching system asks the student to explore the environment on the basis of this situation.

Another issue here is the appearance of the coach. The coach can either be present as textual feedback and hints, or as a pedagogical agent who is present in the environment.

Research on pedagogical agents show promising applications and results. For example, the pedagogical agent Steve.[22]

The computer tutor Steve is a human like agent that collaborates with the student in a virtual world to help the student to learn[23].

This virtual world is used for training people how to perform tasks such as operating or maintaining complex equipment.

The virtual reality world provides a three dimensional interactive mock up of the students' working environment allowing her to practice tasks. The student enters this virtual reality by putting on a head mounted display.

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[21] *See* Jos van Berkum & Ton de Jong, *Instructional environments for simulations*. EDUCATION & COMPUTING 6 303 (1991); DESIGN AND PRODUCTION OF MULTIMEDIA AND SIMULATION-BASED LEARNING MATERIAL (Ton de Jong & Sarti eds., 1994)

[22] A short demonstration of Steve is available at: http://www.isi.edu/isd/carte.

[23] These human like agents are also referred to as "atavars". Using animated pedagogical agents in learning is also referred to as guidebot assisted learning. Guidebots help to keep the learner on track, interact with the students in learning environments, engage in instructional dialogue and enhance motivation.

Steve cohabits the virtual world to help the student. Steve first shows the student how to perform the task by performing the task himself, while the student looks over the shoulder of Steve. Steve also talks to the student.

He, for example, tells the student what he is going to do ("Let me show you how to perform the pre-start procedure"). Steve also watches if the student is paying attention. This is followed by the student performing the task while Steve looks over her shoulder. Steve has a specific and meaningful role in learning the task of operating complex equipment. However, this role is already somewhat less obvious in Adele.[24] Medical students are presented with a simulated patient in a clinical setting (a video presentation of real patients on the computer screen). In this case based diagnosis exercise the student has the role of a physician. The student is able to ask questions about the medical history, perform a physical examination, order diagnostic tests and make diagnoses. Coaching is provided by Adele, the pedagogical agent or tutor. Like Steve, she is an animated computer figure; not an animated video of a real human figure. Adele is depicted as a physician and she presents the hints and feedback to the student both in text and with a synthesized voice. The evaluation of Adele showed that student did not find Adele believable as an attending physician. Adele is a pseudo figure who has no specific and meaningful role other than telling the student the feedback that could also easily be presented to the student as text only. The evaluation however, showed that it is not clear if students prefer the persona to a text-only tutor. "Real life" appearance may have no beneficial effect.

III. Knowledge Representation

Coaching systems vary in the way the knowledge is explicitly represented in the system. Systems that use an implicit knowledge representation encode decisions not knowledge.[25] These systems are for that reason classified as non-intelligent. Systems that do explicitly encode the knowledge are labelled as 'intelligent'. Explicitness of knowledge representation comes in degrees.

With an explicit knowledge representation it is possible to make inferences and to give explanations on the basis of the representation.

Environment, coaching strategies and knowledge representation are distinguished as separate factors, which have specific dependencies between them. The ideal is to construct a coaching system with an explicit simulation environment and a coach with explicit knowledge about this environment, where an explanation consists of elements of that explicit representation.

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[24] Adele stands for Agents for distributed learning environments. Screen dumps of Adele are available at: http://www.isi.edu/isd/ADE.

[25] WENGER, *supra* note 18.

This ideal is not so much that it enables the system to be more 'intelligent'. However, this intelligence allows more individualized and flexible reactions to the performance of the student.

Moreover, it allows the system to search for underlying causes (misconceptions) of the student's errors or inefficient task performance. It makes it easier to interpret what the student is doing and to offer the student the proper guidance and remedial. It makes it easier to construct a fully individualized and adaptive coaching system. There is no need to anticipate explicitly all the possible behaviors of the student as is the case with an implicit representation.

E. Coaching systems for learning law

The proposed research approach described above, distinguishing between basic, applied and integration research and emphasizing the relation with research from fields such as AI & Law and AI & Education, is followed in the design of legal coaching systems.

HYPATIA aims at designing electronic materials for law students to learn the law. The focus in the HYPATIA research program is on *new additional* materials. These materials are intended to support students where they experience difficulties in acquiring legal knowledge and legal skills and materials are not available. HYPATIA develops *new additional* electronic materials for legal education. Law students experience difficulties in acquiring legal knowledge and in using legal knowledge and law teachers report these difficulties. However, there are no materials available to help students to overcome these difficulties. Therefore these types of materials are developed within HYPATIA. The materials are made available in an electronic environment because of the advantages of individualized instruction and practice combined with immediate support and feedback. A computer program has the capacity to adapt to the individual student's performance, it may support the management of information and it may present various representations and visualisations of legal knowledge and legal tasks. In realizing the electronic materials we take a model based design approach.

Models of legal knowledge and legal reasoning are the basis for designing the materials. To (re) construct these models a variety of theoretical sources are examined. Next to this it is necessary to gain insight in the specific difficulties students experience in acquiring legal knowledge and legal skills.

Remedies are suggested on the basis of both the models of the legal knowledge and skills and the specific difficulties experienced by law students. HYPATIA is divided into specific research programs. For example, instructional environments for acquiring legal concepts, for learning to use statutes on the basis of insight in the system and structure of statutes,

for learning to use precedents on the basis of insight in the structure and elements of precedents, and for learning to solve legal cases.

We describe three projects within the HYPATIA research program. The first is the design of an instructional environment for learning to solve legal cases: the application PROSA. The second is the design of an instructional environment for learning to structure and analyse case law: the application CASE. The third is the design of an instructional environment for learning to select legally relevant facts out of a real life situation: the application *e*-See.

I. PROSA Problem Situations in Law

PROSA is an Instructional Environment for Learning to Solve Legal Cases with a module in the domain of Administrative law and a module in the domain of Criminal law.[26]

PROSA is an example of a coaching system. It presents an environment in which students can learn to solve cases in law by applying statutory rules.

The task of legal case solving was examined, resulting in a conceptualization of the task and an inventory of difficulties in legal case solving (see Fig. 3).

[26] See Antoinette Muntjewerff, *Evaluating the Instructional Environment for Learning to Solve Legal Cases PROSA, in* COMPUTERS AND ADVANCED TECHNOLOGY IN EDUCATION, 374 (Gustavo A. Santana Torrellas & Vladimir Uskov eds., 2002); Muntjewerff (note 7); Antoinette Muntjewerff & Jolanda Groothuismink, *PROSA A Computer Program as Instructional Environment for Supporting the Learning of Legal Case Solving, in* LEGAL KNOWLEDGE BASED SYSTEMS, 85 (Jaap Hage, Trevor Bench-Capon, Job Cohen & Jaap van den Herik eds., 1998).

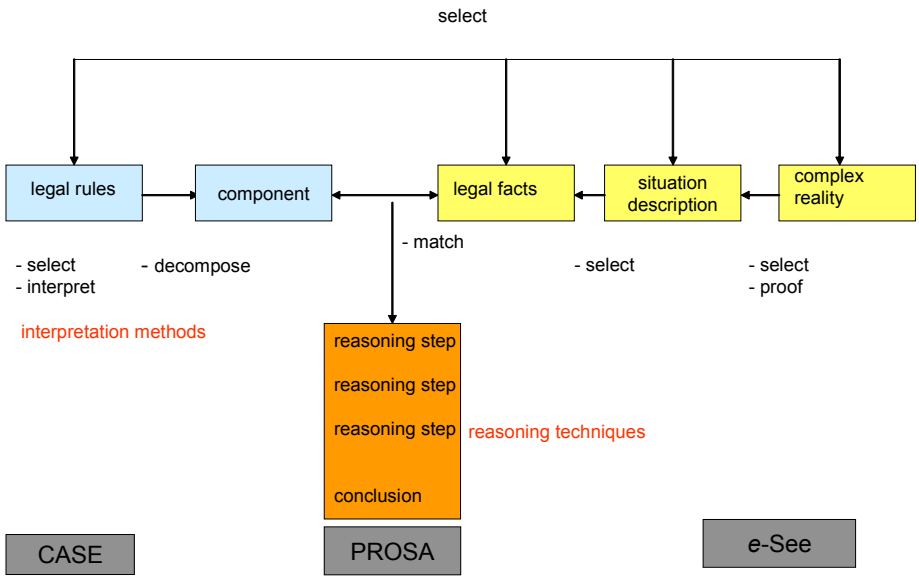


Figure 3: Model of legal case solving

This inventory lead to the conclusion that students should be supported in managing information and prevented from 'jumping to conclusions' to enable the student to construct a correct and complete legal solution. We decided that this requires an environment in which the task components and task characteristics are made explicit in such a way that it restricts the set of activities that have to be performed by the student and it presents systematic guidance to the student.

To select a relevant fact from the situation description requires much leafing that in turn requires the storage of many intermediate findings. As a consequence (short term) memory is exceeded in no time. Making notes may function as a kind of external memory, however, this involves copying articles from statutes and facts from the situation description. This is not only much work, it is also something that students will not do or will not do exhaustively. However, we do want the student to work in a systematic way to prevent them from 'jumping to conclusions' and to enable them to construct a complete and correct solution. We decided to present an environment that meets both requirements: (1) relieve the student of the task of keeping track and recording intermediate results and (2) enable the student to work in a systematic way.

We want the student to construct a legal solution by herself. By actually having the student work on the construction of a legal solution she may experience what it takes to construct a solution and to "go through the problem" so to speak. We found that the different theoretical sources we consulted present a more or less identical decomposition of the task.

However, we also found that the difficulties in legal case solving are not primarily related to *what* activities have to be carried out, but more to *how* these activities have to be carried out. This revealed that the major role in solving a legal case is reserved for legal knowledge.[27]

The understanding and legal interpretation of a situation description requires a correct mapping between this situation description and the knowledge implied by the domain of practice. Based on our insights in students difficulties with solving legal cases we decided that this mapping should be made explicit in such a concrete fashion that it also should act as an external memory that marks which propositions in the legal case have been covered by the law and which have not been. The latter may mean that the proposition is either not relevant in legal terms or has been overlooked. This leads us to differentiate between the legal case, the legal rules and the legal solution, where we also discussed the different components that make up a solution. We also found out that students have difficulties finding their way in the legal knowledge, therefore we should improve the conceptualization of the legal knowledge. It is therefore important to differentiate types of knowledge based on their role in legal case solving. Because we also think it is important to be able to address the knowledge right from the start we decided to externalize these different types of knowledge.

The instructional model for learning to solve legal cases separates the instructional material and the support material. Because the model only defines the instructional model in abstract and general terms we have to add the specific content and required performance, being the legal knowledge and the legal case solving components. It is very important to present immediate feedback to keep the student from muddling and making serious mistakes. However, we think it is also very important that the student may request feedback whenever she wants. The feedback should inform her about her past, e.g. "how well did I do until this point?", as well as on her future, e.g. "can I go on this way?".

We want the student to engage in legal case solving while the computer program monitors her activities and outcomes and correct her during performance. We committed ourselves to a non model based simulation environment. The environment in the coaching system for legal case solving consists of a simulation of a legal case by using textual descriptions. We do not use an explicit knowledge representation, because for a non model based

[27] MUNTJEWERFF, *supra* note 7.

simulation this is not required and we do not use the representation for additional functionalities either, for example, we do not keep a student model that keeps track of the student's mastery of individual concepts. We considered some sort of curriculum planning. Curriculum planning involves some sort of sequencing of introducing topics and matching exercises with increasing complexity.

However, we decided to leave it to the student to select a specific topic and difficulty level. The decision was more or less dictated by our view on motivation, where freedom of control by the student is highly valued.

Our main principle in deciding how we have the student navigate in the instructional environment is freedom of choice and control for the student. The student may do what she wants to do and whenever she wants to do it. The instructional environment allows her to look around and to examine each and every detail. There are no time restrictions, the student may take as long as she wants to solve a case, she may even decide not to solve it at all or not completely. However, although the student may do what she wants, there is only one complete and correct legal solution for each case and there are three pre specified routes that are regarded as the best ways to proceed.

So in the feedback the student will be informed about the deviations concerning both the route and the content of the legal solution. She will also receive feedback whenever she carries out an activity or uses some knowledge element that will lead her nowhere. However, it is up to the student to do something with the information or not.

The student can not type in text, text can be manipulated using copy and paste. We will use buttons to enable to student to select a specific activity or certain types of knowledge. A button in turn contains pop up menus each showing a list of specific options to select from. The legal case and the legal rules are presented as text in the specific windows. Because there are space limits it is inevitable, particularly with the legal rules, to scroll text.

The interface of PROSA visualizes the instructional environment we present to the student to learn legal case solving. PROSA does not explicitly instruct a method. However, the design of the screen constraints the ways the solution can be constructed. We argued that it might be more supportive to present an environment in which the basic legal case solving components are externalized. This way the student is not enforced to work in a pre-specified way, however, she does have something to go by that may support her to work in a systematic way. Externalization may also take over cognitive activities from the student that hinders correct task performance. For example, intermediate results no longer have to be administrated internally, the results can be left in a specific window on the screen in this way diminishing the students' memory load. She also does not have to check data and intermediate results "by heart".

The leading principle in designing PROSA is "divide & conquer". We not only made a distinction within legal case solving between legal case solving method and legal knowledge, we also distinguished between types of legal knowledge, which in turn dictate distinctive components in legal case solving. In the instructional model we distinguished between instructional material and support. These distinctions were realized in the interface in such a way that it presents students with an environment that makes it easy to "conquer" legal case solving. This is accomplished by a spatial design of the interface (see Fig. 4). We opted for a fixed composition of the screen. This way the student can easily recognize the legal case solving components, their content and their functionality which in turn may support a systematic approach to solving a case.

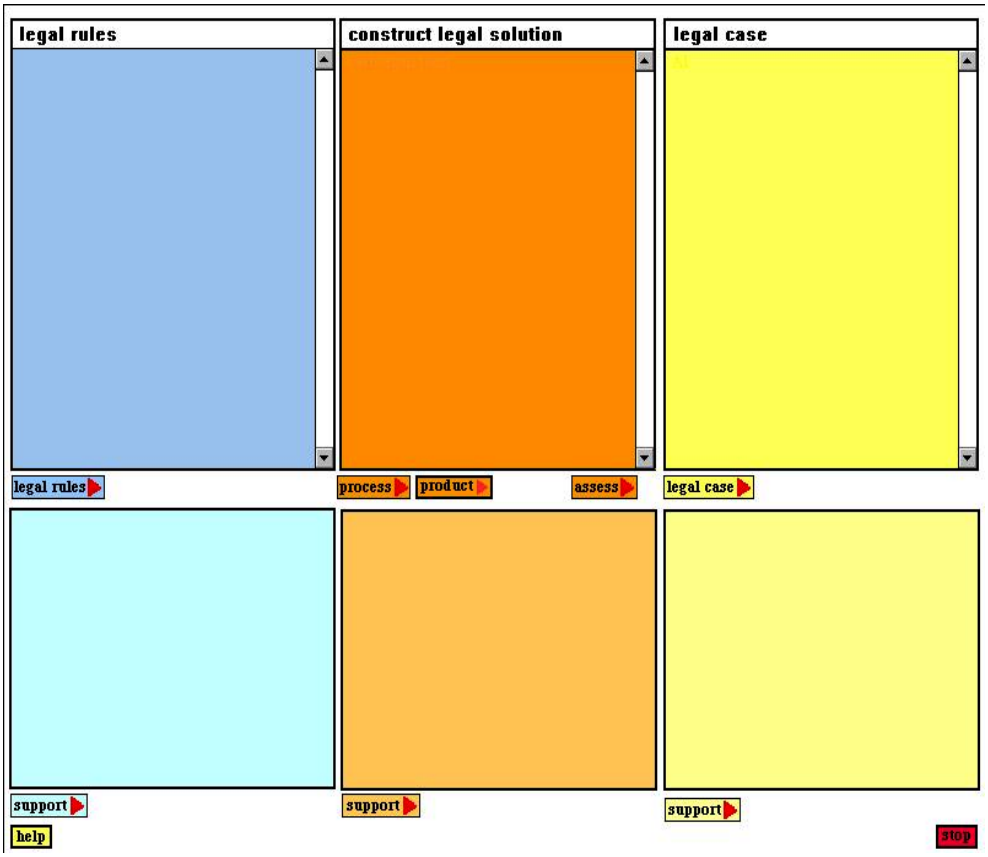


Figure 4: The instructional environment in PROSA.

The screen is divided into two horizontal layers. In this way a clear distinction is maintained between the presentation of the content and the expected performance on the one hand and the presentation of support on the other. The use of color has functionality in distinguishing the subsequent components that play a role in legal case solving.

The distinction between the presentation of the materials and the presentation of the support is expressed using bright colors for the windows where the materials are presented and using pastel colors for the windows where the support is presented.

The LegalRulesWindow contains the legal rules, i.e. the 'theory' that should be applied to the legal case description in the LegalCaseWindow in the upper layer. The student can select a legal case (legal case button) and legal rules (legal rules button).

The middle window in the upper layer the ConstructLegalSolutionWindow is where the student constructs her legal solution by matching selected article components with selected facts (the process button contains the select and the match options, the product button contain facilities to 'edit' the legal solution). The specific problem posed to the student is put at the top of this window. The students' workspace allows her to keep track of her local decisions. Because there is no prescribed method or order to the way she matches legal rules to facts, the student may work both 'theory' driven or 'case' driven. Therefore, in the end the student is capable to come to a conclusion on the basis of the argument structure. The legal solution is the actual work space of the student. However, we have to deal with the fact that our space on a computer screen is limited. This may result in a rather small work space where it may be difficult for the student to keep an overview. Therefore we introduce an option 'large screen' under control of the student for requesting the larger workspace.

The student may ask feedback (assess button), which in turn is presented in the lower layer in the ConstructLegalSolutionWindow. The student may also ask for elaborations (support buttons) on the legal case, the legal rules or the legal solution to be constructed. This support is then presented in the respective window in the lower layer.

Although maintenance and re-use may be classified as basic requirements, we did not discuss these issues up to this point. This is partially due to the fact that both issues are closely related to design and implementation, partially due the fact that it is more or less incorporated in our handling of the other requirements. Our analyses of legal case solving, the domain of practice and arranging instruction resulted in abstract models that can be re-used as well as maintained. The way the domain of practice is modeled, for example, provides us with guidelines for adding new knowledge, or deleting knowledge that is out of date. The fundamental approach we took in setting up these requirements was continued in the specification and the implementation. We are arranging instruction in a field where the knowledge is liable to minor and major changes due to decisions by the legislator or the administration of justice. To be able to test our claims we had to set limits to both the

amount and types of legal knowledge as to the number and topics of legal cases we could include in the system. All this made us very susceptible to the issues of maintenance and re-use. Here we restrict the description to the way in which we attended these issues in the architecture and the implementation.

Maintaining a system as PROSA, requires that the system can be changed. If the system can be changed it is possible to repair mistakes and to add or delete materials, laws change. It is also necessary that changes can be made without too much costs and effort.
It is important that the cause of a mistake can be detected and corrected easily, that materials that are out of date can be deleted without causing problems elsewhere in the system, and that new materials can be added without causing difficulties in other parts of the system. Transparency of architecture and specific tools may facilitate maintenance.

II. A session with PROSA

To get a basic idea of the functionality of the system we now describe a session with PROSA. The description of the session is based on the recommended route. Starting PROSA brings us to the first screen which shows us the PROSA logo and four buttons.

There is a start PROSA button, an explain PROSA button, an info PROSA button and a stop PROSA button. The start PROSA button brings us to the data request screen where we have to insert our name and student number. This is required so PROSA can keep our individual record. When we indicated that we are ready the PROSA screen appears (see Fig. 4). Imagine we are sitting in front of PROSA.

The first thing we have to do is to select a legal case from the set of available legal cases using the menu button legal case. The legal cases in PROSA are arranged by topic. We decide to select a case with topic *interested party* from the list of topics that pops up. Within each topic the legal cases are arranged by level of difficulty. We decide to select difficulty level *easy* from the list.

The situation description selected is then presented in the upper layer in the legal case window (e.g. the Dapper Market case) (see Fig. 5). At the same time the question that belongs to the situation description is presented in the upper layer in the construct legal solution window (e.g. Is Alexander Boer an interested party according to the General Administrative Law Act?). We now select the menu button process in the upper layer in the construct legal solution window. The list with the two activities select and match pops up.

Being presented with a legal case the next thing to do is to select either a legal rule or a fact from the legal case. So to start constructing the legal solution we have to choose the select option. This results in a change in the construct legal solution screen. The distinction between selecting a legal rule from the set of available legal rules and selecting a fact from the situation description is now visualized. There also appears a specific part in the

construct legal solution window that is titled legal solution. This is where we have to put our intermediate results to construct our legal solution. We select a legal rule by choosing the legal rules button in the upper layer in the legal rules window. This button shows the three different categories of legal rules: statutes, other regulations and case law. Within the statute option a further classification of statutes is made based on the area of law the statutes belong to. We choose the option statutes from the legal rules button and then select the act we think applicable given the specific legal case and question to be answered. This act is presented in the legal rules window (e.g. the General Act of Administrative Law). We now have to select an applicable article from this act. This article has to be copied to the construct legal solution window, in the specific part select legal rule (e.g. Interested party means the person whose interest is directly affected by an order). We may bring the article to the legal solution using the product option bring to solution. We now have to select an article component from the article (e.g. the person) and a fact from the situation description to be matched to the article component (e.g. Alexander Boer). We have to use the match option available in the process button to link the article component to the fact. The match option shows us the available link operators that we can use.

Because we argue that the person is Alexander Boer we opt for the operator '='. Our match is automatically put into the legal solution (e.g. the person = Alexander Boer). We have to repeat the select activity until there are no statutes, articles, article components and facts left. The match activity has to be repeated until there are no more article components or facts.

At that stage we have to formulate the final answer to the question. We choose the option formulate answer in the menu button product and select what we think is the right answer (e.g. A. Boer is not an interested party in the meaning of the GALA). One by one the various elements where put on the screen. At this point we are facing the following screen (see Fig. 5).

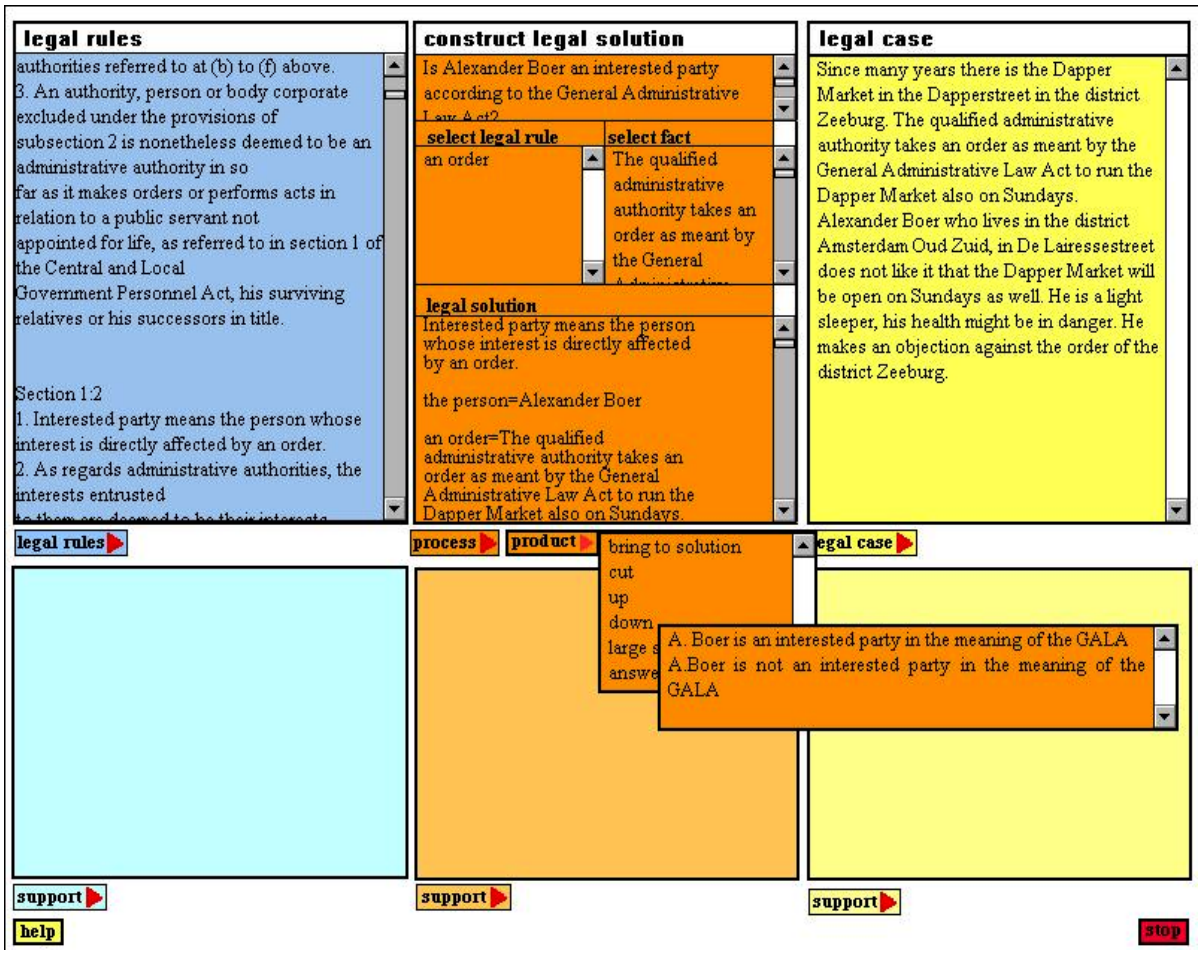


Figure 5: Construct legal solution.

We notice that up till now all materials are presented in the windows of the upper layer. This indicates that we did not request an assessment or an elaboration and that there also was no need for PROSA to correct us.

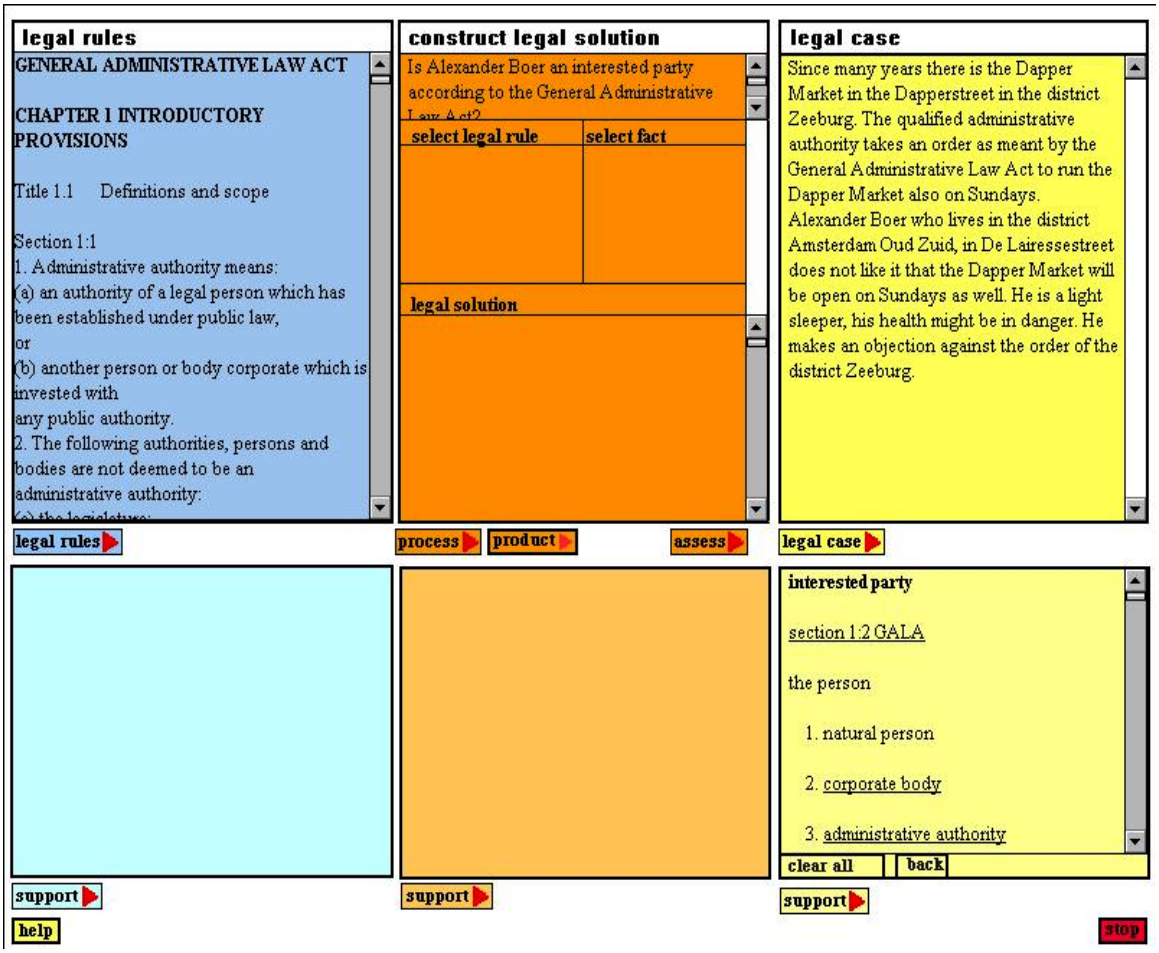


Figure 6: Presentation of the elaboration.

Therefore we now assume that we do not know where to start when we are confronted with the Dapper Market case. We understand that we have to find out if Alexander Boer is an interested party in the meaning of the GALA[28], however, we do not know where we may find the legal knowledge. We therefore decide to ask for an elaboration by using the

[28] GALA = General Administrative Law Act.

support button of the legal case window in the lower layer. The buttons have different options available as a list of concepts and a topic model. We select the 'list of concepts' option resulting in the presentation of an alphabetical list of terms used in the domain of practice. After selecting the term 'interested party' we get a description of the article components (the legal terms) and a reference to the legal rule. When we click on this reference the legal rule is presented in the lower layer of the legal rules window (see Fig. 6).

We not only may ask for elaborations, we may also ask for an assessment of our (intermediate) results using the assess button in the construct legal solution window. The two types of assessment available are sub assessment and final assessment. When we are sure we want to quit working on the particular case we may ask a final assessment, however, when we want to proceed but also want to have feedback on how we are doing we may ask for a sub assessment. The final assessment will present an overview of what we did right and what we did wrong subdivided to process and product, and within the product specifying the status of the components, component order and answer.

A sub assessment gives us the opportunity to get separate feedback on our route (process) and on our constructed solution (product). We may request an assessment any time we want. Fig. 7 shows a sub assessment of our product.

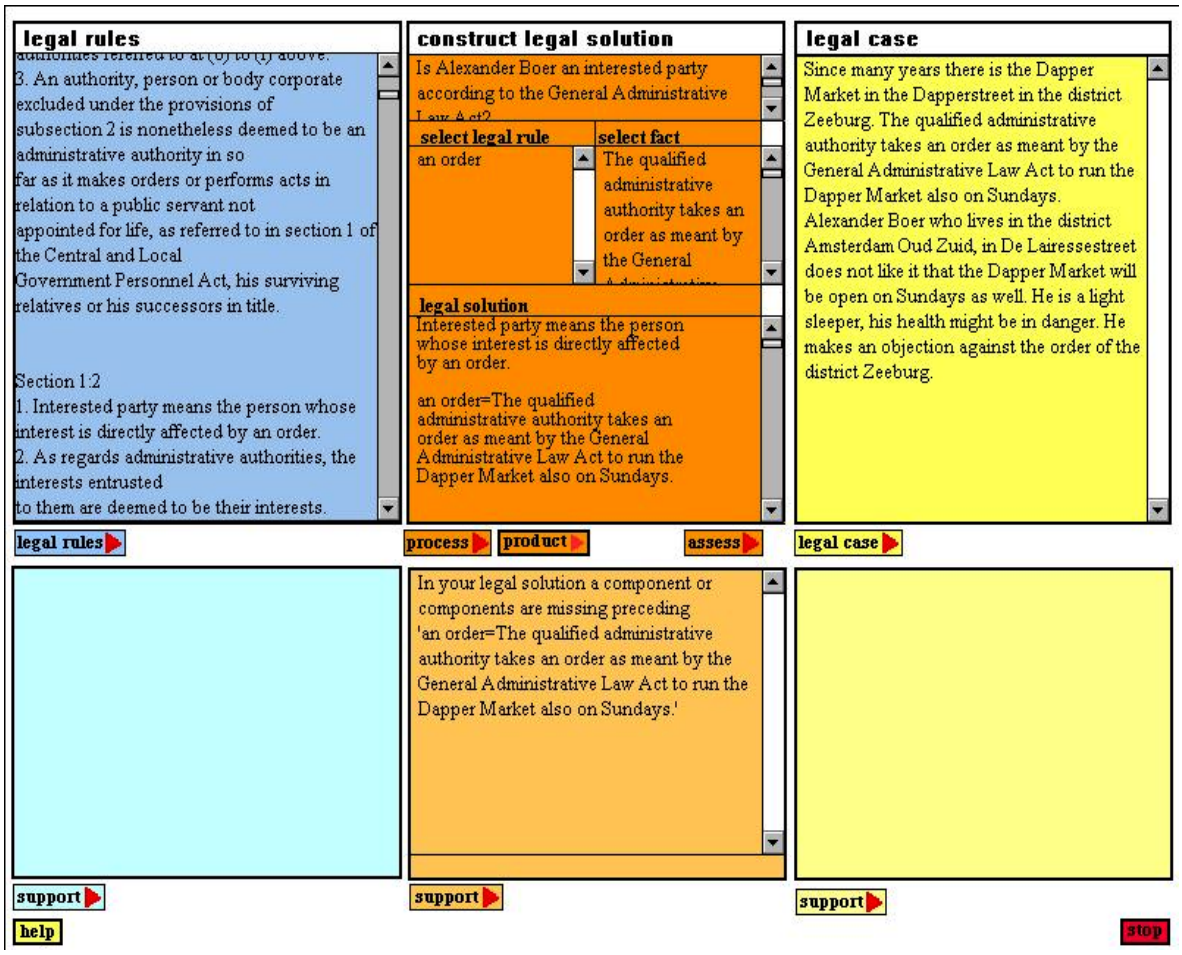


Figure 7: Presentation of the assessment.

When we want to quit working with PROSA we select the stop button which brings us to the stop screen. Here we have different options. We may exit PROSA, we may go back to working with PROSA and we may, before we select one of these options, ask to look at our results. When we choose to look at our results we are presented with our PROSA history.

This overview shows how many sessions we had with PROSA, how many cases we solved in each session specified to the topic and difficulty level and for the most recent session it specifies for each case our achievements both on product and process.

PROSA is an instructional environment for learning legal case solving. When sitting in front of PROSA in what way is what a student has to do different from the way she is used to solve a legal case (using printed materials and her memory)? It is for certain that in solving a legal case the student is running out of memory quite fast. Therefore students make notes. However, making these notes means lot of work, students have to copy text which is inefficient, and also these notes are often incomplete.

For one PROSA does not put as heavy a load on a students' memory as traditional written legal case solving does. The way of working becomes quite different because PROSA takes over the managing of information by externalizing materials, intermediate steps, and intermediate results in an automatic way. The student can just start working with PROSA and her legal solution evolves on the way.

Secondly PROSA facilitates the acquisition of a systematic approach in solving a legal case by creating a path through the knowledge by differentiating the knowledge on the basis of its function in legal case solving. The legal case is separated from the legal rules and the legal solution is divided into partial components.

Working with PROSA is therefore more efficient. However, is being more efficient also being better? It is, because the most important factor in problem solving is what is expressed as "going through the problem". The more a student actively engages in legal case solving the more she learns to differentiate the knowledge, the more systematic her approach will become and the better a legal case solver she will become.

Facilitating the problem solving process as PROSA does results in knowledge differentiation and a systematic approach in a more efficient way than when solving legal cases in the traditional way.

PROSA presents an environment (not a method) in which:

- the student is facilitated and encouraged to work in a systematic way, the chances to miss or leave out something are nil

- the student does not have to manage her information and she does not have to keep track, the coach takes care of keeping track

III. CASE Case Analysis and Structuring Environment

Learning law involves reading, structuring and analyzing precedents to be able to indicate the legal meaning of the precedent. Law students experience difficulties with reading and analyzing precedent cases especially with determining the specific legal meaning of a precedent. Within the current curriculum there is not enough time to read and analyze precedent cases in the presence of a teacher who may provide immediate feedback. Law students are also not presented with models that may guide them in the process of reading and analyzing precedent cases. In learning the law it is essential to know how to structure and analyze a precedent. Therefore we suggest a computer program that presents to the law student an instructional environment in which she is able to analyze a precedent in such a way that the structure is made explicit and the legal meaning can be extracted. This can be realized by presenting the student with the text of the precedent (in electronic format) and to present the student a framework for analyzing the text of the precedent. The student can copy and paste parts of the text from the precedent into the framework. This approach also enables comparison of precedents on elements in the framework.

The law that applies in a legal system such as the Dutch legal system consists of general rules that are determined or acknowledged by authoritative bodies. The two most important authoritative bodies within the Dutch legal system are the legislator and the judge. While it is obvious the legislator determines rules that apply in general, this is more complicated with judges. A judge has to decide in individual cases, she has to construct a legal solution based on the facts of the case and the applicable legal rules. In the majority of cases that come before the court, a judge formulates a decision that applies only to the case at hand. These decisions do not add to the body of applicable rules in the legal system. However, in cases where a judge first has to construct an applicable rule, before being able to decide the case on the basis of this rule, we have a different type of decision.

The rule constructed by the judge to decide the case, may add to the body of applicable rules in the legal system. Legal practitioners and legal scientists need to have knowledge of the general rules that apply in the legal system. This involves both knowledge of the legislation and knowledge of the decisions by judges that function as general rules of law[29]. Law students preparing themselves for the legal profession of course also need these kinds of knowledge. They have to acquire knowledge about the role of decisions by judges in the legal system, and they need to understand the two categories of decisions by judges. A

[29] There is profound confusion about the terminology. In Dutch terms as 'beslissing', 'vonnis', 'arrest', 'uitspraak', are used to indicate a decision by an authoritative body. The term 'jurisprudentie' is used to indicate the set of decisions by authoritative instances that add to the body of applicable rules in the legal system. In English the term 'precedent' is used to indicate both the decision by a judge and the role the decision has in the legal system, that is other judges have to take this decision into account in their future decision making, The term 'jurisprudence' has a completely different meaning, where it refers to legal theory.

student has to have knowledge about where to look for decisions of the second category, understand the structure of decisions and learn to determine what makes a decision relevant to the body of applicable rules in the legal system. Legal education primarily aims at acquiring insight in the legal sources, their history and background. This basic knowledge is of great importance; legal problem solving is hardly possible without an understanding of the legal knowledge. To illustrate the use of this knowledge in practice, teachers work through decisions as examples. However, it is difficult, if not impossible, to learn by explanation or by imitation alone. A more effective way to obtain expertise (skill) is by actually performing the task, i.e. students should do the exercises, while the teacher provides feedback on their solutions. Not only feedback on the solution provided by students is important.

For effective learning, also the solution process should be monitored and provided with feedback. Furthermore it is desirable for students to be able to ask for help at any time during the process. They should also be able to practice over and over again. An ideal situation would have a teacher available for every student, monitoring the student while practicing and providing support where and whenever necessary. However, this being not practically feasible, the second best option is to offer the student electronic support. Using a computer program as the instructional medium does have a number of advantages. It may offer individualized instruction and practice combined with immediate support and feedback. It can have the capacity to adapt to the individual student's performance and, last but not least, may support the management of information.

CASE is an environment where a law student can practice with finding decisions, with structuring its text and with analysing the decision in order to be able to determine in what way it adds to the body of applicable rules in the legal system.[30] These functionalities are implemented in two integrated modules in CASE:

1. The Assembler, a module to compile and store decisions

In essence the Assembler is a database containing a selection of decisions used in legal education. The law student can do a search (key word and/or full text) for a specific decision or a set of decisions. Decisions can be added to the database and key words can

[30] *See* Antoinette Muntjewerff, *Constructie en reconstructie van de juridische oplossing, in* ALLES AFWEGENDE, 287 (Eveline Feteris, Harm Kloosterhuis, Jose Plug & Jeanette Pontier eds., 2007); Antoinette Muntjewerff et. al., *Case Analysis and Storage Environment – CASE*, in LEGAL KNOWLEDGE AND INFORMATION SYSTEMS, 1 (Danielle Bourcier ed., 2003).

be indicated for each decision by the teacher. This module can be used separately or in combination with the PAT module.

2. The Precedent Analysis Tool (PAT), a module to structure and analyse decisions

In essence PAT is an instructional environment for learning to structure and analyse a decision to determine how it adds to the body of applicable rules in the legal system. PAT builds on the Assembler module. It presents the student the text of a selected decision together with a framework containing the main elements in a decision text (as, for instance, the different parties and their roles in the various stages of their procedures before the different courts). It allows the student to fill the framework with the relevant parts from the text of the decision. The activities of the student are monitored, and compared to a model where deviations are diagnosed to be able to present the student with a hint or a remediation.

What is structuring and analyzing a decision? In order to answer this question and to design an environment to support law students in finding, reading, structuring and analyzing decisions to indicate and understand the legal meaning of a decision, it is necessary to analyse the task. The legal sources that were examined to model the task of reading and comprehending decisions all describe a series of steps to be taken by the student when reading a decision to determine the legal significance:

- What are the facts in the decision?
- What is the course of the procedure?
- What is the legal question?
- Which legal rules play a role?
- What are the answers to the legal question of the successive courts?
- Which arguments do they provide?
- What is the complaint in the cassation plea regarding the decisions in the preceding courts?
- Which arguments are provided in the cassation plea?
- What is the opinion of the Solicitor General on the legal question?
- What arguments does the Solicitor General see as decisive?
- What is the opinion of the Supreme Court regarding the legal question?
- Which arguments does the Supreme Court use in this?
- What is the final outcome of the decision of the Supreme Court in this decision?

However, merely *instructing* a method does not work for novices (see for details Muntjewerff, 2000). This is partly due to the fact that instructing a method is a problem in itself, as it is difficult to communicate a method, because this requires the translation of

actions into words. A method is in fact empty; explaining content is much more "substantial" and therefore easier. The somewhat paradoxical situation is that novices have to learn to determine the legal meaning by determining the legal meaning. Law students especially have difficulties with determining what the decision adds to the body of applicable rules in the legal system. Based on findings in research in legal problem solving it is stated that the difficulties are first of all caused by insufficient mastery of, or insight in, the subject matter. Secondly, especially for novices, methods, often as a side effect, emerge from (novice) problem solving, instead of being the driving force. The subject matter appears to be the major source for finding or trying (a) solution (steps). On closer inspection, a decision is a legal solution for a specific problem situation constructed on the basis of abstract legal rules.

Structuring and analysing a decision is in fact the task of reconstructing the problem situation (consisting of a reconstruction of both the facts and the legal question), tracing the abstract legal rules that were applied and specifying the legal solution consisting of the argument structure and the conclusion[31].

Reading and understanding a decision is not a trivial activity. Observations with first year law students reading decisions showed that they experience difficulties with seeing through the composition of the decision, with reconstructing the argument structure and with determining the legal significance of the decision.

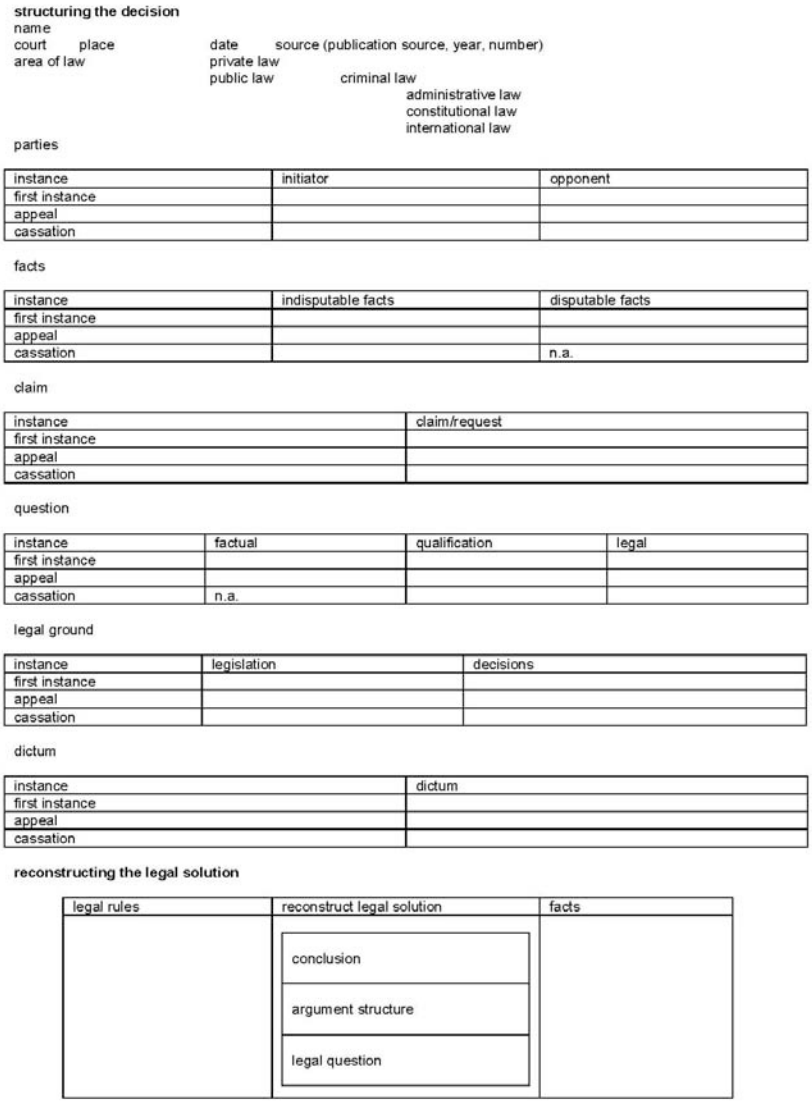
These difficulties are first of all caused by the fact that a decision is an incomplete reproduction of what happened. Next to that the text of the decision contains many references, both explicit and implicit, to regulations, other decisions and concepts. The fact that a decision has a stratified structure which is also not supported by recognizable clues or elements in the text does not help either.

All of this means that the student has to reconstruct the process and the product which involves keeping track of intermediate results. To support the student in performing these tasks, the following remedies are proposed. Present the student a structure to help her to reconstruct the decision, support the management of information and engage the student in structuring and analysing the decision by having her actually carry out these tasks.

This is realised by presenting the student with both the full text of the decision and a framework which visualises the elements in a decision necessary to reconstruct the decision in order to determine the legal significance of the decision (see Fig. 8).

[31] In PROSA the main goal is the construction of a legal solution. The problem solving goal is the question. On the basis of the specific facts and the abstract legal rules the argument structure is constructed to result in an answer to the question. Structuring and analysing a decision is *re*constructing a legal solution. On the basis of the conclusion the argument structure that lead to the conclusion has to be reconstructed to be able to pose the legal question.

Figure 8: Framework



structuring the decision

name
court place date source (publication source, year, number)
area of law private law
public law criminal law
administrative law
constitutional law
international law

parties

instance	initiator	opponent
first instance		
appeal		
cassation		

facts

instance	indisputable facts	disputable facts
first instance		
appeal		
cassation		n.a.

claim

instance	claim/request
first instance	
appeal	
cassation	

question

instance	factual	qualification	legal
first instance			
appeal			
cassation	n.a.		

legal ground

instance	legislation	decisions
first instance		
appeal		
cassation		

dictum

instance	dictum
first instance	
appeal	
cassation	

reconstructing the legal solution

legal rules	reconstruct legal solution	facts
	conclusion argument structure legal question	

There are no applications available that support law students in structuring and analysing a decision suiting the Continental legal system. For the Anglo-American legal system, the CATO application is available.[32] In CATO the student is trained to construct arguments with cases.

The aim of the CASE project is to realize an environment in which law students are supported in structuring and analyzing a decision. This means that both the decision at hand has to be presented to the student, as well as the framework for analysis. The student must be able to select text fragments from the decision and paste these within the correct cell in the relevant table in the framework. Since finding cases is also part of the training of law students search facilities have to be available in the environment. The functionality of searching for a decision is implemented in the module called 'Assembler'. The functionality of structuring and analysing a decision is implemented in the module called 'PAT'. Other basic requirements are maintenance and re-use. It should be possible to make changes to the system and its content without much costs and efforts. Errors in system and content should be easily traceable and correctable. It must be possible to add and delete content without causing problems elsewhere in the system. Transparency of the architecture and tools are therefore design goals, as it may facilitate maintenance. The system has functions for adding decisions, adding key words to decisions and preparing decisions for use in PAT. System functionalities are attributed to a user on the basis of her status: administrator, editor, teacher or student. The CASE architecture is depicted in Fig.9. The Assembler module holds the decisions and allows for search and retrieval of cases and allows teachers to prepare cases for use in the PAT module. Students can use the Assembler to locate cases on the basis of key words and/or full text search to find specific decisions. When the student wants to structure and analyse a decision she can select one of the reported decisions. This decision and the analysing framework are then made available to the student in PAT. The student can start structuring the decision by selecting text fragments in the decision and pasting these in the correct part of the frame.

[32] ALEVEN, *supra* note 7.

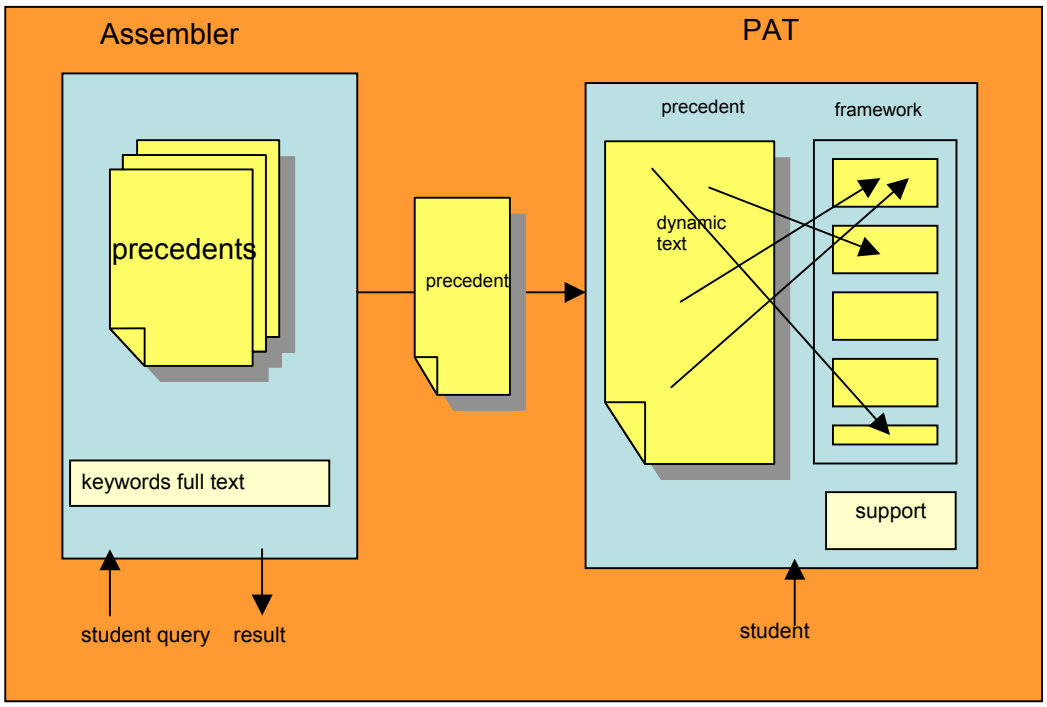


Figure 9: CASE architecture.

CASE is implemented using a web-based server-side application model. The user interacts with the system using a standard web browser, such as Netscape Navigator, Apple Safari or MS Internet Explorer. CASE is developed using Open Source Software, MySQL (4.0.14) and PHP (4.3.2) and JavaScript. The MySQL database backend contains a number of tables, the most prominent ones being a text fragment table, a solution table and a table storing the student's activities. Case's primary component is the server-side application implemented in PHP (4.3.2). This application handles form processing, storage and retrieval of information from the various tables in the database and generating the HTML pages that are output to the user. A small number of simple functions are implemented using client-side JavaScripts. CASE offers extensive support for administrative-, editing-, browsing-, tracking- and educational tasks. Using the same portal, administrators can add, remove

and change users and cases; editors can add keywords to cases and prepare the solution framework of a case for use in PAT; teachers can use the interface to track the results of students, previewing the solution framework and for browsing and searching the database; and students can browse and search the database, and test their analysis skills using PAT.

The search engine allows for both Boolean keyword- and free text search in combination with metadata fields such as: date, name, court etc. The principal concept in CASE is that a precedent can be seen as an ordered set of text fragments, each of which can be labelled according to their place in the solution template. The student can select a text fragment and place in a specific position within the solution framework. Text fragments can be as short as a single sentence, but more often, they are as long as a paragraph. The text fragments are stored in a database along with metadata such as a reference to their position in the solution. Although a text fragment as described is the basic building block, these fragments can have one or more sub-fragments (such as single words) which can also be selected by the student. For instance, the text fragment

> *"Op het beroep van Ronald G, geboren te Amsterdam op 6 aug. 1954, wonende te Amsterdam, req. van cassatie tegen een bij verstek gewezen arrest van het Hof te Amsterdam van 12 dec. 1977, waarbij in hoger beroep een vonnis van de Rb.",*

contains the sub-fragment 'Ronald G', the accused. In some cases the student needs to select the whole sentence, and in others only the sub fragment. The solution framework consists of a number of tables, such as parties, facts, claim and the argument structure before the Supreme Court (see Fig. 8). Each table is two dimensional and contains a small number of cells, e.g. facts as presented by the initiator, and facts presented by the opponent. Each cell in the solution, therefore, can be designated by three coordinates: table, row and column. These coordinates are used to mark the proper location of text fragments within the solution framework. They allow the student's solution to be tested against the solution defined by the teacher; the cell in which the student places the fragment has to match the metadata reference of the text fragment. In the case of an incorrect placement of a fragment, its position relative to the correct place is also known. This allows for standardised responses to common errors. For instance, when a student puts the initiator's name in the opponent's cell, the following response can be generated on the basis of this mixing up of the parties in the dispute: "This indeed is one of the parties in the dispute, but unfortunately it is not the opponent.". To get a basic idea of the functionality of the system we now describe a session with CASE.

3. A session with CASE

As mentioned above, CASE distinguishes four types of user: *administrators, editors, teachers* and *students*. User rights are distributed in an *incremental* fashion in CASE, this means that a teacher has access to both student- and teaching facilities; an editor has access to editing-, teaching- and student facilities; and the administrator user has rights to do everything the other users can, plus adding, removing and changing users, and removing cases from the database. This section describes a typical process from preparation to analysis of a case.

4. The Editor

After login, the editor is presented with a menu containing multiple options: *editor's menu, teacher's menu, Assembler, PAT, change password* and *logout*. Since she recently came upon a decision relevant for law students, she decides to add it to the CASE database. The *editor's menu* gives access to the *add decision* screen. Here she fills in a few facts about the decision (name, publication date, court etc.) and with copy- paste actions, she adds the text of the decision to the database. Next, she visits the *metadata editor* (see Fig. 10).

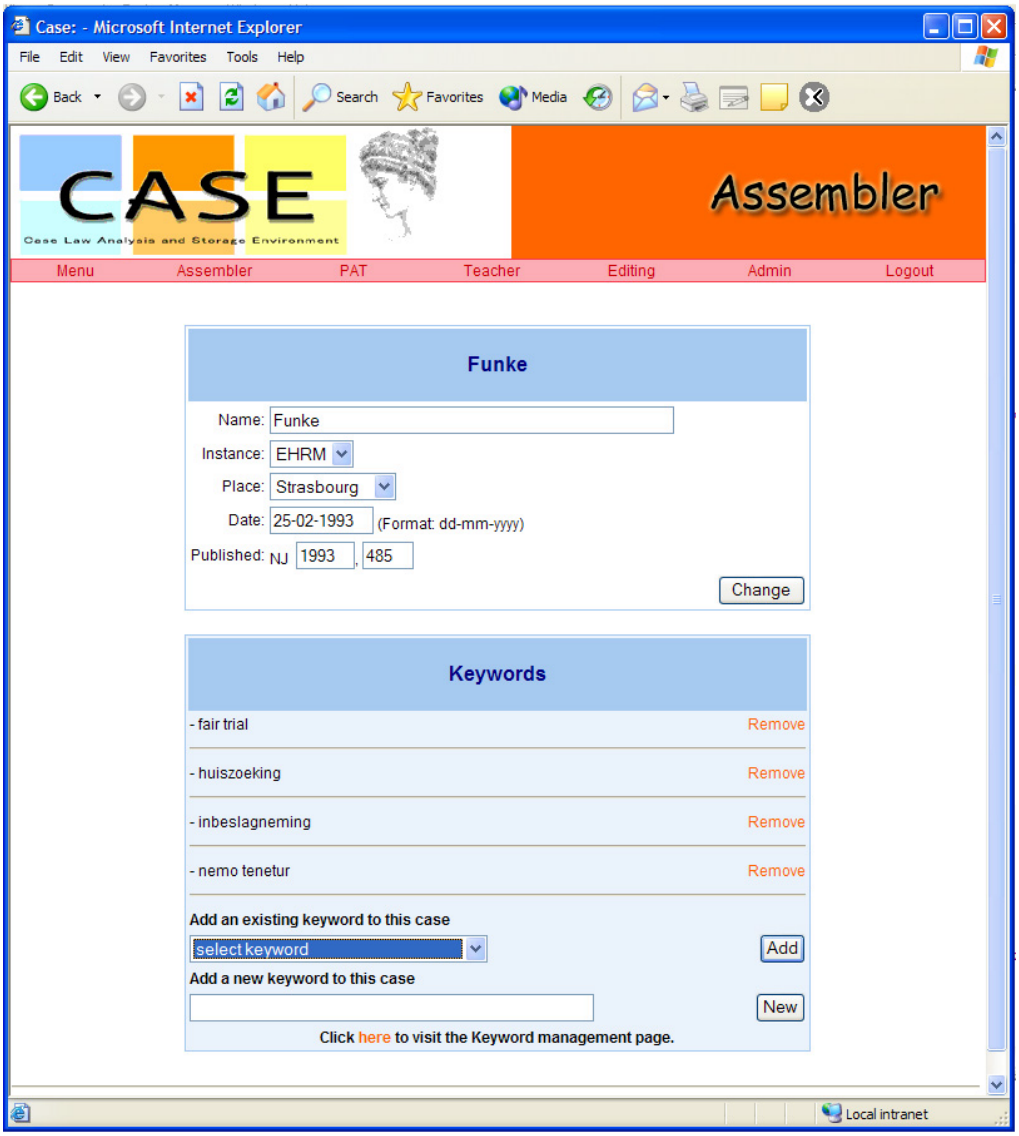


Figure 10: Metadata editor

The metadata editor interface is used to add or change metadata of a decision and, more importantly, to add new keywords, or remove existing ones. After completing this procedure, the decision can be searched for using the search interface.

The next step is the preparation of the decision for use in PAT. The PAT Prepare tool offers an interface that mimics the regular PAT interface: the editor needs to place pieces of text in the correct position within the solution framework (see Fig. 11).

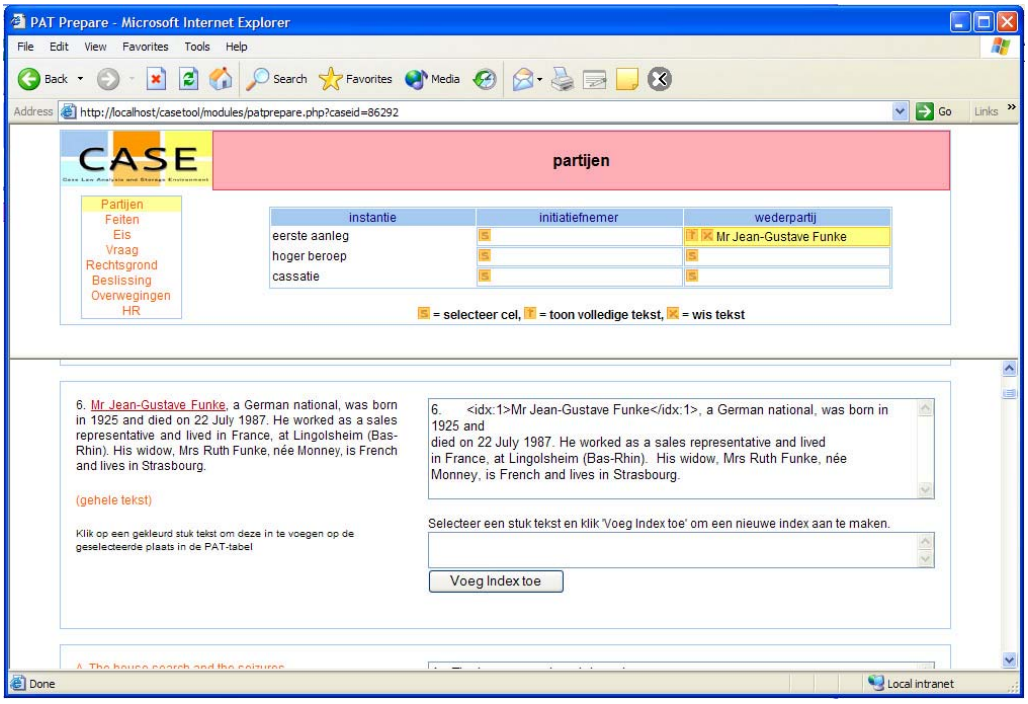


Figure 11: PAT prepare tool

Where the regular PAT interface checks whether the correct text is in the correct position by consulting the database, the PAT prepare tool writes the action of the editor to the database. The editor in a sense teaches PAT the solution of the case at hand. Note that the editor does not have to add feedback to the database. Feedback is provided to the student in a case-independent way. When the teacher only wants part of the text fragment to be part of the solution, the editor can simply mark these smaller parts. This results in a text fragment with color coded sub fragments that can be placed in the solution table (e.g. Mr Jean-Gustave Funke in Fig. 11). After the editor has finished the above steps, the decision is ready for use by both teachers and students.

5. The Teacher

The teacher is not allowed to change the information or the solution framework of a decision. However, he can add students to the CASE user database, and preview the correct PAT answers (the prepared solution framework) for each decision. More importantly, the teacher has access to a student tracking facility to analyze student behavior.

This way the teacher can determine whether a student came to his or her end-result by simply trying every option, or by purposefully placing fragments in the solution framework.

6. The Student

Students can search the decision database using the Assembler search interface (see Fig. 12). This interface allows for metadata search – i.e. on publication date, publication place, court type, court location – but also supports Boolean keyword search and Boolean full text search. The student can also browse through all decisions in the database. The search result page offers support for associative search because key words and other attributes of the cases found are shown. The student can click on any of these to start a search on this attribute.

Thus, for example, searching on all decisions with the same keyword of one of the decisions that were found by the original search is done by simply clicking on that keyword in the results page. From the same page, the student can print a decision or open it in PAT.

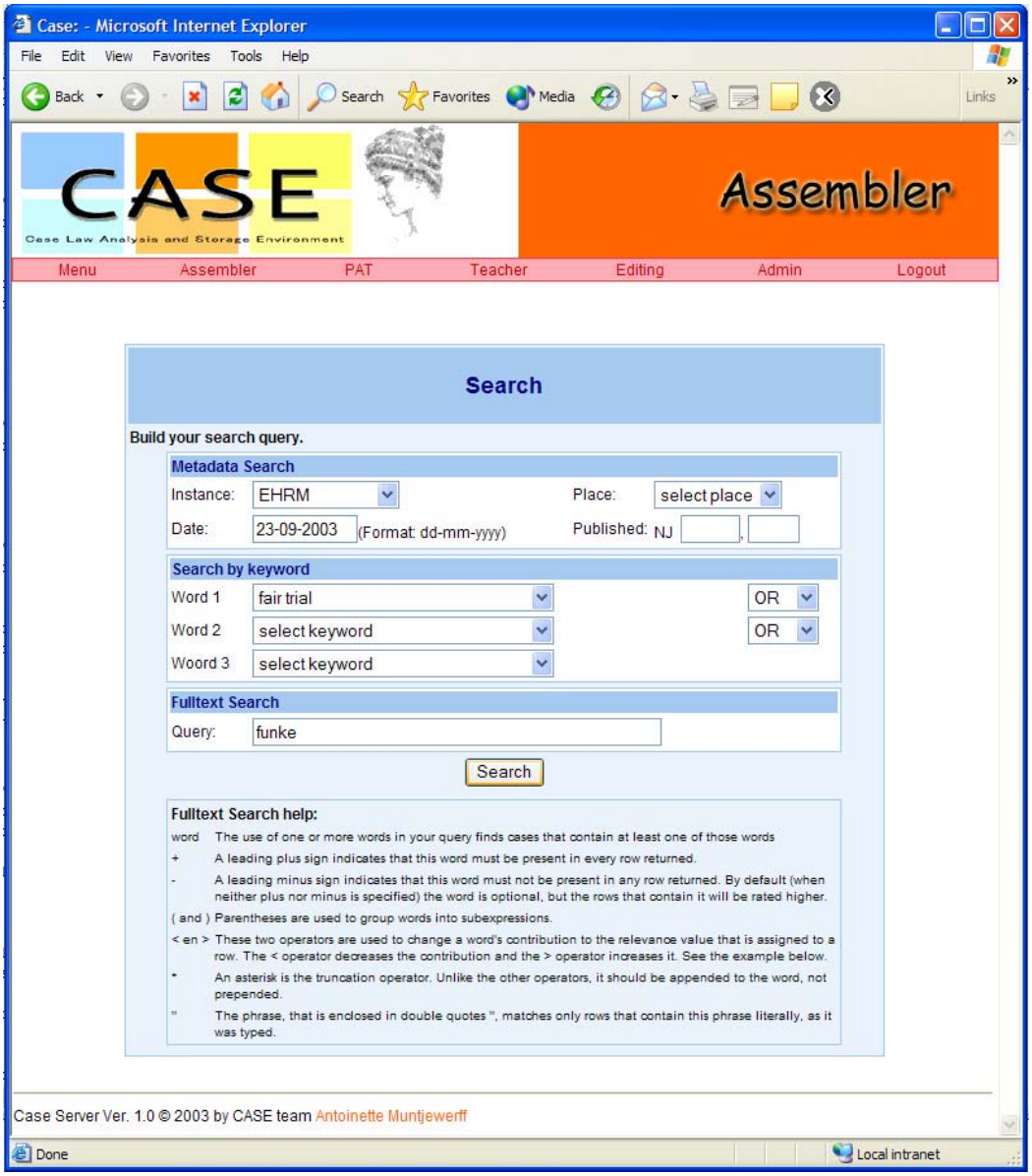


Figure 12: Search the database

The PAT interface, shown in Fig. 13, is divided into three frames. The left frame shows all text fragments of the decision at hand. The top right frame contains the tables of the solution framework. The bottom right frame provides feedback to the student's actions. A text fragment is placed in a cell of the solution table by first selecting the cell, and then selecting the fragment to fill this cell. Once placed, the application will check the combination of cell and fragment and provide a feedback message from the database in the feedback frame. Text fragments can be removed from a cell by clicking the 'x'-button in the table. Once the student has placed all correct fragments in a specific table, she is notified of this through the feedback frame.

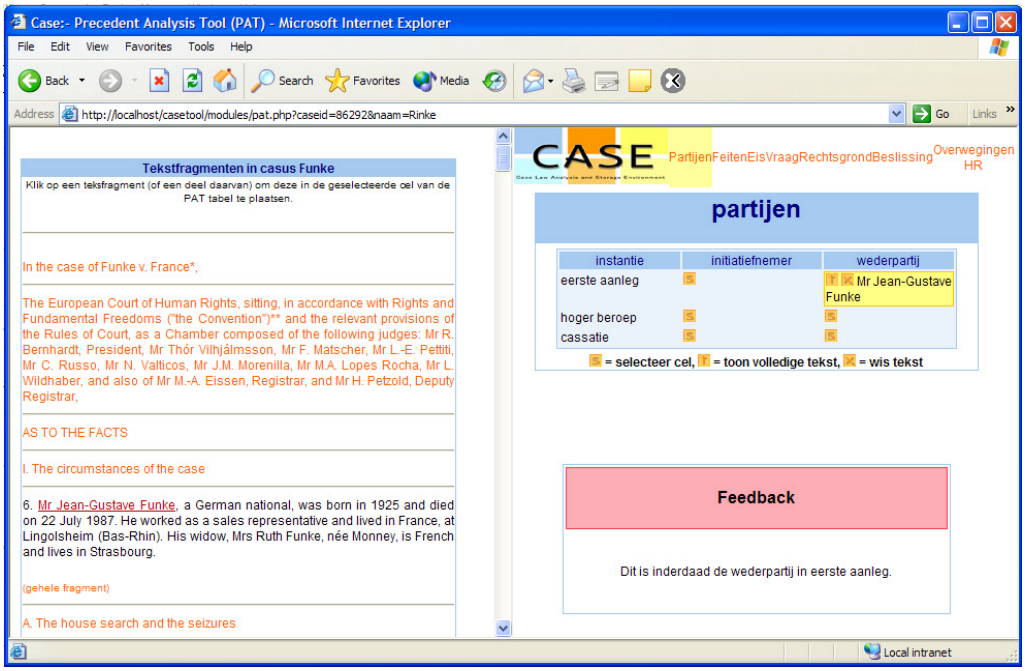


Figure13: Structuring and analysing a decision

III. e-See Embedded Streaming Video for Legal Problem Solving

e-See is an instructional environment for training the construction of a case description involving the selection and ascertaining of facts from a real life dispute

The legal task at stake here is legal case solving, the key activity in legal practice and legal research. Legal case solving involves the construction of a legal solution for a specific case description using abstract legal rules as the problem solving devices. An extensive analysis of the task of legal case solving can be found in Muntjewerff (2000).[33] The basic activities involved in constructing a legal solution are: construct a case description from real life by selecting facts from the real life situation and where necessary ascertain these facts and select applicable legal rules, decompose the legal rule into components, select a component and select a specific legal fact from the case description to match the component to the legal fact. The emphasis in legal education is on the application of legal rules to a case description that is presumed to be complete. To construct a legal solution the student has to select the applicable legal rules and to apply these rules to facts in the case description. PROSA is developed to support law students with learning to select the applicable legal rule, decompose the legal rule into components that can be matched onto selected legal facts from a case description. However, no attention is paid to the construction of the case description. Fernhout et al. (1987) claim that in legal practice most of the time and effort is spent on the activities of selecting facts and ascertaining facts to establish the case description.[34] Fernhout et al. (1987) constructed the coaching system OBLIGATIO which mimics real life problem solving dialogues with clients. Although this application filled a gap, it is limited in its use and technically out of date. Therefore *e*-See is designed to present law students with an environment where they are enabled to construct a case description. The students are presented a real life situation. They are asked to construct the case by selecting and ascertaining the facts that they think are relevant. Where facts can only be assessed as relevant given applicable rules, students have to select applicable rules as well. Constructing a legal solution always involves an interaction between the facts and the legal rules. Depending on what facts you select certain legal rules may become applicable, where based on the selection of legal rules certain facts may become relevant. It is exactly this interaction that makes legal problem solving such a complex activity. Besides that a major problem with selecting and ascertaining facts in legal problem solving is that it may be necessary to actually observe facts in the real life situation.

First of all it must be stated again that the activity of constructing a case description on the basis of a real life situation is not part of the legal curriculum where in legal practice this is the main activity in legal problem solving. When involved in the activity of constructing a

[33] MUNTJEWERFF, *supra* note 7.

[34] FERNHOUT ET. AL., *supra* note 7.

case description the main difficulty is that depending on what facts you select certain legal rules may become applicable, where based on the selection of legal rules certain facts may become relevant. This interaction between possible relevant facts and possible applicable rules is one of the main difficulties in legal problem solving. The only way to really get to grip with this is to practice legal problem solving over and over again. Next to that to be able to recognize a typical legal problem situation in the real life events involves the availability of legal knowledge. Students need to know the system of legal rules and the basic legal concepts and their position in law.

The student has to leaf through the legal rules and has to go back and forth from legal rules to the real life situation. In this process keeping track of intermediate results is also a major difficulty. Another difficulty in constructing the case description is that it may be necessary to actually observe facts in the real life situation, often written documents stating facts and events are not enough.

The remedies proposed to support students in constructing a case description is to present an environment in which the components and characteristics of the activities are made explicit in such a way that it restricts the set of activities that have to be performed by the student and presents systematic guidance to the student. Such an environment relieves the student of the task of keeping track and recording intermediate results and enables the student to work in a systematic way. We want the student to construct the case description herself. By actually having the student work on the construction she may experience what it takes to construct a case description and to "go through the problem" so to speak. *e*-See presents an environment in which the student is facilitated and encouraged to work in a systematic way, the chances to miss or leave out something are nil, the student does not have to manage her information and she does not have to keep track, the coach takes care of keeping track. Real life is imported by integrating video in the instructional environment for training the construction of a case description from a real life dispute.

In *e*-See we use video materials of a real life dispute in a real life situation. Video materials from the Dutch television program De Rijdende Rechter (the Mobile Judge) are made available for educational purposes within the project Davideon.

Legal problem solving requires the availability of legal knowledge. This knowledge can be found in the legal sources. Dutch law is part of the family of Continental law where the main legal sources are, in order of significance, convention, statute, precedent and common law. Legal sources are grouped into areas of law. The basic areas of law are public and private law. Within these areas different fields are distinguished, for example, within public law we distinguish constitutional law, administrative law and penal law, where in private law we distinguish family law, law of legal persons and property law. Within *e*-See these legal sources are available to the student in a variety of representations. There is also

a list of basic concepts available to the student. These concepts in turn link to legal sources.[35]

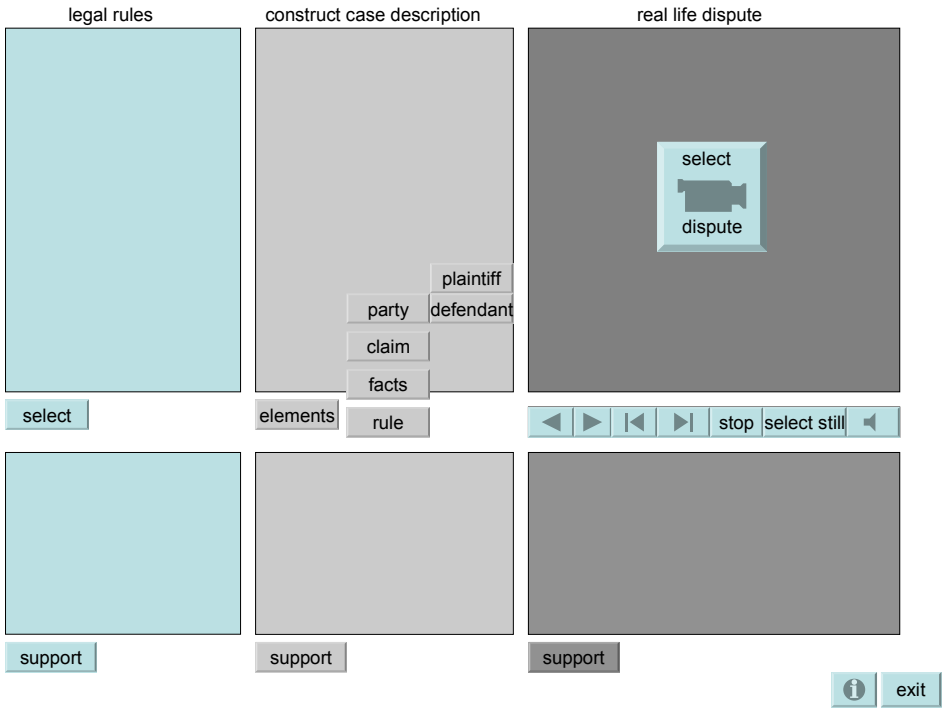


Figure 14: e-See architecture

e-See has to coach the student to enable her to construct a case description. The *e*-See environment is implemented using a web-based server-side application model. The user interacts with the system using a standard web browser, such as Netscape Navigator, Apple Safari or MS Internet Explorer. The application will be developed using HTML and

[35] *See* Antoinette Muntjewerff, *e-See An Instructional Environment for Learning to Construct a Case Description, in* INTERNATIONAL SCIENTIFIC JOURNAL OF METHODS AND MODELS OF COMPLEXITY 3 (2007); Antoinette Muntjewerff & Dorien DeTombe, *A Generic Environment for Integrating Streaming Video in Legal Education e-See, in* EDUCATIONAL MULTIMEDIA, HYPERMEDIA & TELECOMMUNICATIONS, 527 (Gary Marks ed., 2004).

JavaScript. For the video editing Avid Xpress DV is used. The application is realized as a generic environment in such a way that it can be re-used for other legal domains where students have to select and ascertain facts in constructing a case description. Therefore it is required that the domain knowledge can be extended and video fragments can be uploaded easily. Maintaining a system as *e*-See requires that the system can be changed. If the system can be changed it is possible to repair mistakes and to add or delete materials. It is also necessary that changes can be made without too much costs and effort. Therefore editors are added to facilitate maintenance and re-use.

1. A session with e-See

To get a basic idea of the functionality of the system we describe a session with *e*-See. The student selects a real life dispute in the real life dispute part of the screen (Fig. 15).

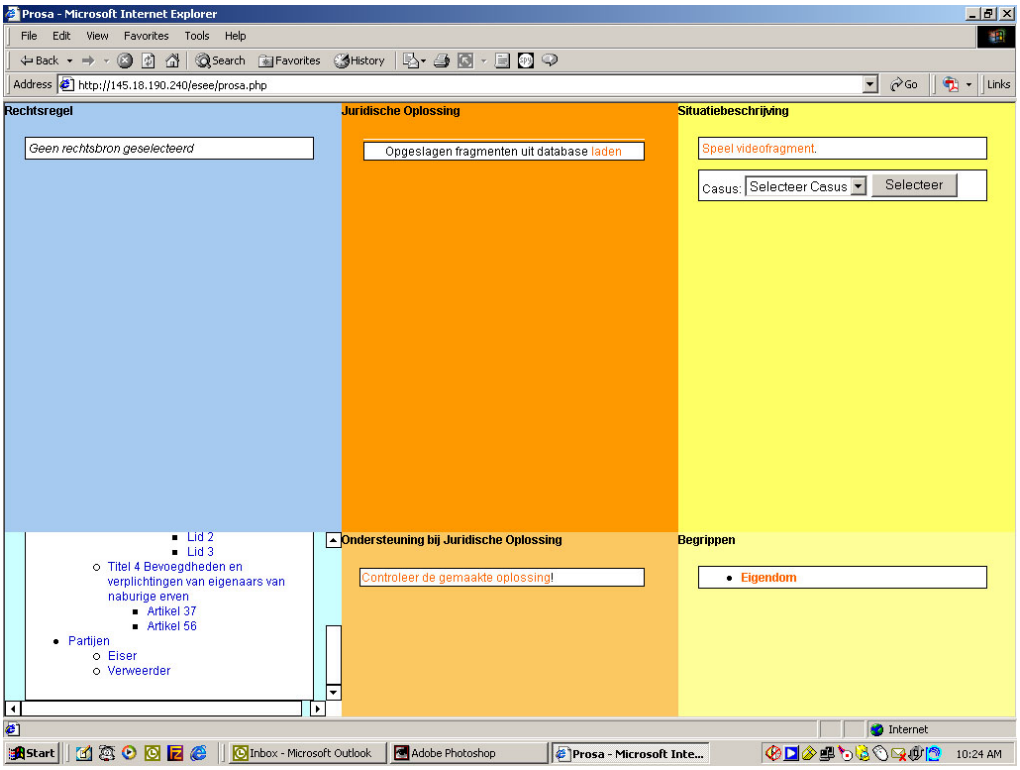


Figure 15: Select a real life dispute

This dispute is presented by the student showing a video of the real life situation in which parties are having a dispute about some issue. The video player is equipped with the usual control buttons and with an extra *select still* button (Fig 16).

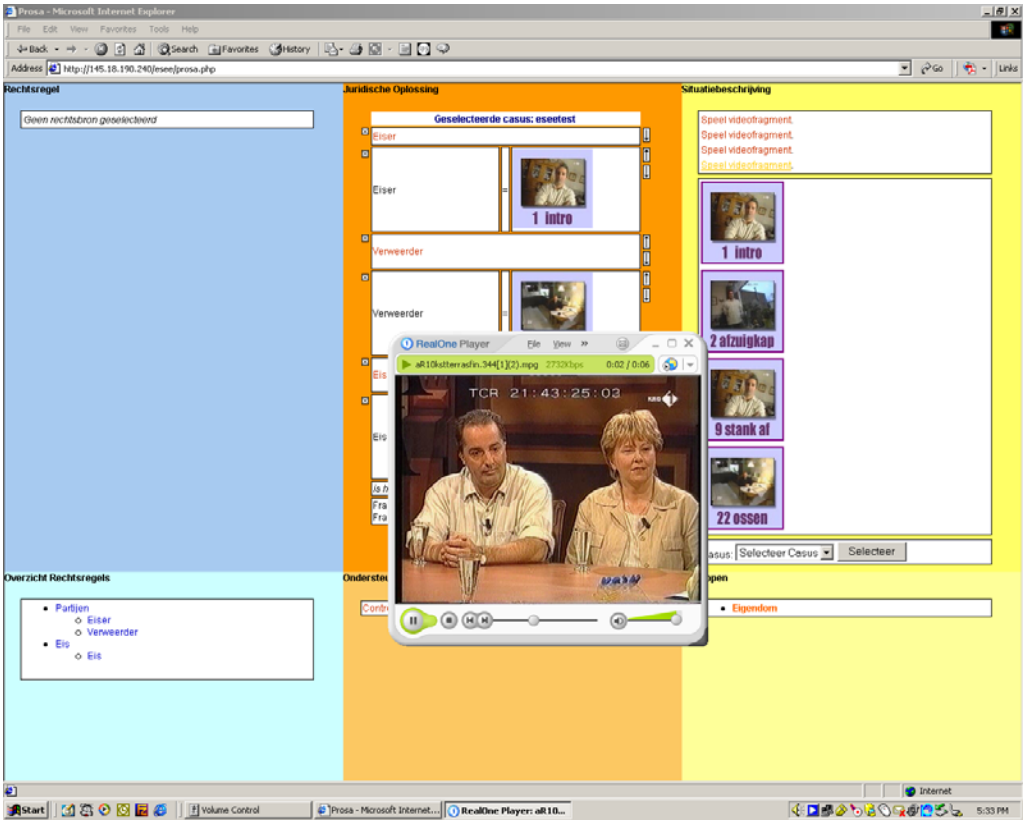


Figure 16

In the construct case description part of the screen the student is presented a menu showing the elements to select from the real life situation to construct the case description (i.e. party, claim, facts, and rule). The student has to select an element, for instance *party*, and find out who the actual plaintiff is in this real life situation. She then selects the *still* matching the plaintiff from the real life part of the screen and brings the still to the case construction part of the screen. Where the video is fragmented in stills and supplied with matching text fragments the text fragment is presented in the case construction part of the

screen when pasting the selected video fragment. To be able to select the correct fragments the student has to select (a) legal rule(s) using the select button in the legal rules part of the screen.

F. Summary and Conclusions

Reforming legal higher education involves organisational aspects as well as aspects on learning and instruction. We focus on the learning and instruction part of education and also make a restriction for institutionalized learning and instruction, that is, learning and instruction that takes place within the context of a school or university. Instruction should aim at enhancing effective and efficient learning, that is the acquisition of knowledge and skills in the field or subject area at stake. Instruction involves presentation of learning materials and presentation of support in processing these materials. Technology can be used in instruction to support both the presentation and the processing of learning materials. The HYPATIA research program describes a methodology for principled and structured design of electronic materials for learning the law effectively and efficiently.

Reflections on U.S. Law Curricular Reform

*By Toni M. Fine**

A. Introduction

There has not been dramatic reform to legal education for many years. Although changes to the way we train students to be lawyers certainly have been made in the past decades, there has not been occasion to fundamentally re-think the process for educating lawyers.

A recent report published by the Carnegie Foundation for the Advancement of Teaching[1] and other critiques of the current state of legal education have re-energized discussions of curricular reform in law schools in the United States. Even as legal educators around the world struggle to adopt education reform – including in Europe where the Bologna Convention[2] calls for what in some countries will be dramatic changes to legal education as usual,[3] and in East Asia where Japan and Korea have recently undergone dramatic reforms to their method of legal education[4] -- U.S. law schools are being compelled to undergo serious rethinking about their curricular choices.

This paper explores critiques of U.S. legal education and ongoing curricular changes to U.S. legal education. Part I examines calls for changes to U.S. legal education. Part II discusses reforms that have been ongoing at law schools throughout the United States. Finally, this paper offers some modest conclusions about the future of U.S. legal education.

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[1] WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, AND LEE S. SHULMAN, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (hereinafter "CARNEGIE REPORT").

[2] BOLOGNA DECLARATION of 19 June 1999, see http://ec.europa.eu/education/policies/educ/bologna/bologna_en.html and http://www.ond.vlaanderen.be/hogeronderwijs/bologna/.

[3] See, e.g., http://www.ond.vlaanderen.be/hogeronderwijs/bologna/, and http://www.unesco.org/iau/he/bologna _process/ index.html, last accessed 16 June 2009.

[4] See, *e.g.*, Setsuo Miyazawa, Kay-Wah Chan and Ilhyung Lee, The *Reform of Legal Education in East Asia* (December 23, 2008), ANNUAL REVIEW OF LAW & SOCIAL SCIENCE, VOL. 4 (December 2008).

B. Calls for Reform of U.S. Legal Education

Despite the predominance over the last century or so of the Landgell method of law teaching, there have been periodic calls for reform of legal education in the U.S. in the modern era, the most prominent of which will be discussed here. The first of these was a study released in 1979 commissioned by the American Bar Association (ABA), and known as the "Cramton Report". The second study, known as the "MacCrate Report," was a report released in 1992 by a task force formed by the ABA. Most recently, in 2007, the Carnegie Foundation for the Advancement of Teaching issued a report on the state of legal education in the United States and, in the same year, a volume of Best Practices was issued. The sections that follow discuss the findings and recommendations of these various reports and the response of the academe.

I. The Cramton Report

In 1979, the so-called Cramton Report, named for its primary author, was released. This report emphasized the importance of a law school curriculum which developed students' abilities in critical thinking and problem solving.[5] Although the Cramton Report was perceived as a watershed in thinking about legal education and although it received a good deal of attention by the bar and among those in legal education, the recommendations contained in the Cramton Report ultimately were largely ignored.[6]

II. The MacCrate Report

The Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, the so-called "MacCrate Report," was published in 1992.[7] The mission and premises of the McCrate Report are so telling that it bears quoting from the report in some length:

> While practicing lawyers undoubtedly appreciate the value of the law school experience to their own careers, surveys understandably indicate that practicing lawyers believe that their law school training left them deficient in skills that they were forced to acquire after graduation. Practitioners tend to view much academic scholarship as increasingly

[5] AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) (the "CRAMTON REPORT").

[6] See, John J. Costonis, *The MacCrate Report: Of Loaves. Fishes, and the Future of American Legal Education*, 43 JOURNAL OF LEGAL EDUCATION 157 (1993).

[7] AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (the "MCCRATE REPORT"), available at http://www.abanet.org/legaled/publications/onlinepubs/ maccrate.html. Last accessed 16 June 2009.

> irrelevant to their day-to-day concerns, particularly when compared with the great treatises of an earlier era. It is not surprising that many practicing lawyers believe law professors are more interested in pursuing their own intellectual interests than in helping the legal profession address matters of important current concern.
>
> Unquestionably, the most significant development in legal education in the post-World War II era has been the growth of the skills training curriculum. As recently as twenty years ago, the typical skills training component of a law school curriculum consisted of a first-year moot court program, and perhaps a trial advocacy course. Today, clinical courses, both in a simulated and live-client setting, occupy an important place in the curriculum of virtually all ABA-approved law schools. Many are taught by full-time faculty members who, pursuant to an ABA accreditation standard, are eligible for tenure or some form of equivalent job security. A clinician is present on virtually every ABA site inspection team to help the team evaluate the quality of the law school's skills-training program, with particular emphasis placed on the commitment of resources and the availability of full-time faculty supervision when students are involved in externship forms of clinical programs.
>
> Early in its deliberations this Task Force concluded that it was not possible to consider how to "bridge" or "narrow" the alleged "gap" between law schools and the practicing bar without first identifying the fundamental skills and values that every lawyer should acquire before assuming responsibility for the handling of a legal matter. Surprisingly, throughout the course of extensive decades-long debates about what law schools should do to educate students for the practice of law, there has been no in-depth study of the full range of skills and values that are necessary in order for a lawyer to assume the professional responsibility of handling a legal matter. Recognizing that such a study is the necessary predicate for determining the extent to which law schools and the practicing bar should assume responsibility for the development of these skills and values, the Task Force prepared a Statement of Fundamental Lawyering Skills and Professional Values. In Part II of the Report, the Task Force sets forth its view of the skills and values new lawyers should seek to acquire.[8]

The MacCrate Report thus identified and explored ten "fundamental lawyering skills essential for competent representation," including problem solving, legal analysis, legal research, factual investigation, communication, counseling, negotiation, litigation and

[8] *Id*.

alternative dispute resolution, administrative skills, and recognizing and resolving ethical dilemmas.[9] The MacCrate Report concluded with a number of recommendations: Disseminating and Discussing the Statement of Skills and Values, Choosing a Career in Law and a Law School, Enhancing Professional Development During the Law School Years, Placing the Transition and Licensing Process in the Education Continuum, Striving for Professional Excellence after Law School, and Establishing an American Institute for the Practice of Law.[10] The MacCrate Report generated an enormous amount of discussion among members of the bar, the bench, and the legal academe, and is often credited with an increase in the number of clinical courses offered in U.S. law schools, but in the end did not yield any significant changes in legal education.[11]

III. The Carnegie Report

The Carnegie Report is one of a series that will include reports on educating clergy, engineers, nurses, and physicians.[12] The Carnegie Report found that U.S. law schools are excellent at using the Socratic method to teach students to "think like lawyers." To draw on the language of the Carnegie Report website, the report "calls for fundamental changes in both the structure and content of legal education in the United States to integrate realistic and real-life lawyering experiences throughout the curriculum, and challenges American law schools to produce lawyers who are not only smart problem-solvers but also responsible professionals committed to service of both clients and the larger society."[13]

Despite accolades for certain aspects of U.S. legal education, the Carnegie Report was highly critical of U.S. law schools in a number of respects. Noting that that the legal profession suffers from "carrying degrees of confusion and demoralization,"[14] the report concluded that "[a] reawakening of professional élan must include revitalizing legal preparation."[15] The challenge for legal education, the authors found, is to do more to link

[9] *Id.*

[10] *Id.*

[11] Russell Engler, *The MacCrate report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to narrow*, 8 CLINICAL LAW REVIEW 109, 136, 141 (2001).

[12] WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, AND LEE S. SHULMAN, SUMMARY OF THE FINDINGS AND RECOMMENDATIONS FROM EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, available at http://www.carnegiefoundation.org/publications/pub.asp?key=43&subkey=617, last accessed 16 June 2009, at 3 ("CARNEGIE REPORT SUMMARY").

[13] *Id.*

[14] CARNEGIE REPORT SUMMARY at 3, available at http://www.carnegiefoundation.org/publications/pub.asp?key=43&subkey=617.

[15] *Id*.

the "interests of legal educators with the needs of legal practitioners and with the public the profession is pledged to serve."[16]

The Carnegie Report observed that the curriculum at most U.S. law schools follow a fairly standard pattern.[17] Noting that law schools do a rather good job at teaching first year students the skills of legal analysis, the report bemoaned the lack of similarly effective efforts in other skills and professionalism training: "The dramatic results of the first years of law school's emphasis on well-honed skills of legal analysis should be matched by similarly strong skill in serving clients and a solid ethical grounding."[18]

The Carnegie Report made five key observations, followed by a number of specific recommendations. The key observations were as follows:

Firstly, that law school provides rapid socialization into the standards of legal thinking. The Report looked favorably at the ways in which U.S. law schools socialize new students to the basics of legal analysis. As the report found:

> Law schools are impressive educational institutions. In a relatively short period of time, they are able to impart a distinctive habit of thinking that forms the basis for their students' development as legal professionals. … Within months of their arrival in law school, students demonstrate new capacities for understanding legal processes, for seeing both sides of legal arguments, for sifting through facts and precedents in search of the more plausible account, for using precise language, and for understanding the applications and conflicts of legal rules…. [T]hey are learning, in the parlance of legal education, to "think like a lawyer."[19]

Secondly, that law schools rely heavily on one way of teaching to accomplish the socialization process. According to the report, "[t]he process of enabling students to 'think like a lawyer' takes places … primarily through the medium of a single form of teaching: the case-dialogue method." The uniformity in legal pedagogy and the curriculum – particularly in the first year – leads to "a striking conformity in outlook and habits of thought among legal graduates."[20] The overwhelming priority given by most law schools to analytic thinking leads students "to understand the law as a formal and rational

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[16] *Id*.

[17] *Id.* at 4.

[18] *Id*.

[19] *Id*.at 5.

[20] *Id*.

system….. This emphasis on procedural and systematic gives a common tone to legal discourse."[21]

Thirdly, that the case-dialogue method of teaching has valuable strengths but also unintended consequences. The report concluded that the case-dialogue method, long the mainstay of U.S. legal education, offers a "deliberate simplification" of central aspects of legal competence."[22] In this way, students learn to "think like a lawyer" simply by "redefining messy situations of actual or potential conflict as opportunities for advancing a client's cause through legal argument before a judge or through negotiation…. By contrast, the task of connecting these conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the case-dialogue method."[23] Students often are "warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analysis."[24] In introducing moral concerns in the curriculum "only haphazardly conveys a cynical impression of the law that is rarely intended."[25]

In this respect, the Carnegie Report identified two major limitations of modern U.S. legal education. First, law schools typically pay "only casual attention to teaching students how to use legal thinking in the complexity of legal practice," with little attention given to "direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients."[26] Second, the report found that law schools fail to provide "effective support for developing ethical and social skills. …. [L]aw schools rarely pay consistent attention to the social and cultural contexts of legal institutions and the varied forms of legal practice. To engage the moral imagination of students as they move toward professional practice, seminaries and medical, business and engineering schools employ well-elaborated case studies of professional work" which are lacking in law schools.[27] Both of these limitations, the report found, are the "unintended consequence of reliance upon a single, heavily

[21] *Id*.

[22] *Id*.

[23] *Id*. at 6.

[24] *Id*.

[25] *Id*.

[26] *Id.*

[27] *Id*.

academic pedagogy, the case-dialogue method, to provide the crucial initiation into legal education."[28]

Fourthly, that assessment of student learning remains underdeveloped. The Carnegie Report argues that while most U.S. law schools do a reasonable job of conducting "summative assessment" they do far less well in terms of "formative assessment." "Summative assessment" relates to "supporting students in learning rather than ranking, sorting and filtering them….Formative assessments directed toward improved learning ought to be a primary form of assessment in legal education."[29]

Fifthly, that legal education approaches improvement incrementally, not comprehensively. The report noted that although U.S. law schools provide substantially more opportunities for experiential learning opportunities and more inter-disciplinary choices than they did fifty years ago, "efforts to improve legal education have been more piecemeal than comprehensive."[30] "Rather than undertaking systematic or integrative reform efforts, U.S. law schools have assumed an additive strategy of educational change [which] assumes that increasing emphasis on the practical and ethical-social skills of the profession will reduce time for and ultimately affect the extent to which students develop skills in legal analyses…. This is not only a logistical problem (too much to accomplish in a limited amount of time) but it is also a conceptual and pedagogical problem."[31]

The report noted the need for "a dynamic curriculum that moves them back and forth between understanding and enactment, experience and analysis," that "bridge[s] the gap between analytical and practical knowledge," and that offers "more robust" opportunities for developing professional integrity,[32] including "capacity for judgment guided by a sense of professional responsibility."[33]

In view of these findings, the Carnegie Report made the following seven recommendations:

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[28] *Id*.

[29] *Id*. at 7.

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] *Id*.

1. Offer an Integrated Curriculum. Law schools should offer an integrated curriculum that (1) teaches legal doctrine and analysis; (2) introduces several facets of practice included under the rubric of lawyering; and (3) explores the "identity, values, and dispositions consonant with the fundamental purposes of the legal profession."[34]

2. Join "Lawyering," Professionalism, and Legal Analysis from the Start. Law schools should provide students with "substantial experience with practice as well as opportunities to wrestle with the issues of professionalism…. The teaching of legal doctrine needs to be fully integrated into the curriculum. It should extend beyond case – dialogue courses to become part of learning to 'think like a lawyer' in practice settings."[35] These other skills should be taught early in the curriculum.[36]

3. Make Better Use of the Second and Third Years of Law School. The third year of law school should be designed as a "capstone" opportunity "for students to develop specialized knowledge, engage in advanced clinical training, and work with faculty in serous, comprehensive reflection on their educational experience and their strategies for career and future professional growth."[37]

4. Support Faculty to Work Across the Curriculum. "Faculty development programs that consciously aim to increase the faculty's mutual understanding of each other's work are likely to improve students' efforts to make integrated sense of their developing legal competence." There should be a "sustained dialogue among faculty with different strengths and interests united around common educational purpose."[38]

5. Design the Program so that Students – and Faculty – Weave Together Different Kinds of Knowledge and Skill. Law schools must do better to demonstrate "how fully ethical-social issues pervade doctrinal and lawyering curricula" and provide "educational experiences directly concerned with the values and situation of the law and the legal profession."[39]

6. Recognize a Common Purpose. Noting that "the formation of competent and committed professionals deserves and needs to be the common, unifying

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[34] *Id*. at 8.

[35] *Id*.

[36] *Id*.

[37] *Id*. at 9.

[38] *Id*.

[39] *Id*.

purpose," a greater focus on professionalism "would give renewed prominence to the ideals and commitments that have historically defined the legal profession in America."[40]

7. Work Together, Within and Across Institutions. The report reinforces the need to integrate different aspects of the law curriculum, noting that "integration can flourish only if law schools can consciously organize their emphases through ongoing mutual discussion and learning."[41]

The Carnegie Report findings and recommendations received a good deal of attention among legal educators, and has been the major focus of major sessions at the Annual Meeting of the Association of American Law Schools over a number of years.[42]

IV. Best Practices for Legal Education

Close in time to the issuance of the Carnegie Report, Best Practices for Legal Education was published.[43] Best Practices began with the fundamental observation that there is a "compelling need to change legal education in the United States in significant ways,"[44] noting that U.S. "[l]aw schools do some things well, but they do some things poorly or not at all."[45] In particular, they are "not committed to preparing students for practice."[46] The authors concluded that "[l]aw schools can do much better."[47]

Best Practices proposed seven ways in which law schools can develop best practices to enable them to better prepare students. These are: Setting Goals (Chapter Two), Organizing the Program of Instruction (Chapter Three), Delivering Instruction (Chapter Four), Conducting Experiential Courses (Chapter Five), Employing Non-Experiential Methods of Instruction (Chapter Six), Assessing Student Learning (Chapter Seven), and Evaluating the Success of the Program of Instruction (Chapter Eight). In short, the authors

[40] *Id*. at 10.

[41] *Id*.

[42] See, *e.g.*, http://www.aals.org/am2000/4170.html, http://www.aals.org/am2008/location.html. Last accessed 16 June 2009. See also http://www.aals.org/profdev/newideas/why.html. Last accessed 16 June 2009.

[43] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION (2007), available at http://cleaweb.org/resources/bp.html. Last accessed 16 June 2009.

[44] *Id.* at 19.

[45] *Id*.

[46] *Id*.

[47] *Id*.

"call on law schools to make a commitment to improve the preparation of their students for practice, clarify and expand their educational objectives, improve and diversify methods for delivering instruction, and give more attention to evaluating the success of their programs of instruction."[48] Of particular note, the Report urged law schools to "organize their curriculums to develop knowledge, skills, and values progressively; integrate the teaching of theory, doctrine, and practice; and teach professionalism pervasively throughout all three years of law school."[49]

V. Other Critiques

The criticisms of U.S. legal education noted above are neither new nor novel. A number of legal educators over the years have noted the shortcomings of traditional methods of legal education in the U.S. As one author noted some years ago, the required curriculum "at many, if not most American law school virtually ignores at least half of the fundamental skills every lawyer should have."[50] More recently, Stanford Law School Dean Larry Kramer said this:

> [T]hinking like a lawyer is not the only skill necessary to be a great lawyer. Far from it. Knowing how to analyze helps lawyers help clients identify legal problems and avoid liability or secure a remedy when problems occur. But it doesn't help lawyers help clients solve problems the lawyers have spotted. To do that, you need also to understand what the client does…. [W]hen the client turns and asks the lawyer to help figure out a legal way to do [a] deal, the lawyer will need to know more than just doctrine. The lawyer will need to understand how the deal works, will need to know how to evaluate the risks and benefits, and will need to be able to work with the client to find a solution.[51]

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[48] *Id*.

[49] Id., citing Standards 2 & 4, WESTERN ASSOCIATION OF SCHOOLS AND COLLEGES, ACCREDITING COMMISSION FOR SENIOR COLLEGES AND UNIVERSITIES, HANDBOOK OF ACCREDITATION (2001), *available at* http://www.wascsenior.org/findit/files/forms/Handbook_of_Accreditation_2008_with_hyperlinks.pdf. Last accessed 16 June 2009. Roy Stuckey elsewhere presents twelve key recommendations for law schools. *See* http://bestpracticeslegaled.albanylawblogs.org/events-presentations-2/best-practices-powerpoint-materials/. Last accessed 16 June 2009.

[50] The required curriculum "at many, if not most, American law schools virtually ignores at least half of the fundamental skills every lawyer should have." John M. Burman, *Oral Examinations as a Method of Evaluating Law Students*, 51 JOURNAL OF LEGAL EDUCATION 130, 132 (2001).

[51] MEMORANDUM FROM LARRY KRAMER, RICHARD E. LANG PROFESSOR OF LAW AND DEAN, STANFORD LAW SCHOOL, TO MEMBERS OF BOARD OF TRUSTEES, 12 February 2007, regarding Developments at the Law School, at 4, available at http://www.aals.org/services_curriculum_committee_innovations.php. Last accessed 16 June 2009.

The case for an alternative type of experience during the third year of law school is also not new.[52] The American Bar Association (ABA), the body that accredits law schools and programs of legal education in the United States, has also recognized the need for greater practical experience as an integral part of U.S. legal education. For instance, the ABA rules state as follows:

> (a) A law school shall require that each student receive substantial instruction in:
>
> (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
>
> (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
>
> (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
>
> (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
>
> (5) the history, goals, structure, values, rules, and responsibilities of the legal profession and its members.[53]

Section 302 (a) (4) of the ABA rules provide that law schools are to require that each student has "substantial instruction in . . . professional skills generally regarded as necessary for effective and responsible participation in the legal profession."[54] Section 302(b) (1) provides that a law school offers substantial opportunities for "live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence."[55]

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[52] See, e.g., Christopher T. Cunniffe, *The Case for the Alternative third-Year Program*, 61 ALBANY LAW REVIEW 85 (1997).

[53] ABA SEC. LEG. EDUC. & ADMIS. TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS STAND. 302(a), 19-20 (ABA 2007) (available at http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf). Last accessed 16 June 2009.

[54] *Id.*

[55] *Id.*

C. U.S. Legal Education Reform

Legal Education in the United States remains very similar to legal education 100 years ago. The fundamental premises underlying how we go about training lawyers have remained largely intact. The program of study at most schools retains the same three-year structure,[56] with the first year comprised largely of required core doctrinal courses and a basic skills course.[57] The second and third years at most law schools remain largely unstructured experiences during which students complete any required courses and choose from a range of electives. Although the nature of these electives has changed over time and now includes more clinics and other courses of an experiential nature, as well as more courses on global and transnational law, the basic foundation of the traditional second and years of law school remains much the same as they were for most of the twentieth century. Section 1 of this Part will explore some of the institutional barriers to more transformative changes to U.S. legal education.

Nevertheless, as suggested above, recent years have seen significant changes in legal education, largely as a result of the various critiques lodged against the status quo. Although change has taken many forms, the following categories of curricular modifications are particular noteworthy: (1) specialization; (2) experiential learning; (3) globalization; (4) integration of skills-based and doctrinal learning; (5) greater training in professionalism; and (6) enhanced feedback. Some of these categories track the critiques lodged in the Carnegie Report and other recent studies on U.S. legal education. These changes are discussed in part 2., *infra*.

I. Changes to but No Major Transformation in U.S. Legal Education

Legal education remains much the same as it did for the duration of the 1900s.[58] As John Sexton said in his critique of the "remarkable conservatism"[59] of U.S. legal education:

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[56] Some law schools have begun to experiment with accelerated programs that allow students to complete the J.D. degree in fewer than three calendar years. For instance, Northwestern recently began accelerated two-year JD program for students with significant work experience prior to law school. See http://www.law.northwestern.edu/academics/ajd/. Last accessed 16 June 2009.

[57] A number of schools have begun to offer an advanced course or elective in the first year, as well as enhanced training in skills and professionalism. See Part D II., *infra*.

[58] See, *e.g.*, Erwin Chemerinsky, *Rethinking Legal* Education, 43 HARVARD CIVIL RIGHTS – CIVIL LIBERTIES LAW REVIEW 595, 595 (208) ("legal education has changed remarkably little in over a century"); Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 WISCONSIN INTERNATIONAL LAW JOURNAL 295, 300-01 (2006); John Lande, *Developing Better Lawyers and Lawyering Practices: Introduction to the Symposium on Innovative Lawyering*, 2008 JOURNAL OF DISPUTE RESOLUTION 1, 1.

[59] John E. Sexton, *"Out of the Box" Thinking about the Training of Lawyers in the Next Millennium*, 33 UNIVERSITY OF TOLEDO LAW REVIEW 189, 194 (2001).

> What is surprising is that, in the face of seismic changes in the world of law practice, it has taken so long for the conversation [abut reforming U.S. legal education] to begin – and that our pedagogy has remained unchanged for over 100 years. True, the last three decades have seen the development of clinical legal education and interdisciplinary work; but these pedagogies have matured within the traditional framework, with the actual change being at the margins.[60]

This "conservatism" in U.S. legal education may be explained by any number of reasons, including that despite the onslaught of criticism, legal education in the United States seems to have worked fairly well. In short, it may be that, despite legitimate critiques, there has not been motivation on the part of legal educations to undertake radical transformation of the way they have been doing business, rather successfully, for more than 100 years.

1. Institutional obstacles to reform

There are also a number of deeply entrenched institutional obstacles to reform. These include faculty attitudes, law school rankings, financial issues, disagreement as to the nature of legal education, and simple resistance to change based on momentum.

a) Faculty attitudes

There are a number of respects in which faculty attitudes foretell resistance to substantial changes in legal education: There is the reluctance to change in and of itself, and change is particularly challenging for some conventional faculty members when it comes to teaching experientially. It has been noted that law professors "may resist change because they prefer to replicate the environment in which they achieved success."[61] This may well be especially true when a proposed change involves the prospect of teaching skills or other experiential-based training. Law professors are hired for reasons that have absolutely nothing to do with law firm or other practical experience,[62] and many law professors have little or no practice experience.[63] Reluctance to support curricular reform may in fact

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[60] *Id*.

[61] John O. Sonsteng, Donna Ward, Colleen Bruce, & Michael Petersen, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WILLIAM MITCHELL LAW REVIEW 303, 352 (2007) (noting that, in general, "law school professors were high achievers in law school.").

[62] Requirements for tenure-track positions include "superior academic grades from top rank law schools, law review experience, prestigious judicial clerkships, [and] scholarly publications." Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 THOMAS M. COOLEY LAW REVIEW 201, 208 (1999).

[63] Linda S. Anderson, *Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results*, 5 APPALACHIAN LAW JOURNAL 127, 134 (2006).

reveal some discomfort with curricular modifications that may make certain faculty members feel a lack of confidence in their ability to take part in new, more modern visions of law teaching.

Second, many traditional doctrinal law faculty members view skills training as less important and less prestigious than the teaching of traditional doctrinal subjects.[64] This may well dissuade faculty members from taking seriously calls for reform that embrace skills as a greater part of legal education or as more integral to doctrinal legal teaching.

Finally, and as a related matter, the legal academe generally places a substantially higher value on scholarship than it does on teaching.[65] This reality suggests that many faculty members may not take legal education reform seriously or spend the necessary time to consider substantial curricular reform.

b) The rankings game

Another roadblock to serious undertakings to reform legal education may be concerns over how dramatic curricular changes may affect law school *U.S. News & World Report* rankings. Although these rankings are highly criticized by deans and others within legal education,[66] they are said to be a critical factor in the way that prospective students, faculty candidates, and law firm hiring committees evaluate law schools.[67] There is also evidence to suggest that concern over rankings may, in fact, retard innovation in law schools.[68]

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[64] See Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth about Affirmative Acton and Law Faculty Hiring*, 97 COLUMBIA LAW REVIEW 199, 261 (1997).

[65] See James Lindgren & Allison Nagelberg, *Are Scholars Better Teachers*?, 73 CHICAGO-KENT LAW REVIEW 823, 827-29; Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 807 (1998); Fred R. Shapiro, *They Published, Not Perished, But Were They Good Teachers?*, 73 CHI.-KENT L. REV. 835, 839 (1998); William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Revitalization in Professional Law Schools*, 48 BAYLOR LAW REVIEW 201, 213 (1996).

[66] See, e.g., Louis H. Pollak, *Why Trying to Rank Law Schools Numerically is a Non-Productive Undertaking: An Article on the U.S. News & World Report 2009 List of "The Top 100 Schools*," 1 DREXEL LAW REVIEW 52; Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 INDIANA LAW JOURNAL 309 (2006); Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education*, 81 IND. L.J. 383 (2006); Brian Leiter, *How to Rank Law Schools*, 81 IND. L.J. 47 (2006).

[67] *See* N. William Hines, *Ten Manor Changes in Legal Education Over the Past 25 Years*, AALS NEWS at 2-3 (Aug. 2005), available at http://www.aals.org/documents/aals_newsletter_aug05.pdf. Last accessed 16 June 2009; See Andrew P. Morriss and William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83 IND. L.J. 791, 791 (2008); Theodore P. Seto, *Understanding the U.S. news Law School Rankings*, 60 SMU LAW REVIEW 493, 520 (2007).

[68] THE AMERICAN BAR ASSOCIATION STANDARDS FOR THE APPROVAL OF LAW SCHOOLS have been said to have a similar effect.

c) Cost

To the extent that calls for reform in U.S. legal education focus on experiential learning cost may play a significant role. It is no secret that skills courses and clinics are substantially more expensive to run than are traditional lecture-based courses,[69] a reality that may drive curricular reforms.

d) Tension between Law as Craft or Law as Field of Serious Intellectual Inquiry

Part of the difficulty in achieving substantial curricular reform, it may be, is the uncertainty over whether law is more of a trade for which one needs a technical qualification or a rigorous fields of intellectual inquiry.[70] Consider these two very different notions of law. First, a statement by Christopher Colombus Langdell, who in 1887 said as follows:

> [L]aw is science, and … all the available materials of that science are contained in printed books …. We have also constantly inculcated the idea that the library is the proper workshop of law professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.[71]

Some fifty years later, Jerome Frank had this to say, in sharp disagreement with Langdell's ideas about legal education:

> Students trained under the Landgell system are like future horticulturists confining their studies to cut flowers, like architects who study pictures of buildings and nothing else. They resemble prospective dog breeders who never see anything but stuffed dogs. And it is beginning to be suspected that there is some correlation between that kind of stuffed-dog study and the over-production of stuffed shirts in the legal profession.[72]

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[69] See, e.g., Ann Juergens, *Using the MacCrate Report to Strengthen Live-Client Clinics*, 1 CLINICAL LAW REVIEW 411, 414 (1994). *See also* CARNEGIE REPORT SUMMARY at 10.

[70] See Simon Chesterman, *The Globalisation of Legal Education*, 2008 SINGAPORE JOURNAL LEGAL STUDIES, 58, 59.

[71] Christopher Columbus Langdell, *The Harvard Law School*, 3 LAW QUARTERLY REVIEW 123, 124 (1887), *quoted in* Simon Chesterman, *The Globalisation of Legal Education*, 2008 SING. J.L.S. 58, 58.

[72] Jerome Frank, *Why not a Clinical Lawyer-School*?, 81 U. Pa. L. Rev. 907, 912 (1932), *quoted in* Simon Chesterman, *The Globalisation of Legal Education*, 2008 SING. J.L.S. 58, 58.

It may well be that some of the challenges in reforming legal education comes from a bona fide disagreement as to which of the approaches exemplified by these very different viewpoints is more legitimate today.

e) Momentum

Finally, reluctance to undertake legal education reform may be a simple product of momentum. As one author described it, "we carry the current paradigm of law school teaching on through sheer momentum; while, like the emperor without clothes, we persist in pretending that all is well."[73] The truth is that, notwithstanding well-placed criticism of U.S. legal education, the modern paradigm has served the profession reasonably well.

2. Changes to Modern U.S. Legal Education

Keeping in mind the reasons that make major reform to legal education in the United States difficult, law schools in recent years have undertaken notable reforms and a few schools have undergone substantial changes. Modifications have been in a number of areas as detailed below: Specialization; globalization; experiential learning; greater integration of theory and practical skills; teaching professionalism and ethics more pervasively (and experientially); and providing more meaningful feedback to students. Some modest efforts have been made to "teach the teachers" by providing for a sharing of ideas and best practices with regard to teaching strategies. Each of these forms of innovation is discussed below, giving examples of the many innovations undertaken by U.S. law schools in recent years.

a) Specialization

One of the driving forces in legal education in recent years has been a move toward increasing specialization. Not long ago, students took a range of courses that spanned doctrinal areas, often with little meaningful attention paid to developing proficiency in any substantive area. More recently, law schools have begun to appreciate the value to students (and to the bar) of encouraging and promoting student specialization in one or more fields.

In a number of law schools, this focus on specialization has been accomplished though tracks or concentrations (sometimes accompanied by certificates) within the upper level J.D. curriculum. The University of Minnesota, for instance, offers J.D. concentrations in Health Law and Bioethics, Human Right, and Labor and Employment.[74] Northwestern's

[73] Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 THOMAS M. COOLEY LAW REVIEW 201, 209 (1999).

[74] *See* http://www.law.umn.edu/current/concentrations.html. Last accessed 16 June 2009.

Plan 2008 calls for the establishment of tracks for student course selection in the third year.[75] Other law schools offer specialized tracks or concentrations in international law, business law, criminal law and procedure, social justice, public law, transnational law, environmental law, real estate law, intellectual property, family law, elder law, and alternative dispute resolution.[76]

Capstone and keystone courses are another way in which law schools are attempting to allow students to achieve some degree of specialization.[77] For instance, keystone courses are offered at William Mitchell law school[78] and capstone courses are offered at the University of Minnesota,79 Southwestern Law School,[80] and at University of Washington Law School, which offers a series of legal research and writing capstone courses.[81]

The movement toward specialization begins early in some law schools. Some law schools have added an elective to the first year curriculum,[82] and a larger number of law schools have included non-traditional substantive courses as part of the required first year program.[83] These include courses on evidence, criminal procedure, regulatory law,

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[75] *See* PLAN 2008: PREPARING GREAT LEADERS FOR THE CHANGING WORLD, http://www.law.northwestern.edu/difference/ strategicplan.html, at 17. Last accessed 16 June 2009.

[76] *See* AALS COMMITTEE ON CURRICULUM SURVEY OF INNOVATIONS IN LAW SCHOOL CURRICULA, http://www.aals.org/services_curriculum_committee_survey.php at 16-20 ("AALS Survey"). Last accessed 16 June 2009.

[77] The difference between capstone and keystone courses has been described by one professor as follows: "A keystone sits at the top of an arch and holds all the other stones in place. Unlike the more familiar "capstone course" – which takes ots name from the stone at the top of a wall – a Keystone Course represents both a pinnacle and a passage. A Keystone Courses is a transformational learning experience representing both the culmination of law school learning and a transition to law practice and a lifetime of self-directed learning.' DENISE ROY, PATHWAYS at 66.

[78] *Id*.

[79] "The Capstone courses are being designed to provide students with intensive immersion in a particular doctrinal area through collaborative or multidisciplinary work on a complex problem." These courses include classroom components and experiential components. *Id*. at 90.

[80] "Capstone Courses provide the opportunity for advanced study, with special emphasis on teaching the Carnegie Foundation Report principles of theory to practice and professionalism. A given Capstone can be interdisciplinary, cover multiple subjects, and be team-taught." *Id*. at 95.

[81] Capstone courses are designed to integrate "information-based knowledge and skills-based knowledge into a unified whole." *Id*. at 22.

[82] *See* AALS SURVEY at 2.

[83] *See* AALS SURVEY at 9-10.

international law, and legal theory.[84] The shift toward specialization in U.S. law schools is also obvious in the increasing variation among law school clinics.[85]

A substantial number of U.S. law schools now offer joint degree programs that allow J.D. students to also complete a master degree in disciplines ranging from business administration, international affairs/international relations, and public administration to degrees in library science, social work, divinity, industrial engineering, and historic preservation.[86] Fordham Law School offers dual degree programs with the university's School of Graduate Business Administration and the School of Social Work.[87]

b) Globalization

A second emerging trend in U.S. legal education over the past 15 years or so is that toward globalization. The movement toward globalizing legal education has taken a variety of forms, including curricular reform, an internationalization of faculty members and the student body, and a rise in extracurricular programs involving global legal issues.

NYU School of Law, through its Hauser Global law School Program is recognized by many as one of the premier global programs among U.S. law schools. NYU describes its commitment to globalization as more than "a catchword limited to adding courses to cover 'hot' international topics or to respond to passing demands for relevance. It is a fundamental organizing principle."[88] NYU's global program reflects the Law School 's conviction that the practice of law has escaped the bounds of any particular jurisdiction and that legal education can no longer ignore the interpenetration of legal systems. Since its inception in 1994, the HGLSP has overseen a radical change in the structure of NYU Law faculty and curriculum, the composition of the student body, and the range of extracurricular opportunities. The goal has been to transform legal education and make NYU Law a "global" rather than merely a national law school.[89]

Northwestern Law School, another leader in the trend toward globalization, has recently re-affirmed its recognition that law graduates should possess "cross-jurisdictional ability" – "an understanding of the basic policy choices that a specific legal system can make to

[84] *Id*.

[85] *See* AALS SURVEY at 21-24. *See also* Becky L. Jacobs, *A Lexical Examination and (Unscientific) Survey of Expanded Clinical Experiences in U.S. Law Schools*, 75 TENNESSEE LAW REVIEW 343, 354-55 (2008).

[86] *See* AALS SURVEY, *passim*.

[87] *See* http://law.fordham.edu/ihtml/cur-2dualdegree.ihtml?id=435. Last accessed 16 June 2009.

[88] See http://www.law.nyu.edu/global/index.htm. Last accessed 16 June 2009.

[89] *Id*.

resolve economic and personal projects and conflicts that clients have throughout the world… [The ability] to operate and manage cross-border transactions and dispute resolutions effectively."[90] In addition, students must possess "cross-cultural sensitivity" and the ability to work effectively on teams with people from different cultures.[91] Northwestern thus recommends preparing students to function effectively in cross-border contexts by integrating JD/LLM students on teams, offering non-US internships, and developing projects that provide substantial interactive and collaborative cross-cultural experiences.[92]

There are a number of ways in which U.S. law schools have been globalizing through curricular reform. These include the broadening and deepening of curricular choices in "global" courses in both the upper level and in the first year, as well as enhanced study abroad opportunities, including joint and dual degree programs with foreign institutions.

The number and scope of courses in international, comparative, and foreign law has increased exponentially in the past years, and these courses are being offered at more and more law schools. Such courses include the more basic offerings in international law, comparative law, International trade law, international business transactions, EU law, and international arbitration; but offerings also now include far more highly specialized courses.[93] Some schools have announced specific efforts to enrich the law curriculum in areas of international law.[94] A number of U.S. law schools now offer concentrations or certificates in transnational law. Yale Law School, for instance, offers "Graduate

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[90] NORTHWESTERN PLAN 2008, http://www.law.northwestern.edu/difference/strategicplan.html, at 16. Last accessed 16 June 2009.

[91] *Id*.

[92] *Id.*

[93] Just to give an example, in the last three or four semesters, Fordham Law School offered the following: global/transnational courses: Advanced Legal Research: Transnational Practice, Advanced Legal Research: International and Comparative, Advanced Legal Research: International Trade Law, Civil Rights: 9/11 and Non-Citizens, Comparative Constitutional Law, Doing Business in India, European and International Antitrust Law, Globalization of American Corporations: Tax and Regulatory Policy, Immigrants' Rights and Access to Justice, Immigration Law for Business Professionals, International and Comparative Patent Law, International Development Project: Millennium Development Goals, International Human Rights Scholarship, International Law of Development, International Litigation in U.S. Courts, International Cartel Enforcement, Introduction to Chinese Law, Islamic Law, Jewish Law, Law and Governance in Comparative Perspective, Law and Society in Japan, Law and Policy of Climate Change, Multinational Corporations, NAFTA, National Security Law, Professional Responsibility in Multinational Practice, Transnational Business & Human Rights, and U.S. Foreign relations Law. See http://law.fordham.edu/registrar.htm. Last accessed 16 June 2009.

[94] For instance, the dean of Stanford Law School has noted the law school's intent to expand global course offerings, particularly to explore cross-border transactions between private parties such as international business and international trade, international procedure and arbitration, international tax, and international investment and development. AALS SURVEY, *passim*.

Certificates of Concentrations" in International Development Studies, International Security Studies, African Studies, and Modern Middle Eastern Studies.[95] Other law schools likewise offer a range of concentrations involving international and transnational law.[96]

While most of the expanded global law courses are upper-level electives, some U.S. law schools require their students to take such a course. Harvard Law School, for instance, imposes a mandatory requirement on its upper-level students;[97] Michigan Law School requires its first year students to take a course in "Transnational Law" an organizing course to introduce students to basic concepts in transnational legal issues;[98] Georgetown Law Center requires J.D. students to enroll in "Law in a Global Context," a one-credit weeklong required course that students take at the start of the second semester of the first year of law school.[99] This program is premised on the notion that the "legal problems today's students must be prepared to face increasingly transcend national boundaries and involve more than one legal system."[100]

Other law schools provide first year electives on global law as one of several choices.[101] A number of law schools encourage faculty members to incorporate global perspectives into

[95] See http://www.yale.edu/macmillan/grad_certificates.htm. Last accessed 16 June 2009.

[96] AALS SURVEY at 16.

[97] See http://www.law.harvard.edu/academics/degrees/jd/pos/internationcomparativelaw/index.html. Last accessed 16 June 2009.

[98] *See* http://cgi2.www.law.umich.edu/_ClassSchedule/CourseList.asp. Last accessed 16 June 2009. This course is designed to "teach every student the minimum every lawyer should know about law beyond the domestic (American) orbit in order to be qualified for practice in an age in which virtually every area of law is being affected by international aspects. The basic idea is that every Michigan law student should take at least one serious look at law on the international level." http://cgi2.www.law.umich.edu/_ClassSchedule/aboutCourse.asp?crse_id=038594. Last accessed 16 June 2009. Michigan required course for upper level in Transnational Law. See http://cgi2.www.law.umich.edu/_ClassSchedule/CourseList.asp. Last accessed 16 June 2009. This course is designed to "teach every student the minimum every lawyer should know about law beyond the domestic (American) orbit in order to be qualified for practice in an age in which virtually every area of law is being affected by international aspects. The basic idea is that every Michigan law student should take at least one serious look at law on the international level." http://cgi2.www.law.umich.edu/_ClassSchedule/aboutCourse.asp?crse_id=038594. Last accessed 16 June 2009.

[99] See http://www.law.georgetown.edu/curriculum/jdprog.cfm#First. Last accessed 16 June 2009.

[100] See http://www.law.georgetown.edu/documents/weekone2008.pdf. Last accessed 16 June 2009.

[101] Columbia Law School requires that first-year students select one of seven electives, including Lawyering Across Multiple Legal Orders. See http://www.law.columbia.edu/jd_applicants/curriculum/1l last accessed 16 June 2009; Minnesota Law School requires first-year students to select from a list of four electives, including International Law. See http://www.law.umn.edu/current/degreerequirements.html last accessed 16 June 2009. American University Washington College of Law and Yale Law School also offer electives to first-year students, which include international law courses.

core first year doctrinal courses.[102] At least one law school has provided stipends for faculty members to encourage them to develop such materials.[103] The integration of more global perspectives into the first-year curriculum was the subject of at least one panel at the annual meeting of the Association of the American Law Schools (AALS).[104]

The globalization trend has also impacted offerings; there are now a number of international and transnational law clinics being offered at law schools around the country,[105] such as the Walter Leitner International Human Rights Clinic at Fordham Law School.[106]

Study abroad opportunities for U.S. law students have also expanded exponentially in recent years.[107] These include summer study abroad programs and semester study abroad opportunities.[108] The American Bar Association regulates these programs and has been supportive and now permits up to one-third of a student's J.D. program to be completed abroad.[109] A number of U.S. law schools have more recently begun to offer dual degree programs with foreign law schools[110] as well as LL.M. degrees in foreign countries.[111]

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[102] See, e.g., NORTHWESTERN'S PLAN 2008, http://www.law.northwestern.edu/difference/strategicplan.html, at 20. Last accessed 16 June 2009. As the then-Dean of NYU School of Law described the situation at his law school, "in the traditional canon of common law courses in the first year, at least two courses in each of the student sections now are taught from materials reworked to take account of globalization," an initiative he described as having as its purpose "introducing a perspective into the study of law … that embraces the kaleidoscope nature of law formation, operation, and practice." John E. Sexton, *supra* note 59 at 199.

[103] See Michael P. Scharf, *Internationalizing the Study of Law*, 20 PENN STATE INTERNATIONAL LAW JOURNAL 29, 32 (2001).

[104] In 2005, the AALS annual meeting sponsored a Workshop on Integrating Transnational Perspectives into the First Year Curriculum.

[105] See AALS SURVEY at 21-23.

[106] See http://law.fordham.edu/ihtml/center3.ihtml?imac=1457. Last accessed 16 June 2009.

[107] *See*, *e.g.*., James P. White, *A Look at Legal Education: The Globalization of American Legal Education*, 82 INDIANA LAW JOURNAL 1285, 1287 (noting that in 1975 there were five ABA-approved law schools offering a summer program abroad and that in 2006, 120 ABA-accredited law schools offered about 160 such programs).

[108] *See* http://www.abanet.org/legaled/studyabroad/abroad.html. Last accessed 16 June 2009.

[109] *See id*.

[110] Examples include Fordham Law School's dual degree program with the University of Paris II, http://law.fordham.edu/ihtml/intl-2studyabroad_semester.ihtml?id=723; Harvard's joint J.D./LL.M. program with Cambridge University, http://www.law.harvard.edu/academics/degrees/special-programs/study-abroad/joint-degree-program.html; Columbia's dual degree programs with Paris I, the University of London, and the Institute for Law and Finance, http://www.law.columbia.edu/center_program/intl_progs/Double_degrees, Cornell's dual degree programs with Paris I, Sciences Po, and Humbolt, http://www.lawschool.cornell.edu/international/study_abroad/international_dual_degrees/index.cfm; the University of Southern California's dual degree program with the London School of Economics, http://lawgip.usc.edu/studyabroad/jdlseinfo.cfm; and the

c) Experiential Learning

The trend toward experiential learning in U.S. law schools has been ongoing for at least two decades. The goal of true experiential learning in the U.S. law school context nonetheless remains elusive. As Professor Erwin Chemerinsky has argued, "[t]he most important change that is needed in law school is to ensure that every student has a clinical experience or the equivalent … Meaningful reform requires that law schools do far more to emulate the way medical schools train doctors."[112]

There are a number of law schools that have taken very seriously the notion that more experiential learning should be provided. The Carnegie Report itself pointed to experiential programs at New York University (NYU) and at the law school at City University of New York (CUNY) as offering exemplary experiential learning programs.

The CUNY curriculum integrates practical experience, professional responsibility, and lawyering skills with doctrinal study at every level, as described in the school's stated academic philosophy:

> The basic premise of the Law School's program is that theory cannot be separated from practice, abstract knowledge of doctrine from practical skill, and understanding the professional role from professional experience. Our curriculum integrates practical experience, professional responsibility, and lawyering skills with doctrinal study at every level. Forming the core of our lawyering curriculum are the skills recognized by the profession in its 1992 report from the ABA Taskforce on Law Schools and the Profession (commonly known as the MacCrate Report) as essential to successful law practice-problem solving, legal analysis and reasoning, legal research, factual investigation, communication (legal writing, oral argument), counseling, negotiation, litigation and alternative dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.[113]

University of Puerto Rico's dual degree program with the University of Barcelona, http://ls-po.law.upr.edu/portal/page?_pageid=33,149936&_dad=portal&_schema=PORTAL. Last accessed 16 June 2009.

[111] Examples include NYU's program at Singapore National University, http://www.law.nyu.edu/llmjsd/llmsingapore/ index.htm and Northwestern's programs in Seoul, Madrid, and Tel Aviv. See http://www.law.northwestern.edu/graduate/llmexec/. Last accessed 16 June 2009.

[112] Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARVARD CIVIL RIGHTS – CIVIL LIBERTIES LAW REVIEW 595, 595 (2008).

[113] http://www.law.cuny.edu/academics/AcademicPhilosophy.html. Last accessed 16 June 2009.

NYU's commitment to situational learning is perhaps best summed up by John Sexton, then Dean of NUY School of Law, who opined that "[l]awyers don't encounter their clients in written opinions; they encounter them in situations." Sexton called for a "situation method" that would be used throughout law school – "and not simply for skills training but also to teach that a lawyer is a counselor, investigator, negotiator, advocate, and even moral authority; that the way she uses the law should take cognizance of the person's identity with whom she is dealing and the context in which she finds herself; and, most of all, that in real life a lawyer constantly finds herself in circumstances where she must serve society, even while serving her client."[114]

In this vein, NYU offers a course called "Lawyering," which exposes all students in their first year to a range of lawyering skills, with intensive feedback and significant opportunities for self-reflection. "Lawyering is the study of law in use."[115] In this course, [t]hrough a series of experiential, collaborative exercises, Lawyering students broaden and deepen their understanding of legal concepts and develop the analytic, interactive and interpretive skills that are integral to practice." The specific goals of the program are as follows: Learning through Experience; Learning Collaboratively; Learning through Critique; Learning through Recognizing and Understanding Difference; and Learning Beyond the Lawyering Program. In this required first-year course, "students work in role as attorneys to integrate sophisticated analysis of facts, careful research, thoughtful interpretation of law, sensitive elaboration of clients' desires, strategic analysis of lawyering interactions, and responsible consideration of the ethical requirements of the lawyer's role."[116] There are seven exercises over the course of the two-semester course, each of which requires students to "analyze the components of a professional task, plan to undertake that task, implement their plans and engage in a structured critique of their work."[117] Among other things, the exercises are designed "to instill life-long habits for learning from experience."[118]

One additional law school that should be highlighted for its recent curricular reform is the law school at Washington and Lee University, which has transformed its traditional third year curriculum to a year-long program in Professionalism. The Professionalism program, which is in addition to the required second year course in professional responsibility, addresses the study of the law profession as a profession and explores the development of ethical judgment in context and in action. Students will be called upon in the course of Professionalism to exercise ethical judgment in simulations that are based on real-world

[114] Sexton, *supra* note 59 at 197.

[115] http://www.law.nyu.edu/academics/lawyeringprogram/mission/index.htm. Last accessed 16 June 2009.

[116] *Id.*

[117] *Id.*

[118] *Id.*

scenarios. The program will also address the development of professional identify beyond adherence to disciplinary ethics rules and managing one's life as a lawyer. In introducing the program, Dean Rod Smolla invokes the Chinese proverb: "Tell me, I will forget. Show me, I will remember. Involve me, I will understand."[119] Dean Smolla states that the program's purpose "is to transform law school into a three year progression from purely academic study of law to the development of the lawyer's professional role as counselor and advocate in the highest ethical traditions of the profession."[120]

Under this program, the third year will be entirely experiential, comprised of simulations and real client experiences that will lead to the development of professionalism and law practice skills. The program will also seek to develop in students all aspects of professionalism, including legal ethics, civility in practice, civic engagement, leadership, and pro bono service.[121]

Each semester of the third year will begin with a mandatory two-week immersion course in practice skills; one of these courses will focus on office and transactional practice skills, and the other will focus on litigation and other conflict resolution skills. In addition to these immersion courses, students will enroll in practicum courses that will include simulation and real client experiences (and which cover the spectrum of doctrinal work) and will be required to engage in extra-curricular law-related activities, which can include clinical work, externships, law review or moot court service, or student competitions. The program will involve practitioners and judges, known as "professors of practice," in the training of students throughout the course of this program. Throughout the year, students will be involved in "the full complement of professional activity that engages practicing lawyers as they apply legal theory and legal doctrines to the real-world issues of serving clients ethically and honorably within the highest traditions of the profession."[122]

The Professionalism program was founded on two driving ambitions. First, students ending their legal education should be given opportunities to express professional judgment in a variety of contexts. The "purposeful expression of considered judgment and counsel to solve client problems will receive greater attention." Second, "a third year law student should be expected to reflect more systematically on what it means to live one's life in the law. Students should recurrently consider and receive guidance on the admirable qualities, dispositions, attitudes, concerns, and habits – moral and intellectual –

[119] http://law.wlu.edu/thirdyear/. Last accessed 16 June 2009.

[120] *Id.*

[121] *Id.*

[122] *Id.*

of good lawyers…. In short, professional values in the best sense, not just competence, should be inculcated and transmitted as out students move toward practice."[123]

But experiential learning is a part of virtually every law school curriculum, although the focus and intensity of skills-based learning vary somewhat dramatically among schools. In response to a survey, most law schools indicated that law schools are doing much more than offer the traditional legal research and writing courses; most law schools have either expanded their legal research and writing courses by enhancing the number of credits awarded or by introducing additional skills in those courses, or in newly-created courses.[124] The most common responses indicate that these courses include a broader set of "lawyering" skills (such as client interviewing and counseling and negotiation), the integration of skills into core doctrinal courses, the addition of an ethics and/or professionalism component into first year studies.[125]

What is more, the law schools that offer rigorous skills training vary enormously as judged by virtually any criteria. What follows are some examples of law school skills courses offering experiential learning:

Liberty Law School, a new law school that received students for the first time in August 2004, adopted a skills program that consists of six semesters of stand-alone courses called Lawyering Skills (Lawyering Skills I – VI) comprising a total of fourteen credit hours. These courses include a thread in Adjudication and in Planning, each of which runs throughout the program.[126]

William and Mary has developed a new two-year legal skills program that is designed to help students develop the skills lawyers need in practice through simulated cases. In this program, students simulate client interviews, negotiations, discovery practice, and other

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[123] *Id*.

[124] See *id*.. At least some respondents also indicated that they have enhanced research training in the first year by including members of the professional library staff rather than relying exclusively on legal research and writing instructors for research training.

[125] Beyond the classroom, a number of states permit admission to the bar after a legal education secured through apprenticeships rather than attendance at law school, a return to earlier days and an implicit recognition of the value of learning by doing.[125] These states are California, Maine, New York, Vermont, Virginia, Washington, and Wyoming. *See* G. Jeffrey MacDonald, *The Self-Made Lawyer*, CHRISTIAN SCIENCE MONITOR, 3 June, 2003, at 13. Delaware requires bar applicants to "perform an aggregated full-time service of at least five months in a law office, as a judicial law clerk, or working for various federal, state, or legal services agencies prior to their admission to the state bar." DELAWARE SUPREME COURT REPORTS. 52(8). During this time they must complete a list of thirty tasks. *Id*.

[126] Matthew D. Staver, *Liberty University's Lawyering Skills Program: Integrating Legal Theory in a Practice-Oriented Curriculum*, 39 UNIVERSITY OF TOLEDO LAW REVIEW 383, 386 – 88 (2008).

important skills that are not typically introduced in the first year legal research and writing courses.[127]

Gonzaga Law School has introduced a Skills and Professionalism Curriculum that requires students to take skills and professionalism courses in all three years of law school. This was achieved through the addition of a 2-credit Litigation Skills and Professionalism Lab in the first semester; a 2-credit Transactional Skills and Professionalism lab in the second semester; a 3-credit Perspective on the Law course; and a required clinic or externship in the third year. These new courses are in addition to the two-part, four-credit course in Legal Research and Writing in the first year.[128]

Case Western Reserve University School of Law initiated a CaseArc Integrated Lawyering Skills Program. This program is essentially a re-design of the law school's more traditional legal analysis, research, and writing, and lawyering skills program into a more fully integrated and sequenced curriculum which extends over all three years of law school. This program consists of an extensive Introduction/Orientation program, four required courses, and a capstone course, which is either a real client clinic, an externship, or a lab. Team teaching integrates legal theory and doctrine, lawyering skills, and the professional role. Doctrinal subjects are linked with legal analysis, research, writing, and problem-solving. Simulations are used to teach fundamental skills including interviewing, counseling, negotiation, and oral presentation. The underlying principles of this program are identified as follows: (1) exposure of all students to fundamental skills (defined as fact investigation including document review, client interviewing, client counseling, legal research tools and methods, legal analysis, legal problem solving and strategic thinking, legal writing in litigation and non-litigation contexts, oral presentation in different contexts, including objective, persuasive, formal and informal, negotiation and other ADR techniques, the transactional planning process, and recognizing and resolving ethical dilemmas); (2) integration of skills and substance; (3) graduated complexity; (4) repetition; and (5) collaboration and coordination.[129]

The University of Dayton law school has developed a *Lawyer as Problem Solver* program, which builds on the "traditional 'counselor at law' concept" to "help clients solve complex problems and make appropriate choices," by trying to train students to "act with sound

[127] http://law.wm.edu/academics/programs/jd/requirements/legalskills/curriculardetails/index.php. Last accessed 16 June 2009.

[128] http://www.law.gonzaga.edu/academic+program/academics/curriculum/legal_research_writing/default.asp. Last accessed 16 June 2009.

[129] See Kenneth R. Margolis, *Turning Law Students into Lawyers*, THE COMPLETE LAWYER, VOL. 3 NO. 5 (14 September 2007).

judgment and common sense."[130] This program includes skills integration throughout the curriculum, including required externship, small-enrollment capstone or clinical course, and introductory dispute resolution course for every student in addition to traditional skills offerings.[131]

Drake University School of Law has launched its First-Year Trial Practicum (FYTP) in which all first year students devote a week to observing and discussing an actual jury trial – from jury selection to verdict. FYTP is the first component of the law school's experiential education pyramid: observation – simulation – participation. Students meet in small groups to discuss the day's proceedings and have the opportunity to meet with the judge and the lawyers.[132]

The University of Northwestern has undertaken a comprehensive study and amendment of its curriculum in what it calls its Plan 2008. Northwestern's Plan 2008 discusses the need to enhance experiential learning by including more in-class simulations, providing concrete examples from actual practice, and intertwining clinical practices resources with substantive first year courses. Among other things, Northwestern University School of Law's Plan 2008 does the following:

- Identifies a discrete set of abilities and traits that law graduates need to help ensure their career success. These "foundational competencies" are organized into related groups – legal analysis and understanding, communication skills, business skills, relationship and leadership abilities, management skills, and personal traits.

- Proposes to establish intensive third year experience which would allow an opportunity for semester-long faculty-supervised, full-time experience within or outside the law school in which they can put into practice their prior learning. These can be clinical practice sections, practicum or internships, intensive academic experiences working on research with individual faculty members or outside apprenticeships, including at foreign law firms.

- Recognizes the importance of giving students the opportunity "to learn through supervised experience, to concretize more abstract ideas in the process, and to sensitize students to the needs of clients with backgrounds and aspirations different from those which students have previously encountered."[133] Plan 2008 calls for "more

[130] http://law.udayton.edu/NR/exeres/A90D0C0C-C138-49E1-8D73-3A791AA1BECB.htm. Last accessed 16 June 2009.

[131] *Id.*

[132] http://www.law.drake.edu/academics/?pageID=trialPracticum. Last accessed 16 June 2009.

[133] http://www.law.northwestern.edu/difference/strategicplan.html. Last accessed 16 June 2009.

integration of concrete examples, simulations, and case studies with traditional theoretical discussion."[134]

Southwestern law school expanded its first-year legal research and writing program and created a new program called LAWS (*Legal Analysis, Writing and Skills*). This six-credit course (double the credits that were awarded under its pre-existing legal research and writing program) provides more detailed instruction in legal methods, legal reasoning, client and witness interviewing, and appellate advocacy. The LAWS program also addresses issues relating to professionalism and the practice of law.[135]

At the University of Washington, business law courses focus on problem solving through a case problem and use writing as an important tool for lawyers.[136] In addition, the law school provides a Foundation for Legal Study Orientation Program which traces the trajectory of a case from start to finish, using simulations and demonstrations to supplement lectures.[137]

University of Detroit-Mercy developed a new approach to teaching that emphasizes solving legal problems, building a bridge to practice, and learning to practice.[138]

At the University of Connecticut, the course *Lawyering in the Community: Experiential Learning in the First Year as a Gateway to Pro Bono* integrates a real life legal experience into the first year legal skills. Numerous models have been employed – having the entire class work on a single pro bono project, offering multiple outside projects from which students can choose, or a combination of both.[139]

The University of Washington offers capstone course in legal analysis, writing, and research during the third quarter of the first year. Students select an area of interest and complete research and writing projects in that area. The goal of this course is to integrate skills-based knowledge and information-based knowledge into a unified whole.[140]

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[134] *Id.*

[135] See http://www.swlaw.edu/academics/jd/newcurriculum1. Last accessed 16 June 2009.

[136] *See* LEGAL EDUCATION AT THE CROSSROADS – IDEAS TO ACCOMPLISHMENTS: SHARING NEW IDEAS FOR INTEGRATED CURRICULUM, 9-12, available at http://bestpracticeslegaled.files.wordpress.com/2008/09/crossroads matlsonline.pdf Last accessed 16 June 2009. ("CROSSROADS")

[137] *Id.*

[138] *See* http://www.law.udmercy.edu/academics/index.php. Last accessed 16 June 2009.

[139] *See* CROSSROADS at 49-52.

[140] *See* CROSSROADS at 21-24.

Washington and Lee has entirely restructured its third year program to include intensive two-week courses in Transactional Practice and Dispute Resolution Practice, which emphasize litigation, mediation, arbitration, and negotiation skills. The revision aims to transform the third year into a "year of professional development through simulated actual practice experiences."[141]

Southwestern Law School now has a one-week January intersession program which will feature more than ten innovative courses that are more suited to short-term, intensive treatment than to a traditional semester. Offerings include Legal Spanish for International Practice and The Art of Persuasion.[142] The law school also offers capstone courses that provide advanced study with special emphasis on applying theory to practice and on professionalism. Skills include advocacy, alternative dispute resolution, and a variety of transactional skills.[143]

Vanderbilt Law School has a third-year curriculum that includes Civil Litigation Capstone Seminar, a year-long seven-unit seminar for students interested in professional careers in the civil justice system.[144]

The University of Minnesota is planning a variety of new courses being rolled out over a number of years to better prepare students for law practice. New classes include intensive training in statutory interpretation integrated into a brief-writing program; "The Work of the Lawyer'" introducing students to the practice of law and its ethical and theoretical underpinnings; and "Perspectives on the Law," a team-taught class exposing students to several different perspectives on such legal issues as law and economics and critical race theory.[145]

The University of New Mexico School of Law offers a practicum course designed to develop in first-year students practical lawyering skills and ethical and professional responsibility. Hypothetical exercises are built around a particular substantive law foundation to encourage students to think in practical ways about client representation. Exercises include a mock client interview, a draft letter to the client, a draft letter from the client to a third party, an analysis of a factual record. The program also includes presentations by lawyers working in various fields.[146]

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[141] *See* http://www.law.wlu.edu/thirdyear/. Last accessed 16 June 2009.

[142] *See* http://www.swlaw.edu/academics/jd/newcurriculum2. Last accessed 16 June 2009.

[143] *Id.*

[144] *See* http://law.vanderbilt.edu/academics/curriculum/elective-courses/civil-litigation-capstone-seminar/index.aspx. Last accessed 16 June 2009.

[145] *See http://www.law.umn.edu/prospective/curriculum.html*. Last accessed 16 June 2009.

[146] *See* CROSSROADS at 5-8.

The law school at California Western has developed a STEPPS Program: Skills Training for Ethical and Preventive Practice and Career Satisfaction. The program includes lectures, readings, case handling and management, office meetings, skills practice (including drafting), and detailed and specific feedback.[147]

Chicago-Kent College of Law's Center for Access to Justice and Technology includes courses in litigation technology and other courses to help students keep pace with emerging technologies.[148]

DePaul University College of Law's Litigation Lab enables upper-class students to have interchanges with lawyers about real cases.[149]

Touro College Jacob B. Fuchsberg Law Center's Public Advocacy Center houses agencies in areas such as housing, immigration, domestic violence, and civil rights, each of which uses Touro students in advocacy services, research work, and client relations.[150]

At the University of Detroit, Mercy School of Law, students may take up to one-third of their credits toward the J.D. degree in Spanish.[151]

Clinical legal education also continues to expand. More and more law schools offer more and more varied clinics. In addition to more traditional clinics, clinical offerings now include intellectual property, elder law, human rights, immigration, fair housing, child welfare, family mediation, domestic violence, environmental litigation, international human rights, securities arbitration, disability law, post-conviction, and health law.[152]

d) More Integration of Theory and Practical Skills

Traditionally, the teaching of legal skills and the teaching of doctrine have been accomplished separately, with little interaction between the two sets of classes (or faculty). Recently, and as a corollary of the renewed emphasis on skills-based learning, a number of law schools have begun to do more to integrate theory- and skills-based education. For instance, the CaseArc Program at Case Western Reserve University School

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[147] *See* CROSSROADS at 72.

[148] http://www.kentlaw.edu/cajt/. Last accessed 16 June 2009.

[149] http://www.law.depaul.edu/programs/professional_skills/lit_lab.asp. Last accessed 16 June 2009.

[150] http://www.tourolaw.edu/pac/index.asp. Last accessed 16 June 2009.

[151] http://www.martindale.com/xp/legal/Professional_Resources/Law_Schools/schl0215.xml. Last accessed 16 June 2009.

[152] *See* AALS SURVEY, *passim*.

of Law seeks to integrate theoretical and practice-oriented training, and has been described as follows:

> CaseArc courses … are integrated with or "inked" to a substantive area of law that students are studying at the same time or in which they have an interest. We believe this will enhance the learning of the subject matter and doctrine as well as the particular lawyering skill under consideration because each will be informed by the other, giving added relevance to both…. This integration permits us to develop rich, content-based and life-like situations for students to grapple with in their writing projects and simulations. It also fosters a deeper understanding of the theory and doctrine of the substantive area.[153]

At the University of New Mexico, skills and professionalism training have been added to most business and tax courses. Desired outcomes include learning how to draft contracts, negotiate deals, understand business objectives of clients, understand how laws and markets interact, effectively navigate federal, tribal, and state regulatory regimes. This program is based on the belief that "substantive black-letter law and theoretical approaches to learning are not mutually exclusive, but rather reinforce one another. Both are critical components of training the complete business lawyer."[154]

e) Teaching Professionalism and Ethics more Pervasively (and Experientially)

Warren E. Burger, then Chief Justice of the United States, once remarked as follows:

> [P]rofessional ethics must have far greater attention from the profession. This should begin on the first hour of the first day in the law school. American law schools perform very well the task of training in the law and in legal analysis. But a system of legal education that teaches lawyers the skills of legal thinking and analysis yet fails to teach them how to act with civility ad according to high professional standards with a commitment to human values, has failed to perform its mission.[155]

A number of schools have begun to take the teaching of lawyer ethics and professional responsibility more seriously. For instance, the law school at William and Mary emphasizes

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[153] Kenneth R. Margolis, *Turning Law Students into Lawyers*, THE COMPLETE LAWYER, VOL. 3 NO. 5 at 4-5 (14 September 2007).

[154] http://lawschool.unm.edu/clinic/business-tax-law/index.php. Last accessed 16 June 2009. See also CROSSROADS at 5-8.

[155] Warren E. Burger, *The Role of Lawyers Today*, 59 NOTRE DAME LAW REVIEW 1, 3, 5 (1983).

the ethical practice of law through the philosophy of the "citizen lawyer," embodied in "the Jeffersonian ideal of the lawyer as skilled advocate and devoted public servant."[156] The law school promises its students that "from the very first day, you'll be putting ethical lawyering skills to practice in a supportive academic setting."[157] The Skills and Professionalism curriculum at Gonzaga Law School includes Professionalism Labs in both litigation skills and transactional skills.[158] Students at Northeastern University School of Law take a first year course called Legal Skills in Social Context which, among other things, explores law in its social context and requires pro bono work.[159] At Washington University, first year students go on a field trip to criminal court to reinforce the humanity of the parties.[160]

f) Enhanced Feedback

Law schools in the U.S. typically provide feedback to students in the form of a single grade at the end of each semester based on a single examination or paper. This is not always the case, of course; in legal writing and other skills courses, there is more systematic and personalized feedback. Other courses may require students to submit short papers along the way, but this has been the exception to the norm.

Some law schools have begun to focus more on the frequency and quality of feedback that is provided to students. Northwestern's Plan 2008, for instance, calls for feedback and evaluations during and at the end of each course to allow students to learn from the feedback and adjust their learning techniques accordingly.[161] Case Western Reserve's CaseArc program has "developed evaluative tools which are designed to give qualitative formative feedback to … students while they can still improve."[162] For the most part, however, law school feedback continues to be evaluative only, and comes only at the end of the semester.

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[156] http://law.wm.edu/academics/. Last accessed 16 June 2009.

[157] *Id.*

[158] *See* http://www.law.gonzaga.edu/News-and-Events/newsdetail.asp?EventID=4487&DepartmentID=15 last accessed 16 June 2009.

[159] *See* http://www.northeastern.edu/law/academics/curriculum/lssc/ last accessed 16 June 2009.

[160] See Emily Hughes, *Taking First-Year Students to Court: Disorienting Moments as Catalysts for Change*, 28 WASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY 11 (2008).

[161] *See* http://www.law.northwestern.edu/difference/NorthwesternLawPlan2008.pdf. Last accessed 16 June 2009.

[162] Kenneth R. Margolis, *Turning Law Students into Lawyers*, THE COMPLETE LAWYER, VOL. 3 NO. 5 at 7 (14 September 2007).

g) Teaching the Teachers

There have been a few efforts designed to help law school instructors engage in effective teaching methods and educational theory. Perhaps the most established of these initiatives is the Institute for Law Teaching at Gonzaga University School of Law, which was created in 1991. This Institute focuses on effective teaching and learning in law school via teaching conferences and workshops, publishing articles, and posting on-line resources for teachers.[163] Georgetown Law Center offers a teacher training workshops over the summer directed toward mid-level clinical professors.[164] The law schools in the District of Columbia have begun a "Rounds About Teaching" program in which law professors meet in workshop-style format to discuss teaching techniques and ways to implement Best Practices and Carnegie Report recommendations.[165] The Center for Computer-Assisted Legal Instruction (CALI) is non-profit consortium of law schools that provides legal education resources over the internet.[166]

D. Conclusions

And now for some modest conclusions.

First, the recent and significant changes in U.S. legal education will continue, but they are not likely to be transformative. In other words, the model of legal education that has been in place for the last century will continue – albeit with updates and improvements.

Second, the changes that we are likely to see are likely to follow the pattern of recent years. More and more law schools will offer opportunities for students to specialize. This will include changes to the first year curriculum, including more opportunities for such students to choose from among a select offering of electives; more and more law schools will provide global opportunities, whether they are offered on campus or around the world; and law schools will expand their efforts to provide experiential learning opportunities for their students. These efforts will be moderated by cost and other constraints, but law schools will be aware of the value of and demand for skills-based learning that helps bridge the gap between school and practice. I am skeptical that many schools will improve substantially the genuine integration of doctrinal and skills-based

[163] See http://www.law.gonzaga.edu/About-Gonzaga-Law/Institute-for-Law-School-Teaching/default.asp. Last accessed 16 June 2009.

[164] *See* CROSSROADS 1-3.

[165] *See Crossroads* at 33.

[166] *See* www.cali.org. Last accessed 16 June 2009.

teaching, in part because there remains at most law schools a separation between those faculty members who teach substantive law and skills.

Third, law schools should respond more reflectively to technological changes than they have been. Lawyers will be making greater use of technology in the future, and there will be increasing demand for law schools to keep pace.

Finally, the recent burgeoning of online J.D. programs that we have seen in recent years[167] is not likely to become a major trend in U.S. legal education. Although they have sparked some interest among students and others, they are at the opposite end of the spectrum in terms of demands for changes to legal education. Nor do I foresee that the American Bar Association will view these laws schools as substitutes for mainstream law schools.

[167] These include Concord Law School (http://www.concordlawschool.edu/index.asp?source=106813&ve=60120&phid=11&ysmwa=[ysmwa]&gclid=CKy9kP6hh5sCFQpgswodsyK5ow), Northwestern California University (http://www.nwculaw.edu/cgi-bin/nwcu/index.html), and West Coast School of Law (http://www.westcsl.com/) Last accessed 16 June 2009.

SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

Brazilian Legal Education: Curricular Reform that Goes Further without Going Beyond

By Roberto Fragale Filho[*]

The celebration of 180 years of legal education in Brazil, held in August 2007, was marked by strong criticism of the *Ordem dos Advogados do Brasil* (Brazilian Bar Association) and the higher education expansion policy which was undertaken in the late 1990s, establishing more than a thousand law schools in the country.[1] The *escolas de enganação* (schools of illusion),[2] created mainly during the last decade, would have increased the numbers in the professional college, which currently has around 600,000 lawyers, to approximately two and a half million, if it were not for the professional filter of the Bar Exam. In other words, the proliferation of mass legal courses in Brazil would have enabled the emergence of educational merchants,[3] specializing in the sale of an illusion of social elevation and professional success, which, thanks to the control of entry into the professional corporation, did not happen.

In addition to the firm criticism and the symbolism around the time of its disclosure, the celebration of the origins of legal education also coincided with the introduction of reforms in higher education in Brazil, and provided the restoration of a partnership between the *Ministério da Educação* (Ministry of Education) and the Brazilian Bar Association. This partnership started the long process of control and evaluation in many law schools. In the days following the celebration of 180 years of legal education in Brazil, the Bar denounced a set of legal courses based on their results on the Bar Exam and the *Exame Nacional de Desempenho de Estudantes* (National Exam of Students' Performance). This was proof of the low quality of the courses, and by consequence, required the energetic intervention of the Ministry. A list of 89 legal courses was established and served to justify the results. The Ministry further specified the measures and arrangements which would be taken to overcome the deficiencies in the legal programming.[4] Although this process has not yet

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[1] See the speech of Brazilian Bar Association President, Cezar Britto at http://www.oab.org.br/noticia.asp?id=10699, last accessed 20 February 2009.

[2] See http://www.oab.org.br/noticia.asp?id=10772, last accessed 20 February 2009.

[3] ELIANE BOTELHO JUNQUEIRA, FACULDADES DE DIREITO OU FÁBRICAS DE ILUSÕES? (1999).

[4] The list is available at http://portal.mec.gov.br/arquivos/pdf/tabela_2.pdf, last accessed 19 February 2009.

been concluded, it has allowed the Bar to rise to the preeminent position that it enjoyed in the curriculum reform of 1994, when its proposals were the basis for a legal education reform.

As a matter of fact, the transformations undertaken in Brazilian legal education in the last two decades were buoyed by three things: (a) the redemocratization of the country, completed in 1988 with the promulgation of the new Constitution, (b) the expansion of higher education, which resulted in the enrollment of more than half a million law students, and (c) the protection of interests of the lawyers' corporation, even though it has been done under the banner of a genuine defense of a minimum level of quality for the Brazilian legal education. Through this process, the Brazilian Bar Association went from a major actor in the curriculum reform of 1994 to a marginalized participant in expansion of higher education and, finally to a partner in the recent adjustments made in the educational system. Such a trajectory is extremely significant and allows us to understand the actual scenario of Brazilian legal education. Within this process, one can hardly find any trace of dialogue with the Bologna process. Further, the integration of new technologies and engagement with the challenges of an increasingly internationalized legal practice are extremely rare. This article proposes a critical review of the incomplete process of legal education reform in three different parts: (a) the expansion, (b) the curriculum, and (c) the control over the profession.

A. The expansion

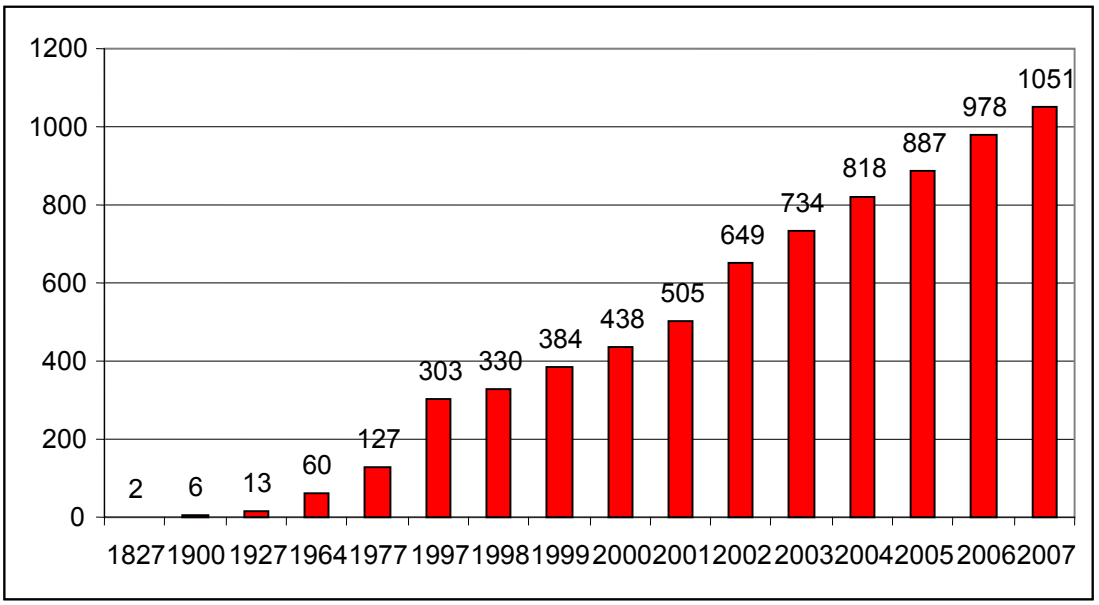
In 1827, just five years after its independence from Portugal, Brazil created its first two law schools in São Paulo and Olinda (lately transferred to Recife, in the State of Pernambuco), where the political and administrative imperial elite was formed.[5] Four new schools were created in the first decade of the Republic, which was proclaimed in 1889. These schools were established mainly as a strategic action of the new government, which needed new institutions to oppose the two old imperial schools, still strongly marked by a monarchist political vision.[6] By 1927, when Brazilian legal education celebrated its hundred year anniversary, the country had only 13 law schools. When the military government took over in 1964, the number of law schools had almost quintupled as it had reached 64. As a strategy for capturing middle class support, the military government launched a wave of higher education expansion and, by 1977, as Brazilian legal education was commemorating one and a half century of existence, the number of law schools had almost doubled. In only thirteen years, the military had created the same number of schools as had been created in

[5] AURÉLIO WANDER BASTOS, CRIAÇÃO DOS CURSOS JURÍDICOS NO BRASIL (1977) and O ENSINO JURÍDICO NO BRASIL (1998); SÉRGIO ADORNO, OS APRENDIZES DO PODER (1988).

[6] Daniel Torres de Cerqueira, *O ensino jurídico no Brasil: breve radiografia do setor*, 4 ANUÁRIO ABEDI, 87, 95 (2006).

the previous 137 years. But, the expansion went still further and by 1997, the number of law schools had almost tripled again. Ten years later, continuing along this wave of expansion, as Brazilian legal education completed 180 years of existence, the number of law schools exploded and passed the cap of a thousand, as it can be seen in figure I.

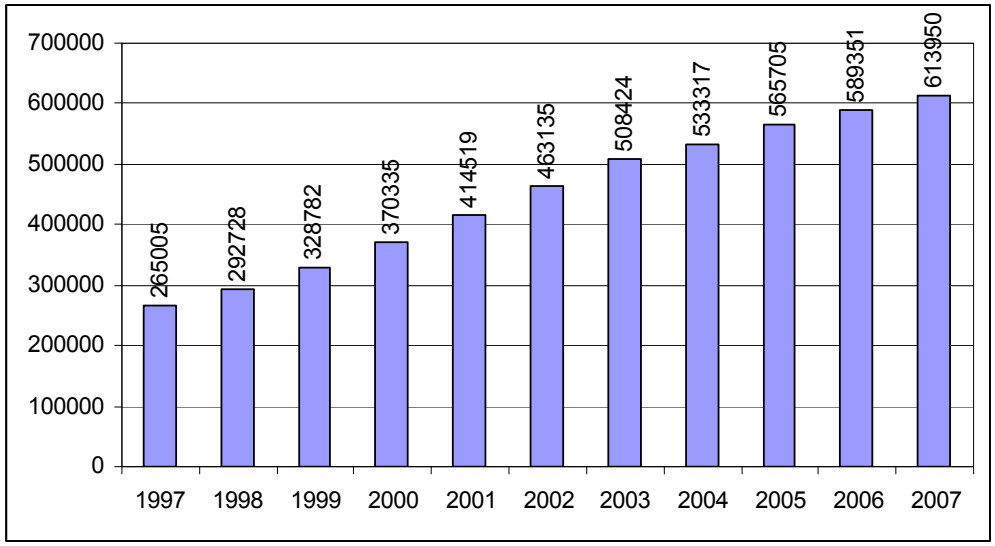
Figure I
Evolution of law schools
1827-2007[7]



As it can be seen in figure II, this scenario affects a large number of people, as it creates an immense student population. In fact, student population has more than doubled, going from 265,005 to 613,950 over the last ten years. But, the growth pace has considerably slowed since 2004, as the year average expansion of the student body population went from a range between 9%-12% to 4%-6%.

[7] Data collected from Daniel Torres de Cerqueira, *O ensino jurídico no Brasil: breve radiografia do setor*, 4 ANUÁRIO ABEDI, 87 (2006) and INSTITUTO NACIONAL DE ESTUDOS E PESQUISAS EDUCACIONAIS ANÍSIO TEIXEIRA, CENSO DA EDUCAÇÃO SUPERIOR 2007, available at http://www.inep.gov.br/superior/censosuperior/sinopse/, last accessed 18 February 2009.

Figure II
Evolution of law students
1997-2007[8]



Naturally, criticism of such an expansion arose and the Brazilian Bar Association has been one of the strongest voices, arguing on one side, that it damages the quality of legal education and on other side, the market is already overloaded by lawyers. In other words, the new graduates could hardly find a place in the legal market not only because it is filled to capacity but also because their education was inferior to that of older graduates. However, the major criticism made by the Brazilian Bar was its marginalized role in the expansion. It does not mean that the Brazilian Bar did not have a say in the opening of new law schools as its opinion is required by law. The problem relates to enforcement, owing to the fact that its opinion is still not binding on the Ministry of Education. As a consequence, most of the expansion did not receive the approval of the Bar, as its opinions were against almost all of the proposals for the new schools.[9]

[8] Data collected from INSTITUTO NACIONAL DE ESTUDOS E PESQUISAS EDUCACIONAIS ANÍSIO TEIXEIRA, CENSO DA EDUCAÇÃO SUPERIOR 2007, available at http://www.inep.gov.br/superior/censosuperior/sinopse/, last accessed 18 February 2009.

[9] Between 2001 and 2003 the Ministry of Education authorized 222 new legal courses, of which only 18 had received the assent of the Brazilian Bar. See http://www.gestaouniversitaria.com.br/index.php/edicoes/9-5/23-pressao-da-oab-sobre-o-mec-comeca-a-surtir-efeito.html, last accessed 19 February 2009.

What was the reason for such disagreement between the Bar and the Ministry of Education? Mainly, the difference is related to the approach to the expansion of higher education. The Ministry of Education was obligated under the National Plan of Education to expand the system in order to change the higher education system from an elite to a mass system and have the ability to offer, until 2010, higher education to at least 30% of the population in the 18-24 year age group. Since there was the capacity to offer higher education to only 12% of that population at the time the Plan was approved in 2000, the expansion had to be made at a fast pace. On the other hand, although the Bar agreed that the expansion was necessary, it insisted that the expansion did not have to be made at the expense of legal education.

As they had different approaches to the subject, they also established dissimilar rules to examine a proposal for a new course. While the Bar examined the ratio between local population and the number of possible students for every proposed course, the Ministry analyzed every proposal on an abstract basis. In reality, the criteria of social need created such a discrepancy that it was abandoned by the Ministry by the end of the 1990s. Originally, the criteria of social need was linked to the demonstration of the relevance of the proposed course for its area of deployment in terms of deficiencies in the number of higher-level professionals, or other deficiencies from a cultural point of view. But, since the promulgation of the *Lei de Diretrizes e Bases da Educação Nacional* (Law of guidelines and bases for national education) in 1996[10], the public policy switched from strong state control exercised at the entrance of the system to a relaxation on the initial elements and greater control over the results of this process, particularly through an assessment of courses and educational institutions. However, the Brazilian Bar did not capture this major change and remained attached to the social needs criteria.

Another major change not perceived by the Bar was the importance of universities' autonomy. While the Bar criticism focused on the number of schools, which did grow over the years, as shown in figure I, the major expansion came from schools already established, which using its prerogative, increased the number of students without having to go through the bureaucratic process that required the participation of the Bar. In a brief period of time, the Bar went from a situation where it had little control over the expansion to another one where it had no control at all.

B. The curriculum

Legal education in Brazil is not based on Langdell's case method. Since its beginnings in the old practices of the University of Coimbra, it mostly reproduces conference lessons in which professors explain the different doctrinal opinions and guide the students in their

[10] Federal Act nº 9,394/1996.

eventual choice of one of them as the most adequate and representative answer for a judicial problem. In the first years, as described by Joaquim Nabuco, study included, "the Ordinances, the rules and definitions of Roman law, the Napoleonic Code, the praxis, the principles of philosophy of law, and the constitutional theories of Benjamin Constant, all under the general inspiration of Bentham. The French commentators of the Civil Code, Criminal law and Roman law were unknown to the students (as well as) the work of Savigny was not yet translated into French."[11] The law schools very quickly became places that were not about the law, but were an entrance into Brazilian imperial politics.

Although this was not reformed in the early Brazilian Republic, changes came in two different and important moments – the curriculum reform of Francisco Campos (1931) and the inaugural conference of San Tiago Dantas for the law school year of 1955 at the *Faculdade Nacional de Direito* (National College of Law)[12] – both emphasized the building of a technical knowledge, the former expressing strong concern for the shaping of a proper legal reasoning and the latter articulating the importance of a professional perspective for the legal studies. Although neither was able to suppress the idea of law schools as stepping stone to the political world, they were extremely important in establishing a transition period in which, by its end, law schools and their curriculum became essentially technical, distanced from the political sphere. This became even clearer after the military took over and introduced the 1972 reforms.

Introduced by Resolution CFE 3/72, the reform transformed the legal course into an intense series of technical subjects, flourished by a few odd hours of Economics and Sociology. In addition, the law student also had to fulfill physical education requirements and two semester courses on Brazilian problems. Extremely focused on legal technicalities, legal studies basically stepped away from the political arena and concentrated on the maneuvering of the law itself. But, by the end of the 1980's, as the redemocratization process was consolidated through the drafting of a new Constitution (1988), criticism around legal studies gained strength and focused on the need of a radical change in order to prepare students for the new political environment.

In fact, dissociated from the Brazilian new socio-economic context, the curriculum established in 1972 was perceived as unable to respond to social changes that were happening in the country during the 1980s. These changes included enormous transformations in the political scenario and the rediscovery of social movements. The eighties, a long transition period marked by the resurgence of Brazilian politics and the reemergence of collective demands personified in the new unionism, associative and communitarian movements, produced a new socio-economic reality to which legal courses did not provide adequate legal answer. Indeed, the crisis in legal teaching was the product

[11] JOAQUIM NABUCO, UM ESTADISTA NO IMPÉRIO 45 (1997).

[12] SAN TIAGO DANTAS, PALAVRAS DE UM PROFESSOR (1975).

of a combination of three different problems: the inadequacy of social and vocational training offered at law schools, fewer job opportunities and the loss of professional legitimacy.

Largely stripped of its political purpose, the legal course work offered mainly technical training which, divorced from the socio-economic transformation, did not respond to social demands, or provide access to the labor market. Moreover, in addition to insufficient training, entry into the job market was still hampered by the irregular distribution of geospatial supply and demand, concentrated in large urban centers, leading to advocacy's proletarization.[13] If in the previous educational arrangement a higher education diploma was already questioned in its capacity to provide for a future job, with a changing economic environment, it stood for an education without social legitimacy, which did not consider the questions of democracy and access to justice, with little (or no) dialogue with other domains of knowledge.

The Brazilian Bar was a major actor in this changing process as it published a series of studies in the first half of the 1990's, establishing a diagnosis of Brazilian legal studies,[14] proposing new subjects for the curriculum and new methodological strategies for the classroom[15] and explaining the contents of the curriculum reform approved in December 1994.[16] Even though the reform did not introduce major changes to the curriculum in a professional content, it produced a major change to the fundamental subjects as it proposed an opening of the course to other areas such as Philosophy and Political Science. Such a demand for an interdisciplinary approach was expressed through a questionnaire conceived by the Legal Studies Commission of the Brazilian Bar and submitted to well-recognized law teachers in the country. A consensus over the need for foundational reform grew and came to being by the same time that the public policy over the higher education expansion was been established. What no one perceived was that these two movements would soon produce a cross-over and the curriculum reform would be stifled by the massive development of legal studies.

In the wake of this process, the approval of the new *Lei de Diretrizes e Bases da Educação Nacional* introduced the need for another "new" curriculum for law schools as it demanded new regulations for every higher education course. The Brazilian Bar and legal academia resisted strenuously but finally succumbed and a new curricular reform was enacted by 2004. It preserved most of the 1994 reforms but it amplified the demand for interdisciplinary studies in law schools, as it introduced a required study of Anthropology,

[13] ROBERTO A. R. DE AGUIAR, A CRISE DA ADVOCACIA NO BRASIL: DIAGNÓSTICO E PERSPECTIVAS (1991).

[14] ORDEM DOS ADVOGADOS DO BRASIL, ENSINO JURÍDICO: DIAGNÓSTICO, PERSPECTIVAS E PROPOSTAS (1992).

[15] ORDEM DOS ADVOGADOS DO BRASIL, ENSINO JURÍDICO: PARÂMETROS PARA ELEVAÇÃO DE QUALIDADE E AVALIAÇÃO (1993).

[16] ORDEM DOS ADVOGADOS DO BRASIL, ENSINO JURÍDICO: NOVAS DIRETRIZES CURRICULARES (1996).

History and Psychology for law students. As Table I shows, the latest curriculum reforms expanded the need for an interdisciplinary dialogue in the fundamental subjects on the legal curriculum tremendously.

Table I
Fundamental subjects

Resolution CFE 3/1972	**Ordinance MEC 1.886/1994**		**Resolution CNE 9/2004**
Introduction to the Study of Law	Introduction to Law		
Economy	Economy		Economy
Sociology	Sociology	Sociology (general)	Sociology
		Sociology of Law	
	Philosophy	Philosophy (general)	Philosophy
		Philosophy of Law	
		Ethics (general)	Ethics
		Professional Ethics	
	Political Science and State Theory		Political Science
			Psychology
			History
			Anthropology

However, the same expansion was not observed in the professional subjects as it can be seen in Table II. The same contents have been reproduced since the 1972 reform with minor changes, *i.e.* the two optional contents of 1972 were delimited in 1994 (Fiscal and International Law) and reproduced in 2004 as well the latest reform merged Criminal and Civil Procedure into a general and diffuse Procedural Law. Further, the real changes in the professional disciplines were not introduced as mandatory but as a broad recommendation to incorporate new areas such as Environmental and Consumers Law as well as the study of Human Rights.

Table II
Professional subjects

Resolution CFE 3/1972	**Ordinance MEC 1.886/1994**	**Resolution CNE 9/2004**
Constitutional Law	Constitutional Law	Constitutional Law
Civil Law	Civil Law	Civil Law
Criminal Law	Criminal Law	Criminal Law
Commercial Law	Commercial Law	Corporate Law
Labor Law	Labor Law	Labor Law
Administrative Law	Administrative Law	Administrative Law
Civil Procedure Law	Civil Procedure Law	Procedural Law
Criminal Procedure Law	Criminal Procedure Law	
Option A	Fiscal Law	Fiscal Law
Option B	International Law	International Law

While approved in 2004, the new curriculum is not mandatory as yet as it will only be enforced beginning in the 2010 school year. The reason for such a lapse of time between its approval and its enforcement is mostly related to the discussion surrounding the duration of the course. For years, Brazilian legal studies have maintained an undergraduate requirement which would take five years to complete. The reforms have increased the amount of hours required for graduation from 2,700 (1972) to 3,300 (1994) and finally to 3,700 (2004) but have been unable to change the total year length of the course. Although there is no empirical evidence that such an amount of time would be necessary for the student to achieve its academic maturity, the Brazilian Bar and legal academia have been extremely resistant to change, with the Brazilian Bar even going to court in order to declare void a Ministry Ordinance reducing its length to three years. The court upheld the Bar opinion[17] and in 2007, the *Conselho Nacional de Educação* (National Board of Education) stated that legal studies should be five years in length as a general rule and exceptions could only be made based on the quality and demands of pedagogical projects[18].

The debate over the length of legal studies is a perfect example of the lack of dialogue with the Bologna process. As one can imagine, the five year duration does not promote student mobility, lifelong learning or the establishment of a system based on two cycles, all of which are characteristics of the new educational environment proposed by the Bologna

[17] See *Superior Tribunal de Justiça*, MS nº 8,592-DF, Minister Franciulli Netto, available at http://www.jusbrasil.com.br/filedown/dev0/files/JUS/STJ/IT/MS_8592_DF_14.05.2003.pdf, last accessed 28 February 2009.

[18] See Resolution CNE/CES nº 02/2007, available at http://portal.mec.gov.br/cne/arquivos/pdf/2007/rces002_07.pdf, last accessed 14 February 2009.

process. Unlike other countries[19], Brazilian legal scholars have mostly ignored the Bologna process and its consequences for legal education. The Brazilian Bar has not been very different in its approach, despite a tame attempt made by a former Bar President who suggested that two different cycles for legal education should be in the agenda[20].

He suggested in April 2002 at the opening of the Brazilian Bar Association Sixth Seminar on Legal Education, that legal studies should last for seven years. The first cycle would last for five years but would not enable the graduate to practice as a lawyer, nor pursue any other legal careers. The professional exercise would only be possible after completion of the second cycle, lasting two years with its contents being defined under the supervision of Judicial Schools. In the VII Seminar on Legal Education held in May 2003, he mentioned once again a course of two cycles, with slight modifications in relation to his previous proposal, as the first cycle would be of three to four years and form a bachelor of laws, after which the student would be entitled to enter the second cycle, with a minimum duration of two years. It is important, however, to note that the Bar did not endorse his proposal, stating that the suggested division in two cycles lacked meditation and should be examined only as a possibility for the future. Unfortunately, the postponed debate never took place.

Another deferred debate relates to the integration of new technologies and challenges of an increasingly internationalized legal practice into Brazilian legal education. The Brazilian Bar has been extremely resistant to online education as it is perceived as a way to circumvent all the legal requirements of a face-to-face education. The Brazilian Bar refuses to think of it as a different form of legal education but insists on education through the same parameters of a classical classroom course. Thus, as it rejected the opening of a virtual legal course[21], it also asked for a moratorium on all proposals of this kind[22]. Even so, the Brazilian Bar has not been able to stop the offer of Brazilian law online courses which operate abroad. These graduates face strong issues concerning the validity of their diplomas as they are not immediately recognized by Brazilian law[23]. Such online courses

[19] See Laurel S. Terry, *The Bologna Process and its Implications for U.S. Legal Education*, 57 JOURNAL OF LEGAL EDUCATION, 237 (2007), available at SSRN: http://ssrn.com/abstract=1086417, last accessed 10 February 2009. See also Andreas Bücker & William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences*, 9 GERMAN LAW JOURNAL, 575 (2008).

[20] Rubens Approbato Machado, *Exigências Práticas no Exercício Profissional e Limitações da Formação Jurídica*, *in* OAB ENSINO JURÍDICO: FORMAÇÃO JURÍDICA E INSERÇÃO PROFISSIONAL, 17, 25 (Ordem dos Advogados do Brasil ed., 2003).

[21] See http://www.oab.org.br/oabeditora/users/revista/123506936717421818190 1.pdf, last accessed 28 February 2009.

[22] See http://www.migalhas.com.br/mostra_noticia.aspx?cod=54606, last accessed 24 February 2009.

[23] This is the case for the *Brazilian Law International College* (http://www.bliccollege.com/tiki-index.php?page=Faculdade+de+Direito+a+Dist%C3%A2ncia, last accessed 27 February 2009) and the *American World University* (http://www.awu.edu/, last accessed 27 February 2009).

illustrate the vast possibilities of a connected world that is also reshaping the legal profession.

Internationalization of legal practice has become a new reality as we move from a print-based industrial society to an IT-based information society.[24] As new technologies are incorporated, judicial work is no longer what it used to be.[25] Information circulates around the web at a speed that makes it very hard to keep track of. Legal practices are not immune to this movement and have increasingly incorporated information from other knowledge fields. As an international law market develops, the legal curriculum should be able to integrate foreign practices and cope with new challenges. However, this hardly happens. Neither the curriculum nor its clinical legal activities integrate such dimensions, although integrating foreign practices has been upheld by the latest reforms as an important dimension of Brazilian legal education.

Formally introduced by the Resolution CFE 3/1972 as an autonomous part of the curriculum, clinical legal education did not develop as a pedagogical practice, but became in fact an alternative form of admission to the Brazilian Bar Association. Placed under the Bar supervision with a required minimum of 300 hours of practice, clinical aid offices allowed the student who went through this process with success to be automatically admitted to the Bar Association. Therefore, the Bar Exam was not required for those practicing (under supervision) in law school clinical aid offices. Needless to say that in a short period of time, the Bar Exam became irrelevant and the Brazilian Bar started to implement a thorough regulation for the clinical aid offices. This double regulation blurred the boundaries between academic and professional worlds; a problem that grew with the later reforms.

The 1994 curriculum reform established a compulsory installation in every law school of a *Núcleo de Prática Jurídica* (Legal Practice Center) aiming to contribute to a change in legal culture that would help clinical aid offices to go from a general practice of legal aid to a wider practice of giving legal advice. Basically, the Núcleo was supposed to break through the reproduction of an everyday jurisdictional life and change the adversarial logic present at Brazilian legal education. A few managed to do so[26], but the majority was very shortly reduced to a reproduction of the past, i.e. a pasteurized student routine of collecting hours

[24] RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES (2008).

[25] Roberto Fragale Filho, *The Use of ICT in the Brazilian Courts*, paper to be presented to the 9th European Conference on e-Government, London, 29-30 June 2009.

[26] See José Geraldo de Sousa Júnior, *A Prática da Assessoria Jurídica na Faculdade de Direito da UnB, in* A PRÁTICA JURÍDICA NA UNB. RECONHECER PARA EMANCIPAR, 21 (José Geraldo de Sousa Júnior, Alexandre Bernardino Costa and Mamede Said Maia Filho eds., 2007). See also JOSÉ GERALDO DE SOUSA JÚNIOR (ed.), COLABORADORES VOLUNTÁRIOS DO NÚCLEO DE PRÁTICA JURÍDICA (2002).

for graduation.[27] Not even the reintroduction of the Bar Exam as a compulsory means to join the profession affected this reality.[28] In fact, as it regained a mandatory status, the Bar Exam eliminated the idea of clinical aid offices as a shortcut to the profession, though it did not clarify the boundaries between legal academic and professional traineeship. The latest reform (2004) sought to emphasize the differences between the curricular and professional traineeship, but it is hard to anticipate what its outcome will be. The same unpredictability also applies to the required student final work as its format is no longer predefined while the 1994 curriculum established the monograph as a mandatory style.[29]

Uncertainty is a necessary characteristic of curricula reform that is on the verge of being implemented. The problem is that a curriculum modification does not necessarily change old teaching habits and little has been said (or done) about it. Pedagogical and curricular innovations are foreign to Brazilian law school classrooms. It is for instance almost impossible to find a single Brazilian law school that uses a problem based learning methodology.[30] Brazilian law teachers seem still attached to the old conference style inherited from its Portuguese origins. Most of all, as the majority of Brazilian law teachers also practice another legal profession, the classroom becomes an extension of their professional offices where they recite and reproduce their most up-to-date everyday judicial experience. This teaching style has been under scrutiny as the legitimacy of teachers has been called into question in the wake of the higher education expansion and the implementation of an evaluative public system. As post-graduate degrees and scientific production become required for a teaching position, things may change, but first there is still a new curriculum to enforce and a growing corporation to control.

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[27] The logic of collecting hours is also present at another curriculum requirement: the complementary activities. Every student is compelled to fulfill between 5% and 10% of the total amount of hours required for graduation by choosing to attend a seminar or participate in research, for instance, which are usually accepted as complementary activities.

[28] Reintroduced by the Federal Act nº 8,906/1994 (available at http://www.oab.org.br/arquivos/pdf/LegislacaoOab/estatuto.pdf, last accessed 22 February 2009), the Bar Exam became mandatory for every law student two years later (article 84).

[29] Resistance to the final monograph came essentially from large schools that had a great difficulty in managing such a requirement for a large amount of students. It was extremely costly and time-consuming for a result that did not necessarily translate into evidence of quality.

[30] For a theoretical application of PBL to the Brazilian legal curriculum, see HORÁCIO WANDERLEI RODRIGUES, PENSANDO O ENSINO DO DIREITO NO SÉCULO XXI: DIRETRIZES CURRICULARES, PROJETO PEDAGÓGICO E OUTRAS QUESTÕES PERTINENTES 152 (2005).

C. Control over the profession

Created by law in 1930, the Brazilian Bar Association is a federal public service that has over the years played a double role as a simultaneous gatekeeper for the national institutions and the profession.[31] In the first role, the law establishes the defense of the Constitution, Rule of Law, human rights and social justice as purposes of the Bar. It is also legally responsible for a permanent call for a proper application of laws, a swift administration of justice and an improvement of cultural and legal institutions. In its second role, it promotes, with exclusivity, the representation, defense, selection and discipline of lawyers throughout the country.[32] Throughout its history, the importance accorded to one or another function has oscillated accordingly to the circumstances. Undoubtedly the resistance to the military government when it ruptured the legal order has allowed the corporation to increase its political capital and become sort of an "official" voice for the civil society during the redemocratization period. This renewed and amplified legitimacy allowed an expansion of the Bar's professional control through the incorporation of a new legal competency, to "collaborate for the improvement of legal education, and give its opinion on the applications submitted to the competent bodies for the creation, recognition or accreditation of these courses".[33]

The Brazilian Bar quickly approved the general criteria[34] for the creation and accreditation of a course. Among them, the criteria of social need which should be evidenced through studies relating socio-economic, demographic, level of services and productions, existence of qualified personnel, and other aspects of the educational region of influence for the proposed new school. Although this approach would be abandoned by the Ministry of Education as a public policy of higher education, as discussed earlier, the Brazilian Bar remained nonetheless attached to such criteria. While the Ministry offered a new regulation for the expansion process, the Bar issued its new regulation[35] in which a set of elements was demanded in order to establish the existence of social need. The applications should provide for the Municipality, or the equivalent area of a radius not superior than 50 kilometers from the future law school headquarters, specific data

[31] See MARIA DA GLÓRIA BONELLI, PROFISSIONALISMO E POLÍTICA NO MUNDO DO DIREITO 56 (2002).

[32] See Federal Act nº 8,906/1994 (article 44, I and II).

[33] See Federal Act nº 8,906/1994 (article 54, XV). The Brazilian Bar opinion, although required by law, does not produce the same results as the American Bar Association (ABA) accreditation process which is not exempt of criticism. See Mathew D. Staver and Anita L. Staver, *Lifting the Veil: an Exposé on the American Bar Association's Arbitrary and Capricious Accreditation Process*, 49 THE WAYNE LAW REVIEW 1 (2003), available at: http://digitalcommons.liberty.edu/cgi/viewcontent.cgi?article=1005&context=lusol_fac_pubs, last accessed 27 February 2009.

[34] See *Instrução Normativa* (Normative Instruction) OAB nº 5/1995.

[35] See *Instrução Normativa* (Normative Instruction) OAB nº 1/1997.

indicating: (a) general population, which can not be less than 100,000 inhabitants as to establish a ratio of an initial maximum number of 100 vacancies per year to 100,000 inhabitants; (b) number of high schools and enrolled students; (c) number of higher education institutions, graduate and undergraduate courses and places offered; (d) the average candidate/vacancy in the latest admission exams for any existing legal course; (e) composition of the systems of justice and security; (f) number of lawyers entered in the local section of the Bar; (g) legal offices or entities capable to absorb trainees; (h) legal bookstores and libraries open to public consultation; (i) curricula vitae of future teachers and their statements of commitment to the course.

The vague concept of social need[36] subsequently gained a clearer frame as it is quite evident that such data would be used to establish some kind of empirical relation between the local population and the allegedly corresponding legal market both within the applicant's area of installation. Although an "ideal" ratio was never established, the Brazilian Bar always sustained that it has never been a matter of safeguarding the legal market from newcomers but just a necessary measure to preserve the quality of Brazilian legal education. As the educational public policy and the professional discourse grew apart, it became necessary for the Bar to reinvent quality measurement. This came from the reintroduction of the mandatory Bar Exam.

Indeed, the high percentage of failure at the Bar Exam was used by the Brazilian Bar as a clamorous evidence of the poor quality of legal education. After each one of the three yearly occasions (April, August and December) in which the Bar Exam was offered, as the results were made public, a general wave of criticism arouse to condemn the poor quality of Brazilian legal education, the fragile character of the higher education expansion, and even the merchandization of education. Bar Exam results were used not only to criticize legal education but also to separate the good schools from the bad ones. This was done through the concession of *OAB Recomenda*, a Bar seal of approval given to schools whose excellence was demonstrated by the Bar Exam results as well as the results obtained at the *Exame Nacional de Cursos* (National Exam of Courses)[37]. The seal, which has been strongly criticized for its methodology[38] has had three iterations in which its results honored

[36] See ENRICO MARTIGNONI & LEANDRO MOLHANO, CONSIDERAÇÕES SOBRE O CONCEITO DE "NECESSIDADE SOCIAL": UMA NOTA TÉCNICA (2005), available at: http://www.databrasil.org.br/Databrasil/..%5Cpdf_docs%5CDoctrab46.pdf, last accessed 23 February 2009.

[37] Replaced in 2004 by the *Exame Nacional de Desempenho de Estudantes* (National Exam of Students' Performance), the *Exame Nacional de Cursos* was a universally applied exam to graduates in order to evaluate the quality of Brazilian higher education. Its results were expressed through five grades from A to E and were quickly adopted by the press to establish some sort of school ranking. For more information, see http://www.inep.gov.br/superior/provao/default.asp, last accessed 17 February 2009.

[38] See ÉDSON NUNES, ANDRÉ MAGALHÃES NOGUEIRA & LEANDRO MOLHANO RIBEIRO, FUTUROS POSSÍVEIS, PASSADOS INDESEJÁVEIS: SELO DA OAB, PROVÃO E AVALIAÇÃO DO ENSINO SUPERIOR 75 (2001).

respectively 52[39], 60[40] and 87[41] legal courses, although every iteration has used a diverse methodology. The impending forth iteration will be no different as its two major components have undergone through changes: on one hand, the Bar Exam is no longer conceived and offered on a State basis as it has been almost nationally unified[42] (which will allow a comparative exercise on a more secure and consistent basis) and on other hand, the *Exame Nacional de Cursos* has been replaced by the *Exame Nacional de Desempenho de Estudantes*, where results are expressed through two different grades (one expressing the average for each and every school group of students in itself and other expressing a comparative result for all students taking part in the exam).

Thus, the Bar Exam became an extremely important tool for the Brazilian Bar to regain its lost preeminence. As the number of students unable to exercise a legal profession grew due to the Bar Exam failure rates, the Bar discourse gained force and the Bar was once again able to interfere within the higher education public policy. Therefore, the environment provided for at the 180 years celebration of legal education in Brazil could not have been better for the consolidation of a major change in the dialogue between the Bar and the Ministry of Education. Nevertheless, all of this transformation translates into a lot of graduates eager to practice a legal profession. This has produced a major change in every legal corporation. The still unaccounted for major change produced by the expansion is that legal professions are no longer reserved for a few, but have become mass professions. For instance, the legal corporation with its 600,000 members can hardly remain as a small professional community that enhances its legitimacy from the daily contact among its members. A reinvention of the corporation as well as of legal studies has to be on the agenda.

D. Summary

Since 1994, Brazilian legal education has been engaged in a long and inconclusive process of curriculum reform in which the *Ordem dos Advogados do Brasil* (Brazilian Bar Association) has been one of its greatest players. The transformations undertaken in legal education in the last two decades, were buoyed by (a) the redemocratization of the country, completed in 1988 with the promulgation of the new Constitution, (b) the expansion of higher education, which resulted in a amount of more than half a million law

[39] ORDEM DOS ADVOGADOS DO BRASIL, OAB RECOMENDA: UM RETRATO DOS CURSOS JURÍDICOS (2001).

[40] ORDEM DOS ADVOGADOS DO BRASIL, OAB RECOMENDA 2003: EM DEFESA DO ENSINO JURÍDICO (2003).

[41] ORDEM DOS ADVOGADOS DO BRASIL, OAB RECOMENDA 2007: POR UM ENSINO JURÍDICO DE QUALIDADE (2007), available at http://www.oab.org.br/arquivos/pdf/oabRecomenda/OABRecomenda1.pdf, last accessed 14 February 2009.

[42] Minas Gerais is currently the only recalcitrant State. See http://www.oab.org.br/noticia.asp?id=15946, last accessed 17 February 2009.

students, and (c) the protection of interests of the lawyers' corporation. While the expansion made the Brazilian Bar go from a situation where it had little control, to a situation where it had no control at all, the curriculum reform has blurred the boundaries between legal academia and professional practice. The Brazilian Bar, legitimated by a series of studies denouncing the anachronism of Brazilian legal education, especially after the introduction of the 1988 Constitution, played an important role in every curriculum change introduced over the last two decades. The latest reform, which will only be enforced in the 2010 school year, adds a little more to the uncertainty of their effectiveness as one perceives a lack of dialogue with the Bologna process and a poor integration of the challenges of an increasingly internationalized legal practice. Although the Brazilian Bar has been able to regain its status through a renewed mandatory Bar Exam, it has not been able to depart from old teaching habits of law professors. Briefly, Brazilian legal education is facing a broad challenge that goes beyond the definition of its curriculum structure. Rethinking the foundations of its accessibility and the importance of its social impact is undoubtedly a necessity to adequately speculate about the future of Brazilian legal education.

Transnationalizing Mexican Legal Education: But, What About Students' Expectations?*

*By Luis Fernando Perez Hurtado***

A. Introduction

The number of Mexican institutions of higher education (hereinafter also referred to as "Institutions" or "IHE") offering Bachelor's Degrees in Law has increased rapidly. For example, in the 1997-1998 academic year, there were 364 Institutions offering the basic law degree; by the 2006-2007 academic year, the number had increased to 930.[1] It is as if, over the last ten years, each week a new IHE began offering a Bachelor's Degree in Law. During that same period, law school enrollment in Mexico increased from 170,210 to approximately 240,000. By 2003, the Bachelor's Degree in Law was the degree program with the highest enrollment in the country – 11 out of 100 students at the college level chose it.[2]

Some of the principal causes of this growth include: 1) the increased availability of higher education in Mexico, in general, as a response to the growing demand for higher education programs; 2) the ease with which a new law program could be started, including the low investment required; and 3) the diverse reasons that students have to study law.[3]

Following the last point, this article focuses on exploring the diversity of ways future students are exposed to law, as well as the multiple reasons that make the profession and degree attractive for them. It is based on the question "what experience or specific

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* This article is based on Chapter IV of LUIS FERNANDO PÉREZ HURTADO, THE NEXT GENERATION OF MEXICAN LAWYERS: A STUDY OF MEXICO'S SYSTEM OF LEGAL EDUCATION AND ITS LAW STUDENTS (2008) (unpublished J.S.D. dissertation, Stanford Law School) (on file wih the Stanford University Library).

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[1] Sources: 1997-98, author's estimation based on data from Dirección de Análisis y Sistemas de Información, SEP; 2006-07, data collected by the author, *available at:* www.educacionjuridica.org. Last accessed: 26 March 2009.

[2] ANUIES, *Anuario Estadístico 2003, Licenciatura en Universidades e Institutos Tecnológicos, Resúmenes y Series Históricas* 17 (2003), available at: http://www.anuies.mx. Last accessed: 26 March 2009.

[3] See Luis Fernando Perez Hurtado, *An Overview of Mexico's System of Legal Education*, MEXICAN LAW REVIEW (forthcoming March 2009).

situation led to your interest in studying law?" that we asked almost 22,000 Mexican law students around the country at the beginning of the 2004-2005 academic year.

This analysis is important because current efforts to transform legal education tend to consider only international components to incorporate into the law programs. But these reforms should also consider the regional or local needs of the participants of legal education which until now have not been taken into account. For example, as we will describe in this article, one of five Mexican law students chose to study law because they or their relatives had been victims of violations to their rights, or as a result of perceiving their environment as marked by injustice, corruption and impunity. Law for them was a way to do something about it or, at least, be able to protect themselves and their families. This is a reality shared not only by other Latin American countries, but probably by most developing countries. Any reform to legal education should explore ways to incorporate the students' ideas, interests and experiences into their studies not only to improve the program, but also to stimulate the students and increase their motivation.

Before describing the methodology of our study and for those not familiar with legal education in Mexico, it is important to mention some general characteristics in order to understand the context we are analyzing:

a) The formal academic program that allows graduates to practice as lawyers – *Licenciatura en Derecho* or LED – is not a graduate program, as it is in the United States, but an undergraduate degree preceded by a high school degree.

b) At the beginning of the 2006-2007 academic year, there were 930 institutions offering the LED. In general, those institutions function only as centers for the transmission of knowledge. Less than 20% of the IHE that offer the LED are involved in research or in academic extension activities. Some Institutions offer two or more LED in the same facilities that are different in modality (i.e. full-time, part-time, open- or distance-learning), duration and/or approach.

c) In most of the IHE, the curriculum is rigid. This means that students at each level are assigned their courses, their professors, and their schedule without the possibility of making choices regarding these matters. In every law program, students take between 40 and 70 mandatory courses during their studies.

d) Over 90% of the law professors combine teaching with professional practice, and most of the law programs do not have full-time faculty.

e) The cost for opening and operating a law program is low. In general, all that is required is a few lecturers paid a low salary, facilities set up for educational purposes with one classroom for each level, and a library with the books that are recommended for each course.

B. Methodology

This article comes from a broader study on Mexican legal education that aimed to analyze its main elements: the institutions of higher education and their regulatory framework, faculty, students, study plans and programs, and the context for the teaching-learning process. For that study, we developed and implemented a multi-component field research plan; this included observations, interviews, document analysis, as well as the use of questionnaires.[4]

I. Units of Analysis

For the analysis of law students, subject of this article, we applied a questionnaire to students enrolled in full-time *Licenciatura en Derecho*. It means students in programs that required full-time attendance, but no part-time, open- or distance-learning programs.[5] The questionnaire was short, with most questions open-ended, to be answered anonymously. The open-ended question format was used to allow students to express themselves freely.[6]

II. Sample Design and Size

We developed a list of 691 schools that were offering the full-time LED at the end of the 2003-2004 academic year, which formed the base for our sampling. To make inferences about the different kinds of institutions and compare them, we divided the IHE into three Groups or strata: Public, Private 1 and Private 2.

Institutions Considered for the Sampling:[7]

[4] See LUIS FERNANDO PÉREZ HURTADO, THE NEXT GENERATION OF MEXICAN LAWYERS: A STUDY OF MEXICO'S SYSTEM OF LEGAL EDUCATION AND ITS LAW STUDENTS (2008) (unpublished J.S.D. dissertation, Stanford Law School, on file wih the Stanford University Library).

[5] Students in full-time programs represent over 90% of the LED enrollment.

[6] The observation dimensions and main variables follow: general characteristics (gender, age, program level, month and year of entrance to the LED, type of high school, socioeconomic status, scholarships, high school and LED grades, languages, and place of residence); choosing to study the *Licenciatura en Derecho* (other options before considering the LED, experiences that motivated the interest in a law degree, purpose and expectations for studying for the LED); choosing the IHE (other options before considering the current institution, selection of the specific IHE, advantages and disadvantages of legal education in current IHE); and practice of law (student-work experience, professional interests, perception of factors for getting a job, factors of professional success, and plans for further studies).

[7] Estimation based on data from Dirección de Análisis y Sistemas de Información, SEP.

	Institutions	Enrollment
Public	89	104,693
Private 1	290	60,536
Private 2	312	42,782
LED	691	208,011

We included in the Public Group all public institutions, that is, those founded by the federal or state governments, and financed mainly with public resources.

In the Private 1 and Private 2 Groups, we included all private IHE, that is, those founded by individuals or private entities, and mostly financed with tuition and student fees. There are substantial differences among private institutions, mainly derived from their different goals, academic experience and prestige, and their access to economic and human resources. Therefore, we divided the private institutions into two groups. In the Private 1 Group are those private IHE that were classified as "of good quality" using the following criteria. The IHE in Private 1 is:

a) A member of one of the following associations of higher education that require minimal quality standards, such as the ANUIES, the Federation of Private Institutions of Higher Education (*Federación de Instituciones Mexicanas Particulares de Educación Superior*, hereinafter referred to as "FIMPES"), or the Southern Association of Colleges and Schools (hereinafter referred to as "SACS");[8] or

b) One of the best universities at the regional or national level according to the Reader's Digest 2004 University Guide;[9] or

c) Member of a group or system of institutions where at least one of its IHE is a member of ANUIES, FIMPES or SACS, or that has been considered one of the best universities at the regional or national level according to the Reader's Digest 2004 University Guide. The purpose here is to include institutions that benefit from being part of a specific group of IHE that may allow them to have access to economic and human resources for their development.

d) Additionally, we have included the *Escuela Libre de Derecho de la Ciudad de Veracruz*, *Escuela Libre de Derecho de Sinaloa*, *Facultad de Derecho de la Barra Nacional de Abogados*, *Facultad Libre de Derecho de Monterrey*, and *Facultad de Derecho de Tlaxcala*

[8] See ANUIES (www.anuies.mx), FIMPES (www.fimpes.org.mx), and SACS (www.sacs.org). Institutional members of these associations have followed a certification program that shows somehow their commitment to quality.

[9] *GUÍA UNIVERSITARIA READER'S DIGEST,* EDICIÓN ESPECIAL, AÑO 2, NÚMERO 2 (2004).

for the following reason: they have some prestige in their community, and since they offer only law programs, they are less interested in becoming members of the associations mentioned before, and it is more difficult for them to be recognized among the best IHE at the regional or national level, due to their size and specialization.

In the Private 2 Group are all the private IHE not included in the Private 1 Group. Many of these institutions have been criticized for providing low quality education. However, we do not know much about these institutions and most of them have a non-traditional approach to education and/or they are on their way to consolidation.[10]

We placed each IHE in one of the three groups, we used a stratified cluster sampling for the specific case of students. Each group was considered a stratum (Public, Private 1, or Private 2) and 15 institutions were randomly selected from each group.[11] Each institution was a cluster and we included the totality of students within each cluster.[12] The number of IHE included in the study was determined by taking into consideration the sample needed to reach the study's objective and the time and budget available for visits to schools.

[10] It is necessary to clarify two aspects regarding the Groups. First, we used these "quality" criteria because they allow us to divide the private Institutions into two groups with different characteristics. Not enough information about IHE was available to apply other grouping criteria. Furthermore, there were no generally accepted criteria for defining the quality of private Institutions, such as formal accreditation. The formal accreditation of *Licenciaturas en Derecho* began only in 2006. These circumstances led us to use the criteria described above.

Second, there are differences among IHE in the Public Group, due mainly to the perception that these Institutions differ in their prestige and in the academic experiences they provide to students. Nevertheless, most of public IHE belong to a university system, which means that they have access to economic and human resources for their development, and they benefit from that access. For instance, associations such as ANUIES consider the whole university system, not the IHE alone, for acceptance. Then, if the same criteria for dividing private IHE were applied to public IHE, most of them would be in a "Public 1" group. Few IHE would be in a "Public 2" group, and they would have less than 5% of the law students enrolled in public Institutions. For this reason, we placed them in a single group.

[11] The random selection included the following modifications: (1) In the Public Group, we included UNAM Ciudad Universitaria because of the impact it has on many IHE at the national level. (2) A new sample was taken whenever two or more IHE from the same system of IHE were drawn, to avoid having Institutions with very similar characteristics and with access to the same economic and human resources.

[12] This sampling method offers four advantages: (1) The strata division increases precision and allows us to have a substantial number of students in each stratum. (2) The cluster division assures a more efficient use of economic resources. (3) The inclusion of the totality of students in each cluster allows us to have a substantial number of students with different characteristics, and hence, the possibility to compare them. (4) The observation of all the elements in their context allows for the analysis of students, not isolated, but interacting with factors within their Institutions that may influence their decisions.

III. Data Collection

The visits to institutions took place between July and October 2004. Our goal was to conduct visits during the two first months of the 2004-2005 academic year[13] primarily to obtain the perspectives of new students before they became fully immersed in their studies.[14]

The student questionnaires were administered in the classrooms during a class period. All classes in session during the day that we were at an institution were visited so we could distribute questionnaires to all the students attending classes that day.[15] From the 36,319 students enrolled in the 45 Institutions, 21,789 were present that day and responded to the questionnaire, yielding an overall response rate of 60%. We personally administered 85% of the questionnaires; the rest were administered by the IHE and then sent to us.[16]

IV. Data Analysis

We coded all the data and used the SPSS and STATA programs to analyze the answers on the student questionnaires, and used two weights to analyze the data. The first weight assigned to each questionnaire a value proportional to the total number of students in each Institution. The purpose of this weighting procedure was to correct for differences in rates of completion of questionnaires at the various institutions. It takes into account the academic level of each student, and it is used when making inferences about each Group or stratum. The second weight assigned to each questionnaire a value representative of the total population in the full-time *Licenciatura en Derecho*. The purpose of this second weighting procedure is to correct for differences in the proportion of questionnaires that had been completed in each stratum, while taking into account the first weight. It is used when making inferences about all law students in full-time programs.

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[13] Most of the new law students start classes during those months. From 63,271 first-year law students during the 2004-2005 academic year, 55,108 (87%) stated their studies during that term. Source: Dirección de Información de la SEP.

[14] Due to logistic and time problems, the visit and questionnaire application were performed at the end of the 2003-2004 academic year in four IHE.

[15] We do not have any reason to think that the students that were absent the day of the questionnaire application may have different profiles from those that completed the questionnaire.

[16] We were not able to personally apply the questionnaires in some institutions because some groups did not have class that day or the director decided not to interrupt classes that day. We did not collect from two institutions, both from the Private 2 Group. One of them, with approximately 40 students, did not return any completed questionnaires. The other institution did not have any students that semester; this is rather common in Group Private 2, so we decided to analyze the case instead of repeating the random selection of the Institutions.

To be able to find differences among students, the questionnaire also collected general information, such as gender, age, socioeconomic status (SES) and LED grades.

V. Constraints and Considerations

As with any research, there are constraints and considerations that limit how much these findings can be generalized. First, very little is known about legal education in Mexico, especially regarding the law students. Our intention is to provide a catalyst for new research on the matter by showing the existence of diversity in IHEs offering the LED. In addition, we want to point out problems common to all IHEs, as well as problems that require further study.

Second, as we mentioned before, a large part of this work is based on the answers the students gave in their responses to an open-ended questionnaire. Aside from the difficulties in coding and classifying the 21,798 completed student questionnaires, our main goal was to open a space where students could express themselves, so we could learn about previously unexplored aspects of their backgrounds. There is no doubt that many aspects of law students' experiences remain to be analyzed, and that different conceptual and operational frameworks will be required to further explore such information.

Third, there is a risk that students may have given answers different from their true feelings and perceptions, because their responses may reflect what they thought they were expected to say. We tried to reduce this risk by insisting during the process of administering the questionnaires that students' responses be submitted anonymously. We also tried to reduce this risk by personally administering and collecting most of the questionnaires, rather than having that done by someone affiliated with their institution. Moreover, using open-ended questions as opposed to a multiple-choice format helped reduce that risk.

Fourth, we tried to identify students by Group of IHE, not by institution. This was done with the goal of focusing our attention on the phenomenon that we were observing instead of on the institution that was producing it.

Finally, the questionnaires and the responses were in Spanish. Therefore, every quotation from a person cited in this study is a translation by the author from Spanish to English.

C. Interests in the *Licenciatura en Derecho*

We asked the students, "What experience or specific situation led to your interest in studying law?" Students' responses were varied and rich in information, and they allowed us to explore (1) the factors that brought students into contact with law as a field of study;

(2) what they liked about law after they had made contact with it as a field; and (3) the perspectives regarding law that they brought with them when they entered the LED.[17] Collecting and analyzing data on these issues allowed us not only to better understand students' interests, but also to explain the high demand for law studies.

Student responses can be divided into six "General Topics" or categories: (1) a specific experience: 48.3%; (2) knowledge of what is being studied: 18.9%; (3) knowledge of the extent to which someone in that field can provide assistance: 17.4%; (4) knowledge regarding professional practice: 14.4%; (5) general liking of the field: 14.2%; and (6) other: 8.5%. The total of these percentages is greater than 100% because the responses of some students included more than one factor – that is, their responses addressed more than one category.[18]

Moreover, we will note if there are significant differences in numbers of responses falling into particular categories as a function of Group, Gender, Age, SES or LED grades. One of our objectives in identifying these differences is to encourage further research to elucidate the causes of these differences. In every instance where the text states that a "significant difference" was found, we are referring to a statistically significant difference at the 0.05 level:

I. Specific Experience (48.3%):

The category of Specific Experience refers to the concrete situation that places students in contact with law and its institutions. This includes a situation involving injustice, influence of family members or acquaintances, contact at a professional level, and contact at an academic level.

a) Situation involving injustice: One of the main experiences that raise the interest of students for the law program is that they were victims of violations to their rights, or they perceived their environment as marked by injustice, corruption and impunity.

[17] The answers to this open-ended question were very difficult to code and classify, because they diverged greatly from a simple "I liked it", to more elaborate answers such as: "Simply because I like to act with confidence and this program allows me to avoid many injustices by knowing the law and how I can avoid arbitrary actions of society and authorities. Besides I was a victim of an injustice in a car accident", "Because some social situations that are in great crisis and because moral values are destroyed, young people with criteria and preparation to face them are needed, as well as with a great sense of rightness. I like the legal environment and diplomacy," or "More than anything was helping people, and since I had knowledge of the program it caught my attention. The lawyer as a mediator, as judge, etc. is what I like the most. I think lawyers are a very good model although they have lost their professionalism and ethics."

[18] The responses of 79.7% of students fell into only one general category, while 18.4% fell into two general topics and 1.9% three general topics. 1.8% of the students did not answer this question.

Approximately one of every five students (17.5% of the student total) expressed it this way.

There were many specific examples involving violations of rights. Those affected included:
The students themselves: ("I was left unprotected after my father died,""Unfavorable situations in relation to law application by power organs such as accusations; slander towards me when I was only twelve years old").

The students' family or friends: ("One day I saw that the husband of my neighbor was hitting her and the police didn't do anything. I was 10 years old, she went to report her husband and a few weeks or months later he was free and that is not fair,""An uncle unfairly in jail,""I had the unfortunate experience of seeing my father assassinated and there was no justice against his killers").

Other people in the students' community: ("The fact that in the place where I live they abuse children, there is intra-family violence and wanting to help children and women is what raised my interest in law,""Seeing an indigenous person being unjustly accused for the simple fact he didn't speak Spanish,""The arrogance of public safety officials, especially policemen because they are capable of beating and robbing a person if they are alone at night,""The discrimination against indigenous people of the North Mountains in Papantla, Veracruz").

More general situations: such as the indigenous uprising in Chiapas, the assassination of Luis Donaldo Colosio, problems involving the North American Free Trade Agreement, electoral frauds and university strikes.

Those who spoke of unfavorable environment, mainly refer to injustices ("The great injustices existing in Mexico relating to less privileged social classes, with low resources"), corruption ("Because I'm tired of corrupt people"), rights violation ("the constant citizen rights violations by the public authorities), and impunity ("The impunity of almost 80% of the cases in Mexico"). In some cases a specific group of people affected by these situations is mentioned, mainly the poor, women, children, indigenous and the uneducated. Also some state that they know about these issues because they, their family or friends, or their community are the ones affected and in other cases they know about these issues through television, newspapers, magazines or discussion groups.

A large number of students mentioned lawyers as one of the causes of the problems they perceived ("The lack of honest lawyers or politicians in Mexico,""Because I was an spectator of truly embarrassing situations where lawyers sell themselves and violate their ethics, and this is what motivated me to change this type of situation") or of violations suffered ("The injustices against a family member when he gave his case to a corrupt lawyer,""I had too many bad job-related problems with lawyers who accepted money and I

lost the cases, ending without a job and money, in 3 cases,""A lawyer swindled my parents").[19]

The responses also illustrate what the students expect to do and the impact they wish to have with their law studies. In relation to situations of injustice, students consider that they can repair the damage ("Because they unjustly took my father's ranch away and he was left with nothing. The same person who sold him the ranch took it away. I plan to recover it one day through the legal route,""Watching my family with legal problems and not having the money to pay"), their law studies will provide them knowledge of how to avoid these situations ("For the injustices and violations Mexican society experiences because of ignorance and lack of knowledge of the institutions to which they can go to exercise their rights,""The abuses of authority caused by the lack of legal knowledge by the general population"), well-prepared, honest lawyers are needed ("I consider that there are many poorly prepared lawyers and so, well prepared lawyers are needed," "Because although there are too many lawyers not all of them have the necessary capability"), and as a lawyer they can help to change ("Seeing that impunity is everywhere and being able to contribute to make this stop,""Because I am really worried about the political and legal situation of the country, and I believe that Mexico deserves that all of us worry and improve the current situation in the country").

Significant differences exist when we consider Group, Gender and SES. The percentage of students who mentioned a situation involving injustice as the factor that led to their interest in law is greater in students at Private 2 and Public Institutions, in women and in students with middle-low or low SES.

b) Influence of family members or acquaintances: 16.6% of students responded that the profession, advice or example of their family and/or acquaintances led to their interest in law. Most students in this group answered that what aroused their interest is that their father, mother, siblings or other family members are lawyers or work in legal institutions. However, the way this impacted their decision varies, because it could be by: tradition ("There are many lawyers in my family"), more contact with law ("I worked for a while in a family firm,""By reading law books, because there are many lawyers in my family,""Watching my uncles litigate"), better knowledge of law ("My family and friends are lawyers so they explained what they did and I liked it") or job guarantee ("Because my personal situation inclined me to study law, because I sincerely consider that I had a door opened (by my father) and I would have to struggle less when finding a job"). In relation to job guarantee, it is worth mentioning that it not only applies to those whose family

[19] Not all opinions about lawyers are negative. In other categories good comments are made about them and some examples are given ("Once I saw how a lawyer helped a family free of charge and this motivated me to do something for my fellow man").

members are lawyers, but to all of those whose family members work in places where a lawyer is needed, both in the public and private sector.

Another group responded that their interest arose from interaction with acquaintances who are lawyers or law students. The types of interaction included conversations ("A lawyer I know told me about his bachelor's in law with such enthusiasm that I decided I wanted the same"), or by observing what they did ("One friend I talked to was studying for that degree and I started going with him to court, notaries, etc., and that raised my interest in law").

Some students answered that they decided to study law because of a family-member suggestion, even if they were not lawyers ("I have always liked commerce, but my father suggested law because it is a more complete program than commerce and besides I can practice law"). A much smaller group stated that their family-members imposed it or that it was convenient for their family ("Because in my family there are no lawyers," "Because my family needed a lawyer, which was very expensive and because my dad wanted me to be a lawyer and because I like it"). In general, we observe significant differences by Group, age and SES. The percentage of students who stated the influence of family-members or acquaintances as the reason for their interest in law increases in Private 1, in students of 19 years old or less or in those with a middle-high or high socioeconomic status.

c) Contact at a professional level: 8.9% of the student total answered that the situation that raised their interest was contact with the practice of law – by visiting a law related place,[20] watching a lawyer practice the profession,[21] working in a place related to law,[22] relating professionally with lawyers,[23] or for a legal problem.[24] Even though most students simply said that their interest came from a contact with law or its institutions in general, the more detailed answers showed that the percentage of students who had a negative experience and decided to prepare themselves was higher than the percentage of those who had a positive experience that led them to study law.

[20] "Visiting civil and criminal courts."

[21] "When an uncle was fired and I accompanied him to the labor courts with his lawyer."

[22] "I worked as a secretary in a legal firm and I liked it," "I was interested in the LED because I work in the courts."

[23] "I worked for 2 years in a company where I worked with lawyers and that created my admiration for them."

[24] "In relation to a lawsuit made against a company I worked for, my benefits were not paid completely so I sued them and I won; I liked it a lot because I was in all the labor courts, and people many times don't have the money to pay a lawyer or someone that represents them."

Significant differences by Group, age and SES were found. The percentage of students who stated the contact at a professional level was the reason why they got interested in law rises in Private 2 and in Public, in students older than 24 years of age or middle-low or low socioeconomic status.

d) Contact at an academic level: 5.6% of the student total stated that contact with law during their studies in high school or even before was what raised their interest in studying law.[25] Among the ways they were exposed to law were conferences, contests, talks, internships, visits, research and *pro bono* service. Some also mentioned professional counseling in high school, such as aptitude, vocational and psychometric exams, talks with professional counselors and psychologist, and college fairs. However, the most mentioned influence was a specific course[26] or a teacher.[27] The specific courses mentioned not only refer strictly to legal courses, but also courses in politics, international relations and even oratory, which students associate with law programs. A significantly greater percentage of women students than men students mentioned a previous academic contact as the situation that led to their interest in law.

e) Other: A very small percentage of students mentioned a different specific experience. These stated that reading a book or article – generally the Constitution-, learning more about a historical character, listening to a conference talk by a successful lawyer, contact with successful people or watching a movie (mainly "The Devil's Advocate" and "A Few Good Men") or an American TV show made them want to know more about law.

The specific issues we just analyzed illustrate to us the things that link students with law and its institutions. The following categories study what is what they like about law once they are in contact with it.

II. Knowledge of what is being studied (18.9%):

This category refers to the interest of students in the content of law studies, especially in knowing the laws and their rights and obligations. As reasons for being interested in this knowledge, some students mentioned its importance,[28] specific legal areas,[29] related

[25] In this group we also included some students who took law courses while they studied for a different bachelor's degree and that is why they transferred, or attended law classes as an occasional student before deciding which academic program to study and law caught their attention ("I attended a tax law class and I loved law, the code, and the discussion was very good").

[26] "The law class we had in high school," "I liked social sciences and humanities in high school," "The way they taught me in high school how justice was delivered."

[27] "Influence of a high school teacher who was a lawyer, his way of teaching and his work as a lawyer."

[28] "I consider that the bachelor in law should be studied by most if not all people, because of its relevance."

areas[30] or general knowledge.[31] Contrary to "popular belief", the percentage of students who expressed that they were interested in law because it had no math or other disciplines was very small.[32]

There were significant differences in this area between Groups. The percentage of students who stated that knowing what is being studied raised their interest for studying law is greater for those in Private 2.

III. Knowledge of the extent to which someone in that field can provide assistance (17.4%):

This refers to the help that law can give to the students, their families and/or society. Students referring to help for themselves or their families think about law as a self-defense tool. The answers about helping society have different focuses: General ("[I]nterest in being a person who helps society"); on general problems ("I would like to help to create a country that was more just to all, avoid corruption and injustices, and I think that being a lawyer brings me closer to being able to contribute in something"); on specific sectors ("Wanting to do justice in order to end inequalities with regard to indigenous and poor people", "Because some day I would like to defend people who are in jail for no reason"); on being a good lawyers ("Serving society and trying to eliminate the bad reputation of lawyers (a thief with a degree)").

A significant percentage of students said they were attracted by the possibility of helping themselves and their family through their studies, as well as by the possibility of helping others.[33]

There were no significant differences with regard to this topic by Group, gender, age, socioeconomic status and LED grades.

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[29] "Because I am attracted to everything related to criminal law," "I am a public accountant and I like everything related to tax and labor law."

[30] "I like law very much, besides it is not all about law issues but also social, economic, cultural and political issues; it is a very complete program."

[31] "The high cultural level we get compared to other degrees."

[32] "I don't like math or English, I also don't like computer skills, arts and management, etc."

[33] "The need to know in order to defend myself and others; it can give a sense of safety and altruism at the same time."

IV. Knowledge regarding professional practice (14.4%):

Here we group students who were interested in the different aspects of the professional practice of a lawyer – diversity in areas of practice, access to a specific professional field, wide range of jobs, characteristics of the professional practice, and the lawyer's role in society.

a) Diversity in areas of practice: These students are attracted to the variety of areas where they can work.[34] In addition, some add their interest in combining or complementing it with other degrees.[35]

b) Access to a specific professional field: Most mention politics, litigation and criminology.[36]

c) Wide range of jobs: the many job opportunities perceived by students.[37]

d) Characteristics of the professional practice: This mainly refers to the activities of a lawyer,[38] the professional environment[39] and remuneration.[40]

e) Lawyer's role in society: Includes the perception students have about the importance of lawyers.[41]

The significant differences seen in this category are by Group, gender and SES. The percentage of students who reported that having knowledge about the professional

[34] "I think that by being a lawyer I have my options open to enter almost any work field."

[35] "I am a public accountant and I wish to combine both degrees", "Ideal complement for my first degree and I really like this program."

[36] "I want to be a public servant or work in politics, and I believe that this is an excellent degree to have access into politics", "By studying law, I can then become a criminologist."

[37] "I wanted a broad job offer", "What made me interested in law was that I realized that no one is exempt from having legal problems and needing legal counsel, because problems are present even in your own family". We noted that a high percentage of these students tend to infer that the diversity of study branches is synonymous with a diversity of job opportunities.

[38] "I always found the job of a lawyer interesting and in a certain way exciting."

[39] "I like the environment where a lawyer works."

[40] "Because they say that a good lawyer makes good money."

[41] "I think that a lawyer is a person people respect and a base point of society", "The importance it has in society, the leadership they show managing others."

practice raised their interest for studying law is relatively greater if they are part of Private 1, if they are men or if they are of middle-high or high SES.

V. General liking of the field (14.2%):

Most students in this category answered that the factor leading to their interest was simply their liking for the degree.[42] However, some stated that they have the abilities required in the profession, such as being able to work in a team, facility in the use of written and spoken language, people skills and taste for reading and debates; or that they have the values needed in the profession.[43]

VI. Other (8.5%):

Some responses were too infrequent to be assigned a separate category classification; such responses were placed in the category of "Other". Following are examples of those responses:

- *Study development* ("The fact that it is a very theory inclined program, I like to read and memorize, it is easier than practical programs," "I like to read a lot and it is a degree where you need to read")
- *Getting into a specific institution* ("The interest of being part of an institution like this one");
- *Difficulty* ("I wanted a difficult degree, very formal and where I had to read a lot");
- *Ease* ("Because I have a very low IQ for other programs," "Because it is a degree not so complicated and gives me the opportunity to keep working," "I didn't study other programs because I know myself, I wouldn't make it in other programs"); associated *Opportunities* ("There are more opportunities to study law than other programs," "Law awakens the creativity and ability in the mind," "Because it is the cheapest one," "To have a profession and enter the police academy");
- *Perceived lack of other options* ("It was something I would study while I found another program, but I liked it and I stayed," "Because I had no choice; because my high school education was not good in math, I felt I was no good in that course and today I realize I am good but it is too late," "Because there was no other program where I was," "Because it was the least saturated and I passed the exam").

[42] "It was something spontaneous," "Since I was young, I wanted to study law," "It simply caught my attention."

[43] We can also infer from the answers that these characteristics are discovered by the students themselves, other people mention them ("I asked the people I know what they thought I would be good at and 90% said as a lawyer, I thought about it, did my research and fell in love with my program," "Thanks to my friends, because I argued too much and said that I wouldn't be a bad lawyer because I had character"), or they discover it in professional counseling.

D. Conclusion

Some of the main reasons for the high demand to study law come both from the diversity of ways future students are exposed to law, as well as the multiple reasons that make the profession and degree attractive. On the one hand, students were exposed to law mainly through day-to-day experiences, especially those involving violations of rights or because they perceive an environment marked by injustice, corruption and impunity (almost one in every five students), the influence of family members or acquaintances, contacts at a professional level with the practice of law or through a contact during previous school levels, a class, a paper, a teacher or an academic conference. On the other hand, once students have had contact with law, this field can be attractive because of the content of the study plan; the protection training in law can give them, their family or society; or the characteristics of the professional practice, the job of a lawyer and associated personal benefits such as income, prestige and contacts. Each one of the ways the students are exposed to the legal field, and of the reasons they consider the legal field attractive affect students' perceptions of what law as a field of study is, and especially what can be achieved with it.

The ongoing debate regarding the quality and relevance of legal education in Mexico should explore ways to incorporate the students' ideas, interests and experiences into the study plans, not only to improve the program, but also to stimulate the students and increase their motivation. If we add that the main students' criticism to their programs is the lack of a practical component, one that takes into account the context in which law develops and its application to specific cases, the topic is essential to improve the relevance of law school programs.

Global Anti-Corruption Regimes: Why law schools may want to take a multi-jurisdictional approach

By D. Alison von Rosenvinge[*]

A. Introduction

In the last fifteen years, the legal fight against bribery and corruption has evolved from the solitary effort of the United States with its Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78 et seq., to a global legal endeavor. During the same period of time, corporations have become increasingly engaged in transnational deals that require them to understand their obligations under a web of anti-corruption regulations. The stakes for businesses are high: fines can range in the tens of millions of dollars and individuals found guilty of corruption may be imprisoned for life.[1]

Although the market for legal services has changed dramatically during this time, the curriculum at U.S. law schools has not. Most U.S. law schools prioritize teaching students how to "think like a lawyer" over teaching practical skills and issue-specific law.[2] New lawyers in many legal practice areas, including international law, lack practical skills and legal knowledge when they begin their careers.[3] The gap between what legal services law firms are providing their clients and what American law students learn in law school is well-

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[1] In April 2007, Baker Hughes disgorged profits of approximately USD 33 million and paid a criminal fine of USD 11 million. United States Securities and Exchange Commission Press Release: SEC Charges Baker Hughes with Foreign Bribery and with Violating 2001 Cease-and-Desist Order available at: http://www.sec.gov/news/press/2007/2007-77.htm (last visited Apr. 29, 2009). In 2009, Kang Huijun, former deputy of Shanghai's Pudong New Area District, was sentenced to life imprisonment for taking bribes. Xinhua News Agency, February 3, 2009 available at: http://www.china.org.cn/china/news/2009-02/03/content_17218040.htm (last visited Apr. 29, 2009).

[2] *See generally*, An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, American Bar Association Section of Legal Education and Admission to the Bar (the MacCrate Report), July 1992 available at: http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html #Introduction (last visited Apr. 29, 2009).

[3] Stephen J. Friedman, A Practical Manifesto for Legal Education: Law schools are professional schools, so let's teach these students something, Legal Times, Sept. 28, 2005 available at: http://www.law.com/jsp/article.jsp?id=1127811912465 (last visited Apr. 29, 2009) (Little has been done to help "those new lawyers whose work is transactional, or who focus on advising businesses or individuals and families, or who specialize in real estate or international transactions.") (last visited Apr. 29, 2009).

documented.[4] As industries and financial institutions have "gone global," the needs of legal clients frequently cross jurisdictional borders. The largest consumers of legal services must comply with a wide variety of regulations. A truly effective legal education must not only provide interested students with practical and analytical skills, but also may require a cross-jurisdictional background.[5]

This paper uses the anti-corruption regulatory framework as a case study for how legal education could better track the legal market. Anti-corruption regimes provide a useful model for multinational curriculum offerings because unlike many newer regulatory regimes, the first anti-corruption law, the FCPA, is over three decades old. When the FCPA was enacted in 1977, most countries opposed it as a classic example of the U.S. overreaching its bounds. U.S. corporations opposed it because they thought it made it harder for them to compete internationally.[6] By the 1990s, some academics were arguing that it was not only bad law, but bad business.[7] Yet, by the mid-1990s, other countries and supranational organizations began adopting their own anti-corruption treaties. Since the

[4] The MacCrate Report at Introduction ("It has long been apparent that American law schools cannot reasonably be expected to shoulder the task of converting even very able students into full-fledged lawyers licensed to handle legal matters. Thus, a gap develops between the expectation and the reality, resulting in complaints and recriminations from legal educators and practicing lawyers. The lament of the practicing bar is a steady refrain: 'They can't draft a contract, they can't write, they've never seen a summons, the professors have never been inside a courtroom.' Law schools offer the traditional responses: 'We teach them how to think, we're not trade schools, we're centers of scholarship and learning, practice is best taught by practitioners.'") 1992 available at: http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html#Introduction (last visited Apr. 29, 2009).

[5] Stephen J. Friedman, A Practical Manifesto for Legal Education. available at: http://www.law.com/jsp/article.jsp?id=1127811912465 (last visited Apr. 29, 2009).

[6] *See generally*, Lay-Person's Guide to FCPA, Foreign Corrupt Practices Act Bribery Provisions available at: www.usdoj.gov/criminal/fraud/docs/dojdocb.html (last visited Apr. 29, 2009) ("Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes."); Macleans A. Geo-JaJa and Garth L. Mangum, The Foreign Corrupt Practices Act's Consequences for U.S. Trade: The Nigerian Example, Africa Economic Analysis, at p. 3 available at: http://www.afbis.com/analysis/corruption.htm (last visited Apr. 29, 2009) ("the FCPA has received support as well as criticism for putting American firms at a competitive disadvantage in world business where the bribe is an accepted facilitator").

[7] In the early 1990s, there were a number of articles arguing that U.S. companies were disadvantaged in international business because they were unable to bribe foreign officials while their competitors did so. *See generally*, Peter Semler, *U.S. Companies Find Corruption a Competitor*, JOURNAL OF COMMERCE (J. Com.) 8A (Apr. 18, 1994) (U.S. companies are increasingly losing business abroad as foreign companies unhindered by U.S. anti-corruption laws win contracts through bribes and other practices); E. Grey Lewis, *Continued Official U.S. Pressure Called Key to Winning Kuwait Reconstruction Contracts*, 9 INTERNATIONAL TRADE REPORTER (Int'l Trade Rep.) 472, 472 (Mar. 27, 1991) (Lewis [an attorney] asserted that a major obstacle to U.S. participation in Kuwait's recovery is the constraint placed on doing business by the U.S. Foreign Corrupt Practices Act, which major U.S. competitors do not have to follow.); Stephen Muffler, *Proposing a Treaty on the Prevention of International Corrupt Payments: Cloning the Foreign Corrupt Practices Act is not the Answer*, 1 INTERNATIONAL LAW STUDENTS ASSOCIATION JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (ILSA J. INT'L & COMP. L.) 3 (1995).

early 2000s, the United States itself has stepped up both the number of investigations and the vigor of its enforcement.[8] Far from being a unique outlier, the FCPA was just the first of many anti-corruption regimes. Anti-corruption regulation seems to be here to stay.

This article offers a comparative analysis of the main anti-corruption regimes, how the legal market in the United States has responded to the regulatory environment, and suggests a shift in legal education to allow for multi-jurisdictional specialization in certain regulatory issue areas. The article is divided into three parts: Part I provides background information on the major existing anti-corruption legal regimes; Part II offers an overview of how U.S. law firms are responding to these multi-jurisdictional regulatory regimes; and Part III suggests that traditional state-based legal education should be augmented to provide interested students with a multi-jurisdictional practical education in certain regulatory regimes, using the anti-corruption regulatory framework as an example.

B. Anti-Corruption Regimes

Anti-corruption regulations have been adopted by state governments, international organizations and regional governmental entities.[9] Corporations conducting business across borders can be faced with a number of legal requirements enforced by different entities. What may be an illicit act under one regime may not be under another. This section provides a brief summary of the major regimes.

I. State-Based Anti-Corruption Regime: The Foreign Corrupt Practices Act

From 1977 until the mid-1990s, the FCPA was the only law that targeted international corruption. In early 1974, investigations headed by the United States Securities and Exchange Commission (SEC) linked incidents relating to the Watergate scandal under President Richard Nixon with money laundering through foreign countries, and with using campaign funds to bribe foreign officials.[10] In 1976, the SEC submitted its now-famous "Report on Questionable and Illegal Corporate Payments and Practices" to the United

[8] *See generally*, Danforth Newcomb and Philip Urofsky, Recent Trends and Patterns in FCPA Enforcement (as of February 13, 2008) available at: http://www.shearman.com/files/upload/LT-021308-Recent-Trends-and-Patterns-in-FCPA-Enforcement-February-2008.pdf (last visited Apr. 29, 2009); Andrew Osterland, U.S. targeting execs in bribe probes: Feds' push to investigate companies for corrupt practices overseas

[9] In this paper, "regional organizations" are defined as multi-state organizations whose member states are limited to states within a certain geographical area and "international organizations" are multi-state organizations whose membership is not limited by geographic region.

[10] *See* Alejandro Posados, *Combating Corruption Under International Law*, 10 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW (DUKE J. COMP. & INT'L L). 345, 348-49 (2000); Thomas R. Snider and Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INTERNATIONAL LAW JOURNAL (CORNELL INT'L L.J.) 691, 696-97 (2007).

States Senate Committee on Banking, Housing and Urban Affairs. As a result of the SEC investigations, over 400 U.S. companies admitted to having made questionable or illegal payments worth more than USD 300 million to foreign government officials. The illicit payments ranged from straight-out bribery of high government officials to "facilitating" payments to government functionaries.[11] The report stated that over 60% of the companies analyzed had been involved in making some kind of payments to foreign officials.[12]

In 1977, the U.S. Congress enacted the FCPA to stop bribery of foreign officials and to restore public confidence in American business. The FCPA has two components: (1) the accounting provisions and (2) the anti-bribery provisions. The accounting provisions apply to any company that has publicly-traded securities in the United States and requires those companies to maintain records that accurately and fairly represent the company's transactions. The anti-bribery provisions make it unlawful to bribe or attempt to bribe a foreign government official.

In order to constitute a violation of the FCPA anti-bribery provisions, five elements must be met. First, the anti-bribery provisions apply to domestic concerns,[13] issuers,[14] and any person (including foreign individuals or entities) making or authorizing an illegal payment. Second, the person or entity authorizing or making the payment must have a corrupt intent and the payment must be intended to induce the public official to improperly direct business. A person can violate the FCPA with only a promise or offer of an improper payment, even if the payment is not successful in retaining business. Third, the FCPA categorically prohibits paying, offering, or promising to pay money or anything of value. Fourth, the anti-bribery provisions prohibit corrupt payments to public officials only (not private business people). The definition of public officials includes any officer, employee or functionary of a foreign government, public international organization, or any department or agency thereof, or any person acting in an official capacity. Finally, the anti-bribery provisions prohibit payments made in order to obtain or retain business.[15]

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[11] United States House Report (H.R. Report) No. 95-114, 1-2 (1977).

[12] Posados, *supra* note 10, 355.

[13] Defined as any individual who is a citizen, national or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization or sole proprietorship which has its principal place of business in the United States or which is organized under the laws of a state, territory, possession or commonwealth of the United States.

[14] Defined as a corporation that has issued securities that has been registered in the United States or who is required to file periodic reports with the SEC.

[15] *See generally*, Lay-Person's Guide to FCPA, *supra,* note 6.

II. Anti-Corruption Conventions of International Organizations

1. The Organization for Economic Co-Operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The Organization for Economic Co-Operation and Development (OECD) Anti-Bribery Convention entered into force on February 15, 1999.[16] While the OECD was not the first international convention to combat bribery, it is a significant regime because its members are the world's major economic players.

The OECD Anti-Bribery Convention requires signatories to criminalize intentionally offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[17]

Of the 17 articles that comprise the OECD Convention, the first 12 have substantive significance (the last five deal with the legalities of multilateral treaties). The first article deals exclusively with bribery. Like the FCPA, the OECD Convention applies to monetary and non-monetary payments and payments made through intermediaries.[18] The OECD Anti-Bribery Convention also exempts "facilitation payments" made to low-level public officials to expedite routine governmental functions.[19] The second article obligates each party to implement any steps necessary to "establish the liability of legal persons" for bribery.[20] The third article sets out the requirements for sanctions, including that "[t]he range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include the deprivation of liberty sufficient to enable effective mutual assistance and extradition."[21] Article 4 deals with jurisdictional matters, including a requirement for parties to consult with each other when

[16] The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions available at: http://www.oecd.org/dataoecd/4/18/38028044.pdf (last visited Apr. 29, 2009).

[17] Christopher F. Corr and Judd Lawler, *Damned if You Do, Damned if You Don't? The OECD Convention and the Globalization of Anti-bribery Measures*, 32 VANDERBILT JOURNAL OF TRANSNATIONAL LAW (VAND. J. TRANSNAT'L L.) 1249, 1303-04 (Nov. 1999).

[18] The OECD Convention on Combating Bribery, Art. 1.

[19] Commentaries on the Convention Combating Bribery of Foreign Public Officials in International Business Transactions, United States Senate Treaty Document (S. Treaty) No. 105-43, 22 (Nov. 1997).

[20] The OECD Convention on Combating Bribery (note 18), Art. 2.

[21] The OECD Convention on Combating Bribery (note 18), Art. 3(1).

more than one party has jurisdiction over an alleged offense.[22] Article 5 requires parties to enforce the convention without being "influenced by considerations of national economic interest."[23] Article 6 states that any statute of limitations must allow for an "adequate period" for investigation and prosecution.[24] Articles 7 and 8 address money laundering and accounting.[25] Article 9 provides for mutual legal assistance and requires parties to offer "prompt and effective legal assistance to another Party" for both criminal and non-criminal investigations that fall within the scope of the OECD Convention.[26] Article 10 requires each party to include bribery of a foreign official as an extraditable offense under its own laws and in extradition treaties among parties.[27] Article 11 provides that the Secretary-General of the OECD shall serve as a "channel of communication" for matters that require parties to consult (such as Article 9 on mutual assistance).[28] Article 12 establishes the OECD Working Group on Bribery in International Business Transactions as a means for systematically monitoring the implementation of the Anti-Bribery Convention.[29]

One distinguishing characteristic of the OECD Anti-Bribery Convention is its in-depth—and public—peer review process. The OECD regularly reviews each party's implementation and enforcement of anti-bribery laws and policies.[30] Since the late 1990s, the OECD has conducted 150 investigations resulting in sanctions against over 60 individuals and companies.[31]

2. United Nations Convention Against Corruption

[22] The OECD Convention on Combating Bribery (note 18), Art. 4(3).

[23] The OECD Convention on Combating Bribery (note 18), Art. 5.

[24] The OECD Convention on Combating Bribery (note 18), Art. 6.

[25] The OECD Convention on Combating Bribery (note 18), Arts. 7-8.

[26] The OECD Convention on Combating Bribery (note 18), Art. 9(1).

[27] The OECD Convention on Combating Bribery (note 18), Art. 10(1).

[28] The OECD Convention on Combating Bribery (note 18), Art. 11.

[29] The OECD Convention on Combating Bribery (note 18), Art. 12. *See also* The Annual Report of the OECD Working Group on Bribery available at: http://www.oecd.org/dataoecd/21/15/40896091.pdf (last visited on Apr. 29, 2009).

[30] *See, e.g.*, OECD Working Group on Bribery, 8-9 (Annual Report 2007).

[31] *Id.*, 9.

The United Nations Convention Against Corruption (UNCAC) entered into force in 2005.[32] UNCAC is extensive in its scope and coverage—it is 65 pages long comprising eight chapters and 71 articles-—and the document is uncompromising in its approach. The Forward begins with the stark statement, "[c]orruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish."[33]

The first chapter lays out general provisions, including a statement of purpose and relevant definitions.[34] The second chapter outlines preventive measures state parties must take, which include developing and implementing effective anti-corruption policies, periodically evaluating "relevant legal instruments and administrative measures" to determine whether they are adequate to fight corruption and collaborating with other state parties in promoting anti-corruption measures.[35] The second chapter also requires state parties to ensure that appropriate bodies exist to prevent corruption and requires each particular state party to inform the General Secretary of the relevant names and addresses of its own authorities implementing anti-corruption measures.[36] The second chapter goes into great detail about the requirements for effectiveness and transparency in the public sector[37] and also describes measures state parties should take to prevent corruption in the private sector.[38]

The third chapter addresses criminalization and law enforcement, including the requirement for each state party to adopt legislation criminalizing bribery of national public officials, foreign public officials and officials of public international organizations.[39] The third chapter also suggests that state parties criminalize bribery and corruption in the private sector.[40] The fourth chapter requires state parties to cooperate in criminal matters and suggest state parties "shall consider" assisting each other in civil and administrative

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[32] United Nations Convention Against Corruption available at: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (last visited Apr. 29, 2009).

[33] *Id.,* iii.

[34] United Nations Convention Against Corruption (note 32), Ch. I, Arts. 1-4.

[35] United Nations Convention Against Corruption (note 32), Ch. II, Art. 5.

[36] United Nations Convention Against Corruption (note 32), Ch. II, Art. 6.

[37] United Nations Convention Against Corruption (note 32), Ch. II, Arts. 7-11.

[38] United Nations Convention Against Corruption (note 32), Ch. II, Art. 12.

[39] United Nations Convention Against Corruption (note 32), Ch. III, Arts. 15-16.

[40] United Nations Convention Against Corruption (note 32), Ch. III, arts. 21-22.

proceedings as well.[41] The fifth chapter focuses on measures financial institutions must take to verify customers' identities in order to prevent illegitimate financial transactions and mechanisms that can be taken to recover property acquired through corrupt acts.[42] The sixth chapter deals with training personnel to combat corruption and with the exchange of such information among state parties.[43] The final two chapters address mechanisms for implementing the UNCAC and various other procedural provisions.[44]

III. Regional Anti-Corruption Conventions[45]

1. The Organization of American States Inter-American Convention Against Corruption

The Organization of American States (OAS) approved the Inter-American Convention Against Corruption (IACAC) on March 29, 1996.[46] The IACAC was the first regional legal framework aimed at eliminating bribery and corruption of government officials.[47] The IACAC seeks to "prevent, detect, punish and eradicate" official corruption in all the signatory states.[48] The IACAC also seeks to facilitate cooperation among OAS member states in combating corruption.

The IACAC can be divided into two parts: domestic and multilateral. Article VII, which contains the mandatory domestic measures, requires all state parties, who have not already done so, to criminalize acts of corruption, including: (a) a public official soliciting or accepting "any article of monetary value, or other benefit" in "exchange for any act or omission in the performance of his public functions;" (b) offering any such bribe to a public official, directly or indirectly; (c) any act or omission by a public official for the purpose of "illicitly obtaining benefits for himself or for a third party;" (d) fraudulently using or

[41] United Nations Convention Against Corruption (note 32), Ch. IV, art. 43.

[42] United Nations Convention Against Corruption (note 32), Ch. V.

[43] United Nations Convention Against Corruption (note 32), Ch. VI.

[44] United Nations Convention Against Corruption (note 32), Chs. VII and VIII.

[45] For a review of individual state laws, see the report from the Working Group on Bribery in International Business Transactions available at: http://www.oecd.org/dataoecd/50/33/1827022.pdf (last visited Apr. 29, 2009).

[46] The Inter-American Convention Against Corruption available at: http://www.oas.org/juridico/english/Treaties/b-58.html (last visited Apr. 29, 2009).

[47] Lucinda A. Low, *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW (VA. J. INT'L L.) 243, 246 (Spring 1998).

[48] Inter-American Convention Against Corruption, 29 March 1996, Art. II.

concealing property "derived from any acts referred to in this article;" and (e) participating after the fact in any way with "any of the acts referred to in this article."[49]

Article VIII focuses on "Transnational Bribery." This article requires state parties to prohibit their own nationals from bribing government officials of another state. In states in which transnational bribery is an offense, "such offense shall be considered an act of corruption for the purposes of this Convention." In states where transnational bribery is not established as an offense, those states "shall, insofar as [their] laws permit, provide assistance and cooperation with respect to this offense."[50]

2. Council of Europe Criminal and Civil Law Conventions on Corruption

In 1999, the Council of Europe (CoE) adopted two conventions addressing corruption: the CoE Criminal Law Convention on Corruption and the CoE Civil Law Convention on Corruption.[51]

The CoE Criminal Law Convention covers three basic categories. First, it obligates parties to criminalize active and passive bribery[52] of both domestic and foreign public officials (which includes officials of international organizations, members of international parliamentary assemblies, judges and court officials, as well as persons working in the private sector).[53] The CoE Criminal Convention also requires parties to criminalize "trading in influence," money laundering and accounting offenses connected with corruption.[54] Second, the CoE Criminal Convention requires parties to provide mutual assistance and facilitate extradition and confiscation of the proceeds in relation to corruption.[55] Finally,

[49] *Id.*, Art. IV.

[50] Inter-American Convention Against Corruption (note 48), Art. VIII.

[51] Council of Europe Criminal Law Convention on Corruption available at: http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm (last visited Apr. 29, 2009) and Council of Europe Civil Law Convention on Corruption available at: http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm (last visited Apr. 29, 2009).

[52] The CoE Criminal Convention defines "active bribery" as "the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting." *See* Council of Europe Criminal Law Convention on Corruption, Ch. II, Arts. 2 (public officials) and 7 (private sector employees). "Passive bribery" is "the request or receipt" by a person "directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or promise of such an advantage, to act or refrain from acting. *See* Council of Europe Criminal Law Convention on Corruption, Ch. II, Arts. 3 (public officials) and 8 (private sector employees).

[53] Council of Europe Criminal Law Convention on Corruption, Ch. II, Arts. 2-11.

[54] *Id.*, Ch. II, Arts. 12-14.

[55] Council of Europe Criminal Law Convention on Corruption (note 53), Ch. II, Arts. 21-23 and Ch. IV, Arts. 25-31.

the CoE Criminal Convention requires each party to allow the Group of States Against Corruption (GRECO) to monitor implementation of the Convention.[56]

The CoE Civil Convention is less expansive than its criminal counterpart. It defines corruption as "requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof."[57] It makes three important substantive efforts. First, it requires states to provide legal remedies (including compensation for damages) for those who have suffered damages as a result of corruption.[58] Second, it requires international cooperation among the parties.[59] Finally, like the Criminal Convention, the Civil Convention requires parties to be subjected to GRECO monitoring.[60]

3. African Union Convention on Preventing and Combating Corruption

In 2006, the African Union Convention on Preventing and Combating Corruption (AU Corruption Convention) entered into force.[61] The AU Corruption Convention acknowledges that there is the need to "address the root causes of corruption on the continent" and "formulate and pursue, as a matter of priority, a common penal policy aimed at protecting society against corruption."[62] The AU Corruption Convention covers a range of issues obligating parties to take three essential steps: prevent corruption, criminalize corruption and cooperate with other AU members on matters of corruption.[63]

The measures to prevent corruption require public officials to "declare their assets at the time of assumption of office during and after their term of office in the public service," to

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[56] Council of Europe Criminal Law Convention on Corruption (note 53), Ch. III, Art. 24.

[57] Council of Europe Civil Law Convention on Corruption, 27 January 1999, Ch. I, Art. 2.

[58] *Id.*, Ch. I, Arts. 3-4. *See also*, Timothy W. Schmidt, *Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines*, 93 MINNESOTA LAW REVIEW (MINN. L. REV.) 1120, 1128 (Feb. 2009) ("The private right of action is unlike anything found in either the OECD Convention or the FCPA.").

[59] Council of Europe Civil Law Convention on Corruption (note 57), Ch. II, Art. 13.

[60] Council of Europe Civil Law Convention on Corruption (note 57), Ch. II, Art. 14.

[61] African Union Convention on Preventing and Combating Corruption available at: http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf (last visited Apr. 29, 2009).

[62] African Union Convention on Preventing and Combating Corruption, 2.

[63] *Id.* arts. 4-24; *see generally* Thomas R. Snider and Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*¸ 40 CORNELL INT'L L.J. 691 (Fall 2007).

create bodies to implement and monitor codes of conduct for public servants and to maintain accounting, auditing and monitoring systems.[64] The AU Corruption Convention also addresses preventing private corruption, including adopting legislation to combat corruption in the private sector, establishing mechanisms to "encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights," and adopting measures "necessary to prevent companies from paying bribers to win tenders."[65]

The AU Corruption Convention criminalizes any public official or any other person soliciting or accepting, directly or indirectly, "any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions."[66] Thus, the AU Corruption Convention criminalizes both demand and supply sides (the "offering" and "granting" of benefits).[67]

Finally, the AU Corruption Convention facilitates international cooperation among parties by creating national authorities for mutual legal assistance on corruption matters and by establishing an advisory board on corruption.[68] The purpose of the advisory board, among other things, is to document corruption in Africa (including the "behaviour of multi-national corporations operating in Africa") and to advise governments on how to fight corruption.[69]

C. Law Firm Responses

Anti-corruption regimes now cover most of the globe. For anyone doing business in a state that is party to any, or several, of these conventions, understanding the similarities and differences between the laws is critical to avoiding expensive penalties and even jail time. Government regulators are active and clients are worried. Providing advice to clients concerning anti-corruption regulations has become a legal cottage industry over the last few decades.

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[64] African Union Convention on Preventing and Combating Corruption Arts. 7(1)-(2) and 5(4).

[65] *Id.,* Art. 11.

[66] African Union Convention on Preventing and Combating Corruption (note 64), Art. 4(1).

[67] African Union Convention on Preventing and Combating Corruption (note 64), Art. 4(1)(b).

[68] African Union Convention on Preventing and Combating Corruption (note 64), Arts. 19-20 and 22.

[69] African Union Convention on Preventing and Combating Corruption (note 64), Art. 22.

Each one of the 25 largest U.S. law firms has a dedicated practice group to provide counsel to clients on anti-corruption issues, which can include anything from helping with internal investigations to dealing with government regulators to litigation.[70] Baker & McKenzie, the largest U.S. law firm with over 3,000 lawyers worldwide, advertises its strength in helping clients navigate international treaties and regimes that "continue to expand while local public and commercial laws remain disparate. A patchwork whose complexity is constantly increasing."[71] DLA Piper, the second largest law firm in the United States, has a "Regulatory and Government Affairs" practice group that provides specialists from Austria, Belgium, Bulgaria, China, Georgia, Hong Kong, Latin America, the Netherlands, Norway, Poland, Romania, Russia, Spain, UAE-Dubai, Ukraine, the United Kingdom and the United States.[72] Jones Day touts on its website its representation of Northrop Corporation "in the

[70] Research was based on the websites of the largest American law firms according to America's Largest 250 Law Firms available at: http://www.ilrg.com/nlj250 (last visited Apr. 29, 2009). *See* footnotes 70-80 and Holland & Knight available at: http://www.hklaw.com/id16048/mpgid4764/ (Foreign Corrupt Practices Act); WilmerHale available at: http://www.wilmerhale.com/litigation/foreign_corrupt_practices_act/ (Foreign Corrupt Practices Act); Weil Gotshal available at: http://www.weil.com/investigations-criminal-defense/ (Investigations and Criminal Defense, including FCPA); Kirkland & Ellis available at: http://www.kirkland.com/sitecontent.cfm?contentID=218&itemID=781 (FCPA and OECD); Morrison & Foerster available at: http://www.mofo.com/practice/practice/litigation/securitieslitigation/overview.html (anti-kickback case); McDermott Will & Emery *available at* http://www.mwe.com/index.cfm/fuseaction/sub_areas.detail/object_id/6a1bc687-06f0-4d6c-a129-a0c3ace93ed2/practice_area_id/0042458a-1ae2-437e-80eb-b2a7e69f60a5/long/1.cfm (FCPA investigations); Shearman & Sterling available at: http://www.shearman.com/practices/detail.aspx?practiceid=5b60d2c9-aaa0-4ae0-9369-ab8a283424e1 (FCPA and Global Anti-Corruption Compliance); Kirkpatrick & Lockhart Nicholson Graham available at: http://www.klgates.com/practices/ServiceDetail.aspx?service=53 (white collar crime/criminal defense, including FCPA); Hogan & Hartson available at: http://www.hhlaw.com/whitecollar/ (FCPA investigations); Reed Smith available at: http://www.reedsmith.com/practice_areas_&_industry_groups.cfm?widCall1=customWidgets.content_view_1&cit_id=23484&cta_tax_id=14172 (Global Regulatory Enforcement); O'Melveny & Myers available at: http://www.omm.com/whitecollar/ (white collar defense and corporate investigations including FCPA investigations); Akin Gump Strauss Hauer & Feld available at: http://www.akingump.com/services/ServiceDetail.aspx?service=296 (white collar criminal defense including FCPA defense in Afghanistan, Angola, Argentina, Austria, Azerbaijan, Bahrain, Belarus, Bosnia, Brazil, Cambodia, Canada, Chile, China, Colombia, Congo, Cote d'Ivoire, the Czech Republic, the Dominican Republic, Egypt, England, France, Germany, Ghana, Greece, India, Indonesia, Iran, Iraq, Japan, Kazakhstan, Kyrgyzstan, Libya, Liechtenstein, Mexico, Nigeria, Pakistan, Peru, the Philippines, Romania, Russia, Sao Tome and Principe, Saudi Arabia, South Africa, Switzerland, Tajikistan, Tanzania, Uganda, Ukraine, United Arab Emirates, Uzbekistan, Vietnam, Zaire and Zambia); Paul Hastings available at: http://www.paulhastings.com/PracticeAreaDetail.aspx?PracticeAreaId=32 (white collar, internal investigations and corporate governance); Foley and Lardner available at: http://www.foley.com/services/practice_detail.aspx?practiceid=403 (white collar defense); Fulbright & Jaworski *available at* http://www.fulbright.com/index.cfm?fuseaction=description.subdescription&site_id=427&id=539 (white collar crime: special skills, including FCPA representation) (last visited Apr. 20, 2009).

[71] Baker & McKenzie, Trade & Commerce available at: http://www.bakernet.com/BakerNet/Practice/TradeCommerce/default.htm (last visited Apr. 16, 2009).

[72] DLA Piper, Regulatory and Government Affairs available at: http://www.dlapiper.com/global/services/detail.aspx?service=74 (last visited Apr. 16, 2009).

1980s involving allegations of overseas bribery."[73] White & Case's White Collar group explicitly states:

> "An important trend in business enforcement in the new decade is the rapidly increasing cooperation among national and multinational enforcement authorities. Officials in Washington, Brussels, London, Tokyo and other jurisdictions are sharing information at an unprecedented rate. [. . .] These matters are often pursued simultaneously in multiple jurisdictions and require a national and transnational network of legal resources to properly defend client interests."[74]

White & Case further advertises its expertise in handling enforcement and defense in public and private corruption, as well as helping clients through international government investigations and inquiries in the United States, Europe, the Middle East and Asia.[75]

Latham & Watkins claims expertise in FCPA violations.[76] Skadden advertises its "extensive practice in advising and defending clients in matters involving the United States Foreign Corrupt Practices Act (FCPA) and related international laws, including the OECD Anti-Bribery Convention" and claims that the firm is "uniquely positioned" to help clients in "navigating the legal landscape when business conduct results in concurrent criminal, civil and/or administrative proceedings that require a strategically coordinated response."[77] Sidley Austin presents its "extensive experience representing clients with respect to the U.S. Foreign Corrupt Practices Act" as well as "significant" experience in the laws of other countries "which relate to dealing with government officials."[78] Greenberg Traurig warns potential clients on its website that "[r]ecent events have illustrated that the government has taken an increasingly aggressive investigative posture toward businesses, especially those subject to government regulations" and offers clients its "ability to develop integrated 'global' solutions" in international trade.[79] Mayer Brown advertises its

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[73] Jones Day, Government Regulation – Overview available at: http://www.jonesday.com/government_regulation/ (last visited Apr. 16, 2009).

[74] White & Case, White Collar available at: http://www.whitecase.com/whitecollar/ (last visited Apr. 16, 2009).

[75] *Id.*

[76] Latham & Watkins, White Collar and Government Investigations available at: http://www.lw.com/practices.aspx?page=practicedetail&practice=55 (last visited Apr. 16, 2009).

[77] Skadden, Foreign Corrupt Practices Act Defense available at: http://skaddenpractices.skadden.com/fcpa/ (last visited Apr. 16, 2009).

[78] Sidley Austin, FCPA/Anti-Bribery available at: http://www.sidley.com/OurPractice/ServiceDetail.aspx?Service=258 (last visited Apr. 16, 2009).

[79] Greenberg Traurig, LLP, White Collar Criminal Defense available at: http://www.gtlaw.com/Experience/Practices/WhiteCollarCriminalDefense (last visited Apr. 16, 2009).

familiarity "with the complexities of multinational investigations in coordinating the work of foreign counsel in such investigations."[80] Morgan Lewis touts its "cross-disciplinary team of lawyers to address every aspect of FCPA counseling and compliance."[81]

Law firms are not only advertising their anti-corruption expertise on their websites, but many firms regularly publish guides for clients seeking help with anti-corruption issues.[82] It is not surprising that law firms are competing with each other for this business because it is largely recession-proof (government regulators will go after corruption regardless of the state of the economy) and because bringing in one client with an anti-corruption matter frequently leads to more work for the law firm (if a company has corruption issues in one part of the globe, government regulators will frequently ask the company to expand the scope of its internal investigation to other countries known to be prone to corruption). What is surprising is that law schools have not similarly responded to the new legal framework.

D. Multi-Jurisdictional Legal Education

After completing four years in college, a typical U.S. law student spends three years in law school.[83] The first is dedicated entirely to "the basics" that vary little from school to school: Torts (actionable wrongful acts that are not covered by contract), Contracts, Civil Procedure (rules that govern who can sue whom and how, when and where they can do so), Property, Criminal Law and Constitutional Law (a history class of important United States Constitution cases).

In the second and third years, students generally may take "electives" (courses students choose themselves). With the exception of students who want to specialize in tax law, most students are more concerned with the grades they receive in courses than the

[80] Mayer Brown, Foreign Corrupt Practices Act *available at* http://www.mayerbrown.com/fcpa/ (last visited Apr. 16, 2009).

[81] Morgan Lewis, Foreign Corrupt Practices Act available at: http://www.morganlewis.com/index.cfm/fuseaction/practiceArea.detail/nodeID/a837b788-db43-44cf-9f9d-1a3937cdbbe8/practiceAreaID/D38AB295-21C1-4F61-A2CE-3725A3AD7EE8 (last visited Apr. 16, 2009).

[82] *See* Shearman & Sterling LLP, Danforth Newcomb, Recent Trends and Patterns in FCPA Enforcement, available at: http://www.shearman.com/files/upload/FCPA_Trends.pdf (last visited Apr. 16, 2009); Proskauer Rose LLP, Matthew S. Queler, Wendy Wu and Bettina Chin, Foreign Corrupt Practices Act—Best Practices available at: http://www.proskauerguide.com/law_topics/27/IV (last visited Apr. 16, 2009).

[83] See, *supra,* note 2 ("Thus, in contrast to virtually every other country, prospective lawyers in the United States commence their study of law in a professional school, after receiving an undergraduate degree. Students in other countries experience their first academic contact with the law as undergraduates, similar to students studying history, literature or philosophy. In other countries, the practicing bar assumes the major responsibility for accomplishing the transition of these students into practicing lawyers. Here, the bar's role is ill-defined.").

substance of the courses themselves. It is during these last two years that U.S. law schools could offer students an issue-focused multi-jurisdictional curriculum.[84]

Thirty years ago, the American legal education system may have served its purpose because those required first-year courses, along with a strong apprenticeship system of the traditional partnership-based law firm, provided most of the tools necessary to practice law. In the last few decades, though, those required courses have failed to provide a strong foundation for many lawyers because what many lawyers do has become so specialized and because law firms have changed from smaller partnerships to large limited liability partnerships. Not only has there been a dramatic increase in legal specializations, but law firms have transformed from partnerships where junior lawyers were treated as apprentices to partners who spent serious time training junior lawyers to enormous legal services firms where junior lawyers are measured in terms of billable hours and partners, even if so inclined, have little or no time to train associates.[85] The combination of the increasing legal specialization and the shift away from partner-training has left new lawyers more dependent than ever on the education and skills they receive at law school. Offering students a curriculum based on practical issue-specific areas of the law seems reasonable. For some issue areas, the curriculum must be multi-jurisdictional in approach if it is to be comprehensive.

For example, a student specializing in anti-corruption regimes could begin with an introductory comparative course. Such a course would provide an overview of the FCPA, the IACAC, the OECD Anti-Bribery Convention, the CoE Criminal and Civil Law Conventions on Corruption, the UNCAC and the AU Convention on Preventing and Combating Corruption. This course would include, among other things, comparisons of how the conventions define public officials, what acts are prohibited and which entities are obligated to comply with the conventions.

After the introductory course, a student would have the option of taking in-depth courses on conventions and state laws in each region of the world that would include such topics as relevant cases concerning the convention, an introduction to related law in the jurisdiction, an overview of the relevant legal system and the study of the social context of corruption in the jurisdiction. For example, a course on Europe would not only cover the CoE Conventions, but also the OECD, the UNCAC and the FCPA.

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[84] See, *supra,* note 3 ("[A] student is far better off with a law school experience that comes as close as possible to an integrated combination of skills, knowledge and substantive law in one broad area—such as litigation or corporate transactions—than with a smorgasbord of unrelated courses, even if that student ends up practicing in an entirely different area.").

[85] See, *supra,* note 2 (Over the last century "the in-house clerkship form of legal education was increasingly incompatible with the needs of the emerging corporate law firms created to meet the complex needs of institutional clients.").

The final course for a student specializing in anti-corruption regimes could be a case study seminar requiring the student to write an in-depth client memorandum providing concrete advice based on a hypothetical fact pattern. Students would be asked to analyze, for example, what liabilities a British bank, whose securities are traded on the New York Stock Exchange, has in a situation in which the bank is acting as an underwriter for a securities offering in Germany and has hired a consultant who may have bribed certain foreign officials in connection with the offering. The hypothetical situation would change to reflect the current state of the law and the final product would be similar to what many white collar lawyers provide their clients on a regular basis.

E. Conclusion

The market for legal services is dominated by clients needing global, specialized and regulatory counsel. Although legal education has long been limited by the borders of the states in which law schools exist, the transnational realities of the practice of law demand some adaptations. As is evident from Part I, there are many important differences among anti-corruption regimes, for example, whether (1) there is a private right of action,[86] (2) private sector corruption is criminalized,[87] (3) public officials have obligations to disclose their financial assets under their own laws,[88] (4) there is a statute of limitations[89] and (5) the definition of public official.[90] Corporations must understand the differences among the regimes in order to create effective internal policies and respond appropriately when there may be misconduct. Large law firms appear to be aligning themselves internally in order to provide such counsel.

U.S. law school education, however, is not tracking this reality. Junior lawyers enter the workforce at global law firms in a world of legal specializations and cross-border regulatory regimes largely ill-prepared. Not only has anti-corruption regulation "gone global," but so, too, has anti-trust/competition law, food and drug regulations and environmental law.

As the analysis of law firm practice groups demonstrates, law firms based throughout the United States are providing clients with multi-jurisdictional advice. Perhaps it is time for U.S. law schools to reevaluate their course structure and offer students formal issue-area specializations, including multi-jurisdictional specializations when necessary. Offering

[86] See, *supra,* note 58.

[87] See, *supra,* notes 38 and 40.

[88] See, *supra,* note 64.

[89] See, *supra,* note 24.

[90] Low, *supra*, note 47, 265-74.

students the opportunity to gain practical skills in issue-specific areas not only will make them better lawyers once they graduate, but will also likely make them more effective lawyers because they will be practicing in an area of the law in which they not only have an interest, but also have the skill set necessary to succeed.

Challenges in Legal Education and the Development of a New European Private Law

By Bram Akkermans[*]

A. Introduction

These are exciting times for European private law. After many years of research the publication of the Draft Common Frame of Reference in the form of the interim outline edition of 2008 and, in particular, of the Outline Edition in 2009, is set to change the landscape of legal education in private law.[1] Although many universities are likely to continue a traditional curriculum based on national law, possibly with comparative influences, for some universities this will be an occasion to move from a comparative to more truly European curriculum. The change to a European-based curriculum is controversial in legal education as the need to train nationally qualified lawyers remains.[2] However, there are some experiences with the setting up of a European-based curriculum that might demonstrate a possibility of how to do this.[3]

Generally, there are three types of curricula. First, there is the national law curriculum that is taught in the national language by nationally trained educators. These days, it is hardly possible to teach private law without any comparative remarks. Second, there is the comparative law curriculum, either taught in the national language or, in the *lingua franca* of comparative law, English. These comparative law programmes have been very successful in the last decades. In some legal orders it is also possible to develop a third type of curriculum. The European Union, with its supranational legal order, especially offers an opportunity to train lawyers that are less dependent on a single legal system. This

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[1] PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW. DRAFT COMMON FRAME OF REFERENCE, INTERIM OUTLINE EDITION. (Christian von Bar *et al.* eds., 2008); PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW. DRAFT COMMON FRAME OF REFERENCE, OUTLINE EDITION. (Christian von Bar *et al.* eds., 2009).,

[2] See, on this, SJOERD CLAESSENS, FREE MOVEMENT OF LAWYERS IN THE EUROPEAN UNION (2008).

[3] The author was a member of the Curriculum Committee setting up a new English language bachelor programme (LL.B.) named the Euroepan Law School – English Track, at Maastricht University. Of course, many other transnational law degree programmes exist.

type of program is generally taught in English and focuses on comparative law and European law. However, because of the legal framework in which legal education takes place and because of the expertise needed to teach this type of curriculum, these programmes are rare.[4]

Comparative and European private law takes a very important position in the programmes of the second and third type. With its, compared to other legal disciplines, well developed methodology and vast body of research already carried out, comparative private law offers an excellent opportunity to teach students how to do comparative law as well as to train them to work with abstract legal concepts.[5] The Europeanisation of private law, i..e the increasing body of European Union legislation and case law of the European Court of Justice in this area, in the last decades adds a third element to this in the form of a combination of European Union law and private law: European Private Law. This element has in particular become relevant in the curriculum of the third type that seeks to combine comparative (private) law with European law. In fact, I will argue, European Union Law adds content to any curriculum in such a way that it can no longer be avoided. It should therefore become included in every curriculum, of any type, from now on. The development of a European private law serves as an example of this, but similar developments can be found in the law of civil procedure, or in criminal law.[6]

B. The Development of Private Law and its Challenges on Legal Education

It is not entirely clear when it began, but at a certain point in the last 50 years legal academics started to compare systems of private law.[7] This development came after a

[4] The Maastricht European Law School – English Track (ELS-ET) seems to be a unique programme in the non-English speaking world. Other programmes include, *inter alia*, the Hanse Law School programme between the universities of Groningen (Netherlands), Bremen (Germany) and Oldenburg (Germany) and the Transnational Degree Programme at Utrecht University (Netherlands) and Washington University School of Law (USA). See, P. Zumbansen, Transnational Law, in ENCYCLOPEDIA OF COMPARATIVE LAW, 748-750 (Jan M. Smits ed., 2006).

[5] For an overview of the state of affairs in comparative private law, including methodology, see, THE OXFORD HANDBOOK OF COMPARATIVE LAW (M. Reimann & R. Zimmermann eds.,2006).

[6] See, for instance, GREEN PAPER ON CONSUMER COLLECTIVE REDRESS COM(2008) 794 FINAL, CONSULTATION PAPER ON CONSUMER COLLECTIVE REDRESS FOR THE HEARING OF 27 MAY 2009, Available at: http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm, COUNCIL DECISION OF 12 FEBRUARY 2007 ESTABLISHING FOR THE PERIOD 2007 TO 2013, AS PART OF THE GENERAL PROGRAMME ON FUNDAMENTAL RIGHTS AND JUSTICE, THE SPECIFIC PROGRAMME 'CRIMINAL JUSTICE', OJ 24.2.2007, L58/17, THE COMMISSION'S ANNUAL WORK PROGRAMME 2009 ON CRIMINAL JUSTICE OF 28 SEPTEMBER 2008, Of course, a full curriculum in this new style would also have to include other areas of law. This contribution merely seeks to explore some of the possibilities the developments in private law offer on legal education. Potentially, other areas of law could be inspired from these developments.

[7] Early works include the famous RENÉ DAVID, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL COMPARÉ: INTRODUCTION À L'ÉTUDE DE DROITS ÉTRANGERS ET À LA MÉTHODE COMPARATIVE (1950); see, also, J.M. Smits, *A European Private Law as a Mixed*

period in which, mostly due to the national codes of private law made in most of the EU Member States, legal science had become strictly national.[8] Legal concepts and solutions were perceived as characteristic for the specific legal system, and hardly any look was taken at other systems. The rise of comparative law as a subject of study meant the re-discovery of the period of the *Ius Commune*, in which there has been a common law of Europe, as well as renewed interest in Roman law, the law that once had applied throughout Europe. Moreover, comparisons between legal systems in Europe, both between civil law systems and between common law and civil law systems showed great similarities in certain areas of law. In particular the law of obligations, more specifically the law of contract received much attention. This renewed interest led to great publications such as Zimmermann's Law of Obligations, Glenn's work on legal traditions, and much more.[9] Moreover, it led to dreams about reunifying Europe through a code of private law for the European Union. Parallels were drawn to the unification of the Germanic States in the 19th century and the role a unification of private law had played there.[10] Moreover, parallels were drawn to the discussion on what has become known as a top down or bottom up harmonisation. Of course, there was also opposition to these ideas, in particular in the person of Pierre Legrand, who argued that legal systems cannot converge and that a European Civil Code was therefore unfeasible.[11]

In order for a law school curriculum to connect to the state of affairs in those days, it was necessary to offer courses on legal history and comparative law and on comparative law itself. Moreover, some attention had to be paid to the law of the European Union, in this

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Legal System. Towards as Ius Commune throught the free movement of legal rules, 5 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 328, 328-329 (1998).

[8] The exceptions are, of course, the law of England and Wales, the law of Scotland, Northern Ireland and the Republic of Ireland. These common law or, in case of Scotland, mixed legal systems, are generally uncodified legal systems. However, the characterisation that these systems have an isolated view and focus on their national tradition just as much applies. See, C. Donahue, *Comparative Law before the Code Napoléon*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, 3 (M. Reimann & R. Zimmermann eds.,2006).

[9] REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS. ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION (1996), H. Patrick Glenn, *Legal Families and Legal Traditions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, 421 (M. Reimann & R. Zimmermann eds.,2006). See also, JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW. PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT (2006); JAMES GORDLEY AND ARTHUR TAYLOR VON MEHREN, AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW. READINGS, CASES, MATERIALS (2006).

[10] R. Zimmermann, *Savigny's Legacy; Legal History, Comparative Law, and the Emergence of a European Legal Science*, 112 LAW QUARTERLY REVIEW, 576 (1996); Reinhard Zimmermann, *Europeanization of Private Law*' in THE OXFORD HANDBOOK OF COMPARATIVE LAW, 539 (M. Reimann & R. Zimmermann eds.,2006).

[11] Pierre Legrand, *Sens Et Non-Sens D'un Code Civil Européen*, 4 REVUE INTERNATIONALE DE DROIT COMPARÉ, 779 (1996); Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 52 (1996); Pierre Legrand, *Against a European Civil Code*, 60, 1 MODERN LAW REVIEW, 44 (1997).

respect in particular the drafting of Directives and Regulations that had an effect on the systems of private law in the Member States.[12]

The resistance against those focussed on achieving a harmonisation of law grew and more and more attention was paid to the difference between legal systems as well as the difficulties in achieving a civil code for Europe.[13] At the beginning of the debate the differences between civil law and common law had been central, but later the differences between civil law systems also became the focus of attention. For law school curricula this development was a golden opportunity to make diverse and original contributions in the course of a comparative law programme.[14] Academics could introduce the students to their own ideas and through that develop their own school of thought. As a result however, the content of the course differed very much depending on the school that was followed. These could vary from historical-oriented courses to courses almost strictly dealing with law and economics, but also in content from focussing on comparative law or on European Union law.

Depending on the country in which the course would be taught, the materials would be in one single language, for instance in English, German, Dutch, French or Italian, or would be a combination of any of these and more. Of course, the materials that could be offered would very much depend on the knowledge of the staff and of the students taking the course. However, offering materials from different jurisdictions, not necessarily in the same language, is crucial to convey the differences in legal approaches and concepts as well as to underline similarities in the approaches taken and the concepts used. It is therefore useful to underline both diversity as well as similarities in concepts and approaches. Using comparative literature from only one single jurisdiction will not likely lead to as complete a view of private law in the European Union as when sources from different jurisdictions are used.

From 2008 most of these problems potentially solved with the publication of the research results of the Study Group on a European Civil Code in the form of the Principles of European Law (PEL) and in the form of the Draft Common Frame of Reference (DCFR). These publications offer a solution to two typical problems in comparative private law teaching. First of all, the principles formulated are accompanied by a series of comparative notes that are the result of multiple years of research conducted by researchers from around Europe. The result is therefore a very rich source of comparative materials, all

[12] See, for example, J.M. Smits, *Supra* (note 7), 328-329.

[13] Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, 383 (M. Reimann & R. Zimmermann eds.,2006).

[14] See, for example, the work on legal transplants, M. Graziadei, *Comparative Law as the Study of Transplants and Receptions,* in: THE OXFORD HANDBOOK OF COMPARATIVE LAW, 441, 442-444 (M. Reimann & R. Zimmermann eds.,2006).

compiled in English and in one single volume per topic. For a comparative law curriculum these sources therefore offer, at least to those who master English, a solution to the search for comparative materials. Preferably combined with a set of other sources that are more nationally oriented, and perhaps also provide a critical view on the PEL and DCFR sources, the combination of materials should give its student a proper overview of the content of private law in the European Union.

Secondly and equally exciting, the research group has also set forth principles that either represent the law of the Member States or that offer, in the view of the researchers, the best rule. Although this approach as well as its results can be criticised from all sorts of viewpoints, they do offer an excellent teaching tool.[15] The discussion of a general principle or rule on a certain subject offers the student a view on what is likely a different solution from his own legal system, as well as raises the question whether the rule from the own legal system may fall under that European principle or rule. The first aspect concerns the more traditional aspect of using comparative law to create a better understanding of the own legal system. The second aspect creates awareness of the place of one's own legal system in an international legal order in development. It is in this latter aspect in particular that the most important contribution of the Study Group on a European Civil Code to legal education can be found.[16]

The principles and rules offer the possibility to develop curricula from the second type into curricula of the third type. Moreover, they offer justification to do so now that the European Commission seems to be taking the development of an actual European private law seriously.[17] Regardless of the opinion on the development of private law, it is the task of universities to be critical of these developments and to therefore deal with these documents. In doing so, they assist the further development of the discipline.

Nevertheless, there are challenges that this type of education faces. First of all, teaching such a subject requires a complete overview of the current state of development. However, such an overview is hardly held by one single academic, except perhaps those actually participating on a high level on the development of the Common Frame of

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[15] N. Janssen and R. Zimmermann, *Restating the Acquis Communautaire? A Critical Examination of the "Principles of Existing EC Contract Law*, 71 MODERN LAW REVIEW 505 (2008) . Although also the use of the DCFR as a teaching tool has been criticised, see J.M. Smits, *The Draft Common Frame of Reference, Methodological Nationalism and the Way Forward*, in: 16 EUROPEAN REVIEW OF PRIVATE LAW 278 (2008).

[16] The study group itself also emphasizes the use of its document as a teaching tool. See Christian von Bar *et al.* (2009), *Supra* (note 1), 7.

[17] See, *inter alia*, THE EUROPEAN COMMISSION'S COMMUNICATION ON EUROPEAN CONTRACT LAW AND THE REVISION OF THE ACQUIS: THE WAY FORWARD COM' 651 (2004); FIRST ANNUAL PROGRESS REPORT ON THE COMMON FRAME OF Reference, 23 SEPTEMBER 2005COM, 456 (2005) GREEN PAPER ON THE REVIEW OF THE CONSUMER *ACQUIS*, 8 FEBRUARY 2007 COM, 744 (2006) and SECOND PROGRESS REPORT ON THE COMMON FRAME OF REFERENCE 25 JULY 2007 COM , 447 (2007).

Reference at the moment. Secondly, the existence of a large body of European Union law in this area does not only require knowledge on private law, but also knowledge of the law of the European Union. In order to deal with the effects of the European legal order, this knowledge should go beyond the standard knowledge of a generally trained lawyer, as it requires study and understanding of both the drafting process of legislation as well as the decisions of the European Court of Justice and, perhaps most importantly, their impact on national law. It is in the third type of curriculum in particular that all of these aspects are combined.

The Draft Common Frame of Reference (DCFR) combines the principles of European law (PEL) which are the result of comparative study of the laws of the Member States and the *Acquis* principles (ACQP). These second set of principles are drafted by the Research Group on Existing EC Contract Law (*Acquis* Group) and form a set of principles and rules derived from the existing body of EU legislation and case law of the European Court of Justice.[18] The DCFR offers a combination of both and should therefore be considered to include elements of national law as well as elements of European law. Understanding the principles and rules of the DCFR therefore requires extensive knowledge on both aspects.
Moreover, teaching any area of national private law increasingly requires knowledge on the law of the internal market in the European Union, in particular the rules dealing with free movement of goods, persons, services and capital, as well as EU competition law. A short example using private law may illustrate. In national private law scholarship the influence of European Union law on some areas, for example property law, is usually denied.[19] However, in recent years, the European Court of Justice has ruled on several occasions on cases dealing with property law. These include free movement of goods, but mostly the free movement of capital.[20] Especially concerning the free movement of capital, laws of the Member States governing the acquisition of ownership of a piece of land used as a secondary residence, have been struck down.[21] Moreover, European law also interferes in other private law relations. In German law, for instance, it is possible to use a

[18] On the *Acquis* Principles (ACQP) and the drafting process see C. Twigg-Flesner, *The Acquis Principles: an insider's critical reflections on the drafting process*, in:. THEORY AND PRACTICE OF HARMONISATION, (C. Baasch Andersen, M. Andeneas eds ,forthcomming), available at at: http://ssrn.com/abstract=1342713.

[19] For a rejection of this idea see, *inter alia*, J.H.M. VAN ERP, EUROPEAN AND NATIONAL PROPERTY LAW: OSMOSIS OR GROWING ANTAGONISM? (2006), Vincent Sagaert, *De Verworvenheden Van Het Europese Goederenrecht*, in DE INVLOED VAN HET EUROPESE RECHT OP HET NEDERLANDSE PRIVAATRECHT, 301 (A.S. Hartkamp, C.H. Sieburgh, and L.A.D. Keus eds.,, 2007), Bram Akkermans, THE PRINCIPLE OF NUMERUS CLAUSUS IN EUROPEAN PROPERTY LAW, 475 (2008).

[20] See Case C-69/88 *H. Krantz GmbH & Co v Ontvanger der Directe Belastingen en de Staat der Nederlanden* [1990] ECR I-583, Case C-302/97 *Klaus Konle v Republik Österreich* [1999] ECJ I-3099, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Hans Reisch and others v Bürgermeister des Landeshauptstadt Salzburg and others* [2002] ECR I-2157, and Case C-370/05 *Criminal Proceedings against Uwe Kay Festersen* [2007] ECR I-1129.

[21] Case C-302/97 *Klaus Konle v Republik Österreich* [1999] ECJ I-3099, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Hans Reisch and others v Bürgermeister des Landeshauptstadt Salzburg and others* [2002] ECR I-2157, and Case C-370/05 *Criminal Proceedings against Uwe Kay Festersen* [2007] ECR I-1129.

right of servitude to secure the performance of a certain obligation. This is done through the formulation of a prohibition that forms the content of a right of servitude. Besides the right of servitude, a contract is concluded between the parties, which states that the right of servitude will not be invoked as long as one of the parties performs his obligation under the contract.[22] These types of contracts are used, for example, between petrol companies and owners of gas stations. The contract, however, and therefore also the property right indirectly, is subject to the rules of competition law, either national or European, depending on the parties involved. As a result such a contract can only be made for a short duration of time.[23] These examples show that national law can always, especially in its effects, be subject to the law of the Internal Market. The reasoning of the European Court of Justice does not concern itself with national classifications of concepts in a certain area of law, but with the effects on intra-Community trade only. Such is, after all, the *Dassonville* formula that brings all hindrances, whether actual or potential, direct or indirect, under the ambit of the free movement of goods.[24] A similar reasoning is applied in respect to the other freedoms.[25] Occasionally, even purely national affairs can still invoke a preliminary ruling from the European Court of Justice, whereas it was previously thought to be outside the scope of European Union influence.[26] In other words, in order to understand the law of a country, European Union law must be understood in such a way as to make sense of the ongoing osmosis of national and European law.[27]

National law is therefore no longer strictly national law, but rather the law in a specific country.[28] German law is therefore more the law that applies in Germany, which can either be national law made through national legislative procedure taking into account the potential effects on the internal market, national law made through the national procedure in the implementation of European legislation, or European legislation directly.
The effects of this on legal education should be visible: we need courses on *New* European Private Law. The influence of European Union law on the private law should no longer be denied. However, change is not easy. Many of the current curriculum-developers were

[22] See, for more on this, Bram Akkermans, *Supra* (note 19), 195.

[23] OLG Munchen 4 September 2003, NJW-RR 2004, 164.

[24] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, Para 5.

[25] See, in this respect, the Opinion of AG Geelhoed in Case C-515/99 *Reisch* [2002] ECR I-2157.

[26] See, for instance, Case 448/98 *Criminal Proceedings against Jean-Pierre Guimont* [2000] ECR I-10663, para 22-23, and Case C-515/99 *Reisch* [2002] ECR I-2157.

[27] The term osmosis is frequently used by Sjef van Erp in his work on European Private Law. See J.H.M. Van Erp, *De Osmose Van Nederlands En Europees Goederenrecht*, 10, 94 NEDERLANDS TIJDSCHRIFT VOOR BURGERLIJK RECHT, 533 (2004), J.H.M. van Erp, EUROPEAN AND NATIONAL PROPERTY LAW, *Supra* (note 20) ;and J.H.M. VAN ERP, HUIDIG EN TOEKOMSTIG EUROPEES ZEKERHEDENRECHT, PRE-ADVIES AAN DE KONINKLIJKE NOTARIËLE BEROEPSORGANISATIE, (forthcoming).

[28] J.H.M. van Erp, HUIDIG EN TOEKOMSTIG EUROPEES ZEKERHEDENRECHT, *Supra* (note 27).

trained in a nationally oriented curriculum and, in times of strong anti-European sentiment, are not always interested in the most current European developments. Additional measures might therefore be needed to allow European law school curricula to connect with the most up to date state of affairs in their legal order.

C. Cooperation as a solution to the current challenges

A course in a law school curriculum that intends to provide a complete overview of the development of European private law must combine comparative law, European Union law in its positive form, i.e. through European legislation, and negative form, i.e. through the case law of the European Court of Justice, the Draft Common Frame of Reference and its development, as well as an understanding of the political process in the European Union.[29] The latter part is especially relevant in order to create a full understanding of existing, but also future, legislation.

European Private Law is becoming increasingly complex, so much so that perhaps it has become too much for a single person to understand. Few universities will be able to gather a group of people knowledgeable enough and with allocated teaching time enough to provide a lucky group of students with a perfect course on European private law. Moreover, dealing with all aspects of the New European Private Law might require more time than is currently allocated to a single course in the curriculum. Ideally a student in a course on New European Private Law has already completed a full course on foundations of European law dealing with the EU Institutions and their relations and governance structures as well as a full course on European substantive law dealing with the four freedoms in the Internal Market at the least. After this general knowledge on European Union law the student would be ready to tackle the application of European Law to the law of the Member States: to deal with the application of European law in reality.

The subject of New European Private Law should therefore not strictly focus on the similarities, although they cannot but pay attention to the system of European Private Law that is created through positive and negative integration, but also should pay respect to the differences between the laws of the Member States and potentially how European law does or, in particular, does not solve these. The emphasis on similarity or difference is a general methodological question in European private law that all, students and teachers alike, must deal with.[30]

[29] Moreover, it should take into account other international organisations such as the United Nations, The Council of Europe, the World Trade Organisation etc.

[30] Gerhard Dannemann, *Supra* (note 13).

Knowledge of the New European Private Law must be acquired through a process of learning about the different areas of law it comprises, as well as, through observation of its functioning for a while. Depending on, *inter alia*, the political and methodological foundations, a certain emphasis will follow automatically. The past has shown how academics can become divided on questions of similarities or differences.[31] Such another divide must be avoided, as it would be likely to bring the debate back to the old arguments, rather than to move the scholarship forward.

Perhaps the time has come to cooperate intensively, at an international level, to develop the scholarship on New European Private Law. The networks of academics, stakeholders, in particular practitioners, and other interest groups have previously worked together to draft principles. Perhaps these same academics, practitioners and interest groups can work together on a New European Private Law Curriculum. We should increasingly try to co-teach courses, collaborate electronically and, most important of all, spend time at each other's faculties to observe and learn from each other.

For a long time academics have worked together to co-teach courses on an individual basis. Often this cooperation follows from research networks and ad-hoc research cooperation already in place. Usually, these contacts come through academic friendship and respect for each other's work. However, a forum of New European Private law could offer a more structural basis to exchange information on each other's courses and create opportunities to meet and co-teach.

Electronic communication could offer an almost perfect tool. When it is logistically or financially impossible to travel to meet in person, the Internet offers an opportunity. More and more universities build facilities to teach over the Internet. This may be with a group of students on one end and an academic at the other end, addressing the students through video, either with or without any other technical aids. However, it may also be two groups of students with two teachers collaborating over the Internet through a live video connection. It has now become possible for students and teachers alike to enter into a debate with each other on any topic, in real-time, without having to travel to meet each other.

Such collaboration would allow students from different cultures to engage in a discussion on the rise of a New European Private Law, to discuss the different application of European legislation in their country, or to debate on other topics of European Private Law. The results could be common papers, common presentations and, possible, a meeting between the students at the end of a very successful course through a student conference of colloquium. The development of electronic communication, using text, voice and video, would at least be worth a try.

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[31] See P. Legrand, *Against a European Civil Code*,, *Supra* (note 11); TOWARDS A EUROPEAN CIVIL CODE, 3rd revised and expanded edition, (A. Hartkamp et al. eds., 2004).

Another way in which electronic communication can be used is through previously recorded video. Increasingly academics are using visual aids in their presentation of the subject matter to students. This may vary from 'simple' slides summarising information or the view of the lecturer, to complicated multi-media presentations that support the communication from teacher to student. Cooperation in this area can also be very interesting.

It will be almost impossible to provide students with an overview of all the relevant actors and ideas in the area of New European Private Law. However, it is possible to introduce the students to the main schools of thought. This can be done in a classic way by making the students read contributions written by principal proponents of a certain school, but it perhaps may also be achieved through showing students a short video of the person in question explaining his or her views. It would be cooperation at a relative low cost to make a set of constantly expanding videos (in multiple languages), including subtitles in multiple languages, to show to students of New European Private Law. This could either be done as a part of teaching, or as 'reading material' on their own time. It would allow all contributors to benefit from the work of others by being able to share their work with students. Moreover, it would also allow other 'stakeholders' to participate in the education of students of New European Private Law. These could include Members of the European and national parliaments, as well as civil servants from the European Commission.[32] Such an initiative would possibly allow a more complete overview of all the various actors and their respective ideas.

Most importantly, however, we should try to spend time at each other's institutions for as long as possible. The study of a New European Private Law and the hopefully accompanying rise of a New European Private Law scholarship should offer more and easy opportunities to exchange.[33] The increasing role of the European Court of Justice should offer assistance here. As more and more the cases of the Court deal with matters of national private law, and the cases are translated into the official languages of the European Union, the case law of the European Court of Justice is increasingly becoming a rich library of information on the private law of the Member States. Moreover, the publication of the Principles of European Law offers such an opportunity, as the comparative notes present the laws of the Member States in English.
It should therefore have become easier to find out whether a particular legal system is relevant for a particular type of research. Moreover, the increasing body of available material in English allows for better preparation for a visit to another jurisdiction and to should also increase the effectiveness of a stay abroad.

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[32] See, for example, the video's posted online by MEP Diana Wallis. Diana Wallis, *On European Contract Law*, Available at :http://www.metacafe.com/watch/1699851/diana_wallis_on_european_contract_law/.

[33] This would seem to be in line with the European Commission's plans for the development of a European Research Area (ERA). See GREEN PAPER THE EUROPEAN RESEARCH AREA: NEW PERSPECTIVES COM, 161 (2007) .

D. The End of University as We Know It?[34]

Times are changing and the development of society, as well as the rise and further development of new legal scholarship, increases the need to adapt our law school curricula. It proves an excellent opportunity to re-evaluate the way in which lawyers are educated. I argue that one way forward can be found in the recognition of the reality in which European private law is continuously developing in the Internal Market of the European Union. The availability of new materials, offered on the basis of comparative and European Union law scholarship, in the form the PEL, ACQP and DCFR, including comments and notes, finally offers one way to do it. Additionally, the increasing body of case law of the European Court of Justice also offers a rich source of information, available in all languages of the EU.

I argue that we should achieve this through cooperation. Cooperation will allow a more consistent development of a new European private law scholarship in which there is room for diversity of opinions. Cooperation should avoid a unreasonably harsh battle of schools of thought on the desirability of a European Civil Code. It should stimulate debate, rather than end it. What should unite students (and that includes teachers) of New European Private Law is the awareness of the growing body of private law and the conviction that this private law should be studied from multiple angles. These angles include comparative insights, but also the recognition of the importance of European Union law and the effects this has on national law.

In his opinion article to the New York Times, Mark C. Taylor argues that change is needed if American education is to thrive in the 21st century. He suggests, *inter alia*, restructuring the curriculum into a 'web or complex adaptive network' in which there is room for multiple disciplines, and increasing collaboration among institutions. The same applies to European education. The development of a New European Private Law scholarship, and the accompanying law school curriculum may offer a way forward.

If this is the future of legal education in the area of private law, there is no longer room for the traditional –nationally oriented- law school curriculum. Law schools that offer a curriculum of this type should move towards a comparative law curriculum as quickly as they can. Law school that offer a comparative law curriculum should take the challenge to develop it into a European and comparative law curriculum. The time is right to do so. Finally, law schools that already provide a European and comparative law curriculum should take a leading role in the development of these types of curricula. The example of new European private law shows that it can be done. Moreover, these law schools should take responsibility for advancing the state of development they are in and reach out to the

[34] See, Mark C. Taylor, *End the University as we know it,* NY TIMES, (27 April 2009), Available at: http://www.nytimes.com/2009/04/27/opinion/27taylor.html

law schools that may be able to use their help. This includes opening up course material and sharing course literature with colleagues that share the same interest. Together we can create better lawyers that may actually be able to move beyond the restrictions of our national legal systems and who may actually be able to decide where the law should go next.

SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

The Ambivalent Role of Experiential Learning in American Legal Education and the Problem of Legal Culture

By David M. Siegel[*]

Recent criticism of American legal education has focused on its being theory-driven rather than practice driven, which either produces or reinforces a divide or gap between theory and practice. Yet two features of American legal education expressly draw upon experiential learning, one directly by sending students into experiential learning situations (legal clinics) and the other indirectly by bringing instructors who are engaged full-time in active practice into the classroom (*i.e.* adjunct faculty). If skills development is a feature of American legal education, to what degree can, or should, this be transplanted to other systems of legal education? Are American experiential techniques of legal education meaningful elsewhere?

While both legal clinics and adjunct faculty are virtually universal in penetration of American legal education, they have ambivalent positions in the academy. To the extent that either adjunct faculty or legal clinics respond to the criticism that American legal education does not adequately remedy the theory/practice divide, to what degree is either transplantable? Another approach to the question might be: to what degree are these methods of instruction a cause, or an effect, of the adversarial system?

Part A of this article briefly reviews data describing the role of adjunct and clinical faculty in American legal education to show the position each has as nominally important yet distinctly secondary in the pedagogical framework. Part B briefly reviews recent evaluations of attempts to transplant American educational approaches, and suggests legal culture as an explanation for the results of these efforts.

A. Adjunct and Clinical Faculty in American Legal Education

American legal education is undergoing extensive self-study.[1] Virtually all of the seven basic recommendations of the recently released report of the Carnegie Foundation for the

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[1] WILLIAM M. SULLIVAN, ET AL, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, Carnegie Foundation for the Advancement of Teaching (2007) (hereafter "CARNEGIE REPORT").

Advancement of Teaching, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, address integrating the experiential or practical aspects of legal education with doctrinal ones. For example, Recommendation 4 ("Support Faculty Work Across the Curriculum"), suggests "[b]oth doctrinal and practical courses are likely to be most effective if faculty who teach them have some significant experience with the other, complementary area."[2] Similarly, Recommendation 5 ("Design the Program so that Students—and Faculty—Weave Together Disparate Kinds of Knowledge and Skill") observes ". . . in teaching for legal analysis and lawyering skills, the most powerful effects on student learning are likely to be felt when faculty with different strengths work in a complementary relationship." These recommendations conflict with the present status of adjunct and clinical faculty in important respects.

I. Adjunct Faculty

Adjunct faculty, lawyers and judges with full-time occupations who also teach part-time in law schools in non-tenure track positions, have a growing but ambivalent position in US legal education. Recent surveys suggest roughly one quarter of courses in US law schools are taught by adjuncts,[3] and that economic pressures will almost certainly expand their use. Lander surveyed fifty-six law schools' use of adjunct faculty in the Spring 2007 semester,[4] and found a median use of adjuncts in 24% of classes. In terms of subject matter, at most schools a majority of trial advocacy classes were taught by adjuncts, as were specialty courses such as sports law, entertainment law, bankruptcy, and to a growing degree advanced corporate and tax courses.[5] He confirmed that the use of adjuncts was increasing.

Against this growth are key systemic factors that limit the role for adjuncts. While law school accreditation rules of the American Bar Association (ABA) encourage including "practicing lawyers and judges as teaching resources to enrich the educational program,"[6] they also require that "full-time faculty shall teach the major portion of the law school's curriculum, including substantially all of the first one-third of each student's coursework."[7]

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[2] *Id.*, summary at 7.

[3] David A. Lander, *Are Adjuncts a Benefit or a Detriment?*, 33 UNIV. OF DAYTON LAW REV. 285 (2008) (citing 2004 survey, and conducting 2008 survey) (hereafter "Lander").

[4] Lander, *supra* note 3, at 288. Lander sent a survey to all law schools in the AALS Directory; fifty-six responded.

[5] *Id*.

[6] AMERICAN BAR ASSOCIATION, Standard 403(c) ("Instructional Role of Faculty"), 2008-2009 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS. Available at http://www.abanet.org/legaled/standards/20082009 Standards WebContent/Chapter%204.pdf (last accessed on 14 June 2009) (hereafter "ABA STANDARDS").

[7] ABA STANDARDS, Standard 403(a).

ABA accreditation rules count adjuncts as only 2/10 of a full time faculty member for calculating student-faculty ratio (a criteria for accreditation), and limit to 20% for student-faculty ratio purposes the total proportion of faculty that can be adjuncts.[8]

Perceptions about advantages and disadvantages of adjunct faculty are well-established, but they are supported by very little data. Adjunct faculty are thought to bring areas of specialized expertise to the curriculum, "real world" or practically-oriented approaches to their subjects, highly relevant experience for practice or simulation-based courses, teaching enthusiasm, and networking opportunities for students.[9] Drawbacks may include limited availability to students as part-time teachers, reduced teaching quality vis-à-vis full time faculty, and the secondary effects of having a subject area dominated by part-time teachers such as reduced scholarship and reduced institutional attention to these subjects.[10] There has been very little systematic study or collection of data on the effects of adjunct teaching in law schools.

There has been greater study of the use of part-time, non-tenure track faculty in non-professional education, where they are used much more frequently than in legal education.[11] Use of part-time, non-tenure track instructors in undergraduate education, where they may be graduate students headed to an academic career, may not be directly comparable to their use in legal education but it offers some data. Part-time, non-tenure track faculty have been used in the US for over a century,[12] with significant increases after World War II particularly in the 1970s and 1980s, due to their low cost compared to tenure-track faculty.[13]

Extant data do not support significant distinctions between outcomes, either perceived or measurable, between part-time and full-time faculty. Comparisons of student evaluations of part-time and full-time faculty in eight different social science departments at a large public university (Boise State) show "no significant differences in students' evaluation of

[8] ABA STANDARDS, Interpretation 402-1(1) to Standard 402 ("Size of the Full-Time Faculty").

[9] Lander, *supra* note 3, at 289-90.

[10] *Id.*, at 291-92.

[11] A 2003 by the National Center for Education Statistics found 43.7 percent of instructional faculty at degree-granting institutions in the US were part-time faculty. National Center for Education Statistics, 2005. *Full-time and part-time instructional faculty and staff in degree-granting institutions, by field and faculty characteristics: Fall 1992, Fall 1998, and Fall 2003 Table 232.* US Department of Education, Institute of Education Sciences. Available at http://nces.ed.gov/programs/digest/d05/tables/dt05_232.asp (last accessed on 14 June 2009).

[12] Kate Thedwall, *Nontenure-Track Faculty: Rising Numbers, Lost Opportunities*, 143 NEW DIRECTIONS FOR HIGHER EDUCATION (Fall 2008).

[13] *Id.*, at 13.

instruction or in course grade distributions."[14] In 2004, Bettinger and Long compared outcomes for undergraduates at twelve public universities in Ohio who had taken courses with full-time faculty to those who had taken the same courses with part-time instructors (adjuncts and graduate students).[15] They found that the use of adjuncts and graduate student instructors reduces the number of courses a student later takes in the same subject and the likelihood that the student will major in that field. However, "[t]he results suggest that adjuncts and graduate assistants negatively impact enrolments but not student success in subsequent courses."[16]

II. Clinical Instruction

Clinical instruction, virtually universal in US law schools, offers a direct method of transcending the theory/practice divide in legal education, and its history has been thoroughly set forth elsewhere.[17] It offers application of concepts and skills to "real world" problems, opportunities for social change, engagement with persons who are underserved, and a chance for students to see the larger consequences of their actions. Yet it too has an ambivalent position in American legal education. While the ABA requires that accredited law schools offer "substantial opportunities" for "live-client or other real-life practice experiences,"[18] it does not mandate that students participate in them as a requirement of graduation and it makes clear that accredited schools need not offer them to every student.[19]

A 2007-2008 study by the Center for the Study of Applied Legal Education, surveying 188 ABA-accredited US law schools, suggests that clinical education, either "in-house" with "live clients" or in external "field placements," is a significant feature of US law students' experience measured by their participation *but not* as measured by its formal integration into the curriculum. The study found that only 9% of responding schools had a graduation requirement that students participate in a legal clinic, either in house or in a field

[14] R. Eric Landrum, *Are there Instructional Differences between Full-time and Part-time Faculty?*, 57 COLLEGE TEACHING 23, 25 (Winter 2009).

[15] Eric Bettinger and Bridget Terry Long, *Do College Instructors Matter? The Effects of Adjuncts and Graduate Assistants on Students' Interests and Success,* NBER Working Paper No. 10370 (2004).

[16] *Id*. at 25-26.

[17] Andreas Bücker and William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence Through Clinical Experiences*, 9 GERMAN L. J. 575, 578-609 (2008).

[18] ABA STANDARDS, *supra* note 6, Standard 302(b)(1) ("Curriculum") ("The offering of live-client or real-life experiences may be accomplished through clinics or field placements. A law school need not offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real-life practice experience.").

[19] *Id*., Interpretation 302-5.

placement.[20] Despite the optional status of clinic participation at the overwhelming majority of schools, estimates by responding schools of student participation rates in at least one applied legal education experience by graduation were a median of 26-30% for both in-house clinics and field placements.[21] Nearly two-thirds of responding schools (62%) reported an increase over the past five years in student demand for both types of applied legal education.[22]

B. Transplanting Methods of Instruction

As has been observed before, law is practice and theory, it is doing and thinking, and there has been persistent disagreement as to which aspect of law should predominate in education of lawyers.

The debate over the skills and values required to be an effective lawyer is as old as the profession itself. The history of legal education in the United States is a reflection of that debate. While much has been written about the fundamental skills and values needed to practice law, there is no agreed upon list that all American law schools embrace.[23]

Despite the recent criticisms that American legal education lacks integration of doctrine and skills, or theory and practice, in comparison to continental European approaches, it does integrate these components.[24] American legal education, however, perhaps uniquely, requires no period of practical training.[25]

To what degree do these differences in educational approaches limit the transferability of experiential techniques? Are the educational approaches a function of the legal systems or the legal cultures? "One of the most over-looked differences between practical training

[20] David A. Santacroce & Robert R. Kuehn, *Report of the 2007-2008 Survey*, Center for the Study of Applied Legal Education at 10. Available at: http://www.csale.org/CSALE.07-08.Survey.Report.pdf (last accessed 14 June 2009). 145 schools (77%) responded to the "Master Survey." *Id.* at 1.

[21] *Id.* at 10-11.

[22] *Id.* at 11-12.

[23] Andreas Bücker and William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence Through Clinical Experiences*, 9 GERMAN L. J. 575, 589 (2008).

[24] *Id*. at 609-610.

[25] Marta Skrodzka, et al, *The Next Step Forward - The Development Of Clinical Legal Education In Poland Through A Clinical Pilot Program In Bialystok*, 2 Col. J. East. Eur. L. 56, 71-72 (2008) (noting practical training before second level examination in Germany, pupilage year in the UK, and three year period for acquisition of practical skills in Poland).

models is the legal education system within which the clinical education programs must function."[26]

The application of concepts and skills to "real world" problems, the potential for social change, and engagement with the underserved have been recognized as beneficial when clinical instruction is offered outside the US as well.[27] The experience of introducing clinical instruction outside the US, particularly in countries with civil law systems, has raised several questions concerning the applicability of the approach.

Clinical instruction has gone abroad, mostly through US clinical instructors working with non-US law schools in what Wilson has called the "Global South" (*i.e.*, Latin America, Africa, much of Asia and politically evolving areas of Russia and former Soviet-dominated countries of Eastern Europe).[28] This history has been thoroughly set out[29] as successive waves of US legal academics have participated in efforts to export American legal concepts and educational approaches.

Much of the experience with the transplantation of clinical education has been US educators offering clinical courses, or collaborating with non-US instructors, in developing clinical programs outside the US. Often this involved work in countries with a newly democratic legal system, or a newly independent legal system, in which the growth of legal education that explicitly promoted social change was a goal. How meaningful is any effort to transplant aspects of legal education thought to bridge the theory/practice divide, such as experiential learning through clinics and experiential instruction through adjuncts, in systems of legal education in countries with stable democratic traditions? How well do experiential work in developing hybrid legal systems or changing a legal culture from exclusively one model to another?[30]

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[26] Marta Skrodzka, at al, *The Next Step Forward - The Development Of Clinical Legal Education In Poland Through A Clinical Pilot Program In Bialystok*, 2 Col. J. East. Eur. L. 56, 68 (2008).

[27] Tatiana Selezneva, *Innovative Legal Education and Its Role in Developing the State Based on the Rule of Law: Analysis of the U.S. Law Schools Academic Experience and the Prospects of its Implementation in the Republic of Belarus*, 58 J. LEGAL EDUC. 122, 138 (2008) (purposes of legal education include "guide the student in how to practice active social and democratic modes of behavior"); Andreas Bücker and William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence Through Clinical Experiences*, 9 GERMAN L. J. 575, 611-613 (2008).

[28] Richard J. Wilson, *Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance and Conformity in the Global South*, 8 CLIN. L. REV. 515, 518 n. 8 (2002).

[29] Leah Wortham, *Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve on How to Do So Effectively*, 12 Clin. L. Rev. 615 (2006).

[30] Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L AND COMP. L. 1 (1997) (suggesting efficiency advantages of German civil procedure would impose other costs on the American legal system because they are premised on features of German culture).

These questions increasingly focus not only on the specific processes and rules of a legal system but instead on its underlying culture. It is easy to imagine simply using methods of instruction from one country in another, but if the understanding, expectations and frameworks of students, educators, and legal actors in the country do not accommodate this method, the transplantation will not be meaningful. Nelken has written thoughtfully about the concept of legal culture as an explanatory mechanism for comparing law on the ground, or as it is actually implemented, and a similar use might be made of legal culture in connection with studying educational approaches to law.[31] Legal culture as expressed in American legal education that has in the past century generally maintained a strict division between practice and theory (or even practice and instruction), may be useful way of understanding systemic choices.

Recently, Genty has canvassed his own experiences and those of others to identify five core differences between civil and common law "cultures," either as manifested in their legal systems, their systems of legal education, or both, and the implications of these differences for effective clinical instruction.[32] Genty notes these five differences between broadly defined civil law and common law legal cultures:

> (1) Importance in civil law cultures of substance over process;
> (2) Importance in civil law cultures of mastering, rather than creatively interpreting, legal doctrine;
> (3) Limited importance in civil law cultures of attorney-client relationship;
> (4) Importance in civil law cultures of an informed authority figure; and
> (5) The lack of a concept in civil law cultures of cause lawyering.[33]

Genty suggests civil law countries will need to adapt clinical instruction to their own cultures by approaching it as a "laboratory experiment," in which the "scientific" principles in a specific area of doctrine can be tested.

Others attempting to bring American-style legal instruction, beyond just clinical instruction, to civil law audiences have experienced resistance to both parts of the system and to its underlying concepts. Cavise has detailed resistance of Latin American lawyers from systems moving toward an increasingly party-based approach using orality who were presented simulation and trial advocacy-type courses.[34] These lawyers resisted both

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[31] David Nelken, *Using the Concept of Legal Culture*, Center for the Study of Law and Society Jurisprudence and Social Policy Program (2004) Available at http://repositories.cdlib.org/csls/lss/20 (last accessed on 14 June 2009).

[32] Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide between Civil and Common Law Cultures and Its Implications for Clinical Education*, 15 CLINICAL L. REV. 131 (2008).

[33] *Id.*, at 149-152.

[34] Leonard Cavise, *Essay: The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 WAYNE L. REV. 785 (2007).

adversarial institutions (*e.g.*, the jury system, an adversarial judge who acts as referee rather than rather directing the trial, and plea-bargaining) and the underlying concepts of the adversarial system (*e.g.*, the suggestibility of cross-examination, the responsibility of parties to investigate their cases and to develop a theory of the case).[35] Cavise's conclusion: "At issue is not only procedural and statutory reform but also a complete overhaul of the culture of the courtroom and the role of lawyers."[36] These anecdotal observations suggest that as increased efforts are made to bridge the practice/theory divide, increased attention will also have to be given to the specific legal culture in which the bridge is to be built.

[35] *Id.* at 803-812.

[36] *Id.* at 815.

Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education

By Richard J. Wilson[*]

A. Introduction

I. My Personal Experience with Clinical Legal Education Abroad

I have come to believe, over the last two decades of my consulting work outside of the United States, that the origins, growth and acceptance of clinical legal education throughout the world is the greatest single innovation in law school pedagogy – and certainly in student learning – since the "science" of the Socratic, case method was brought to Harvard by Christopher Columbus Langdell. I remember distinctly when I came to this conclusion. It was around the time of a conference held at beautiful Arrowhead Lake, in California, hosted by UCLA Law School and the University of London at the university's conference facility in the mountains of San Bernardino County, startlingly close to Los Angeles. The event was the Sixth International Clinical Conference, held in October of 2005,[1] and it was the first truly international event in that series. Yes, it was an "international" clinical conference, and prior events had provided participants with something of an international flavor, and the event was sponsored by British and American law schools. This, however, was something new, something different.

This was the first occasion when the agenda of the conference was filled with international speakers presenting papers on clinical legal education developments in their home countries. This was not American clinicians giving their papers on "how I spent my summer vacation developing clinics in [insert developing country name here]." This was clinicians from the United States, together with foreign colleagues, presenting work on the newest

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[1] The official website for the Sixth Conference is available at: http://www.law.ucla.edu/home/index.asp?page=1917, visited on March 12, 2009. The conference papers cited hereafter are available at: http://www.law.ucla. edu/home/index.asp?page=1949, visited on March 12, 2009.

frontiers of clinical legal education in India,[2] Israel,[3] Japan,[4] Russia,[5] China[6] and Australia.[7] These clinics were profoundly altering the shape and trajectory of legal education in countries that account for more than a third of the world's population, countries both developed and developing, countries that had seen radical shifts in the legal culture within the past few decades, and countries with stable democracies.

I remember that same feeling of awe a decade ago when I participated in a gathering of law school deans and teachers from Russia and other countries of the former Soviet Union, held in Budapest in 1998, under the sponsorship of what was then called COLPI, the Constitutional and Legal Policy Institute. COLPI was one of several initiatives in Central and Eastern Europe funded by George Soros, the philanthropist and social entrepreneur.[8] This was a groundbreaking meeting, with a strong share of skeptics, frowning and doubting deans and university administrators arguing that clinics were too costly, too "new" to be adopted by their faculties or their government agencies with oversight of legal education. The bar might oppose the provision of legal services by students, they argued, because of strict rules of admission to the bar and ethical standards forbidding non-lawyers from practicing law, and, perhaps most basically, because a clinic might take bread from the table of the practicing bar.

However, no one sat passively when I rose to speak and said that my preparations for my talk at the meeting were difficult, in that I had to keep up my training as high-jumping

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[2] *Id.,* Frank S. Bloch and M.R.K. Prasad, *Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross-national Currents from India and the United States*; *Id,.* Margaret Martin Berry, Martin Geer, Catherine F. Klein and Ved Kumari, Justice Education and the Evaluation Process (discussing faculty evaluation in clinical and non-clinical courses in the United States, India and other countries).

[3] *Id.,* Yuval Elbashan, *Teaching Justice, Creating Law – The Legal Clinic as a Laboratory* (discussing clinical legal education at Hebrew University in Jerusalem).

[4] *Id.,* Peter Joy, Shigeo Miagawa, Takao Suami & Charles D. Weisselberg, Building Clinical Legal Education Programs in A county Without a Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study *(discussing clinical legal education at Waseda Law School in Tokyo, Japan).*

[5] *Id.,* Oleg Anischik, *Situation in Clinical Legal Education in Russia and Activities of Clinical Legal Education Foundation (CLEF).*

[6] *Id.,* Zhen Zhen, *The Present Situation and Prosperous Future of China Clinical Legal Education*; Dou Mei, Lin Lei & Wu Zhongming, *An Innovation in Clinical Law Education of Nationalities Universities*.

[7] *Id.,* Phil Falk, Keryn Ruska, Jeff Giddings & Maree Stainlay, *Legal Clinics and Indigenous Australian Student Learning*.

[8] Ed Rekosh, founding director of the Public Interest Law Institute, in Budapest, delivered a paper at the 1998 conference. Edwin Rekosh, *Possibilities for Clinical Legal Education in Central and Eastern Europe* (1998), available at: http://www.pili.org/en/content/view/158/26/, visited on March 12, 2009.

champion of the world.[9] When the laughter stopped, I challenged them to ask me questions that would prove I was *not* the high-jumping champion, and the room exploded with action. Where did you train?, they asked. What is the record you hold? How much do you weigh? What methods do you use? (one eager participant rose, put a chair in front of me and challenged me to hop over it to show my skills. I declined – I pleaded that I was "in training, and had no proper equipment. Injury could set me back by months!"). When we had finished the fun, I asked them how a teacher might use that exercise in teaching a lawyer's skills. Their answers were excellent, and they did not depend on the legal system they came from – soviet, civil or common law – but on the kinds of questions that lawyers ask a potential witness or their clients when they doubt they are being told the truth, an all too common situation faced by practicing lawyers in any legal system.

The formerly Soviet deans and professors, all masters of the classroom lecture, had learned by doing, then by reflecting on their experience, the way most adults learn. Their experience had taught them more than anything I could lecture about for hours on end. I continued the session by asking, only somewhat rhetorically, which of them would rather be a passenger in an airplane whose pilot had obtained high marks in courses on the "The Laws of Aerodynamics," and "Theories of Aviation," and had studied planes taking off from the ground for 5,000 hours but had never flown, versus a pilot who had flown solo for 5,000 hours, preceded by in-flight training with an accomplished pilot at her side. The point was not lost on the audience, which nodded knowingly as to the answer.

The COLPI meeting, happily, was the first of my many trips back to the region – to Slovakia, Latvia, Lithuania, Georgia, Ukraine, the Czech Republic, Moldova, and several more conferences in Budapest – where it quickly became apparent that clinical legal education had taken hold in the region as one of the great innovations in legal education reform in those transitional democracies. The American Bar Association's Rule of Law Initiative now reports that there are more than 160 clinics in Russia.[10] Clinical legal education was recognized by schools in the region as a teaching and learning method that actually prepared students to practice law by exposing them to work in role, as an attorney representing clients, with all the attendant issues surrounding the skills, ethics and values of law as it is practiced throughout the world. Further, the clinical method of experiential learning – learning by doing – was not only consistent with everything we have learned in recent years about adult learning theory, but was also a breath of fresh air in the otherwise stultifying atmosphere of the "classical" classroom lecture methods imposed on law students during the Soviet era and before. In fact, these methods find their roots in Medieval university education throughout Europe.

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[9] This exercise, and others, are among the games and other techniques I have used in teaching lawyer skills, as set out in Wilson, The New Legal Education, at 454 et seq.

[10] USAID/Russia, American Bar Association Rule of Law Initiative, *Projects: Development of the Legal Profession*, available at; http://russia.usaid.gov/about/partners/ABA_ROLI/, visited on March 20, 2009.

II. The Global Reach of Clinical Legal Education

I had the same feeling again in Latin America in October of 2007, when I met with new clinical teachers in Mexico City, Mexico, this time under the auspices of the Justice Initiative, another Soros-funded initiative. This meeting brought together not only new clinical teachers from several law schools in Mexico, some with established clinics and some with proposals to open new clinics, but also with veteran clinical co-teachers from programs in Chile and Argentina. My "roots" in clinical legal education outside of the United States had begun with scholarships to Nicaragua[11] and Colombia[12] in 1986 and 1987, respectively, an odyssey that taught me much about practice and procedure in the civil law tradition and, more importantly, about the history of legal education, and particularly of pedagogical methods, in Central and South America. I studied the deep roots of clinical legal education in Chile[13] and found that they were parallel to those of the United States, where clinics had their roots in the social movements of the late 1960's and early 1970's.

The explosive global growth of clinical legal education is documented in my own writing and in the scholarship of others who have immersed themselves over many years in clinical legal education innovations throughout the world.[14] That growth is both broad in its reach, inside and outside of the United States, and deeply rooted in educational philosophy and experience. Within the U.S., clinical legal education has achieved status as a mainstay of legal education, with well over 800 in-house clinical programs operating in U.S. law schools, an average of 6 clinical subject-matters in each school.[15] Upwards of 600 clinical teachers attend the annual meeting of clinical teachers sponsored by the Association of American Law Schools (AALS), and hundreds more attend regional meetings sponsored by the same organization or the Clinical Legal Education Association (CLEA). The clinical

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[11] Richard J. Wilson, *Criminal Justice in Revolutionary Nicaragua: Intimations of the Adversarial in Socialist and Civil Law Traditions*, 23 UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW 269 (1991-92), summarizes that experience.

[12] Richard J. Wilson, *The New Legal Education in North and South America*, 25 STANFORD JOURNAL OF INTERNATIONAL LAW 375 (1989). This was my first foray into the teaching of law school pedagogical methods, clinical and non-clinical, to traditional classroom and clinical professors in Latin America.

[13] Richard J. Wilson, *Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance and Conformity in the Global South*, 8 CLINICAL LAW REVIEW 801 (2002).

[14] See, e.g., Frank S. Bloch, *Access to Justice and the Global Clinical Movement*, 28 WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 111 (2008); Leah Wortham, *Aiding Clinical Legal Education Abroad: What Can Be Gained and the Learning Curve on How to Do So Effectively*, 12 CLINICAL LAW REVIEW 615 (2006).

[15] Data on the number of clinics at all American law schools, and on the total number of clinical teachers, is still somewhat preliminary. The most comprehensive source is the data collected from 131 of the more than 190 U.S. law schools by the Center for the Study of Applied Legal Education, at the University of Michigan Law School. See, CSALE, Report on the 2007-2008 Survey, at 9, available at http://www.csale.org/CSALE.07-08.Survey.Report.pdf, visited on March 20, 2009.

movement received strong support from the American Bar Association (ABA) in 1992, when the MacCrate report moved legal education strongly in the direction of preparing students for practice by teaching skills and ethical values within the curriculum.[16] Those recommendations have been strengthened and reinforced by new ABA standards requiring inclusion of skills courses in law school curricula and providing more secure status for clinical teachers.[17] Most recently, newly issued reports by the Carnegie Foundation[18] and CLEA, on best practices in legal education,[19] have further cemented the role of experiential learning in law schools. Within the United States, the scholarly writing of clinical teachers has produced an enormous bibliography[20] of writing on issues emerging from the practice of law, the work of clinics, learning theory, the structures and operations of bureaucratic legal institutions, and a branch called the "theoretics of practice,"[21] which inductively extracts theory from practice, rather than the more traditional deductive research on the application of general rules to specific situations.

As noted in my references above, private foundations, particularly the Ford Foundation,[22] the American Bar Association's Rule of Law Initiative,[23] and various Soros-funded initiatives[24] have done much to promote clinical methodology outside of the United States, primarily in developing and transitional countries, but also in established legal cultures. Two recent collections on "justice education" include extensive references to global

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[16] American Bar Association, Section of Legal Education and Admissions to the Bar, *An Education Continuum, Report of the Task Force on Law Schools and the Professions: Closing the Gap* (The MacCrate Report) (July 1992) available at: http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html, visited on March 20, 2009.

[17] American Bar Association, *Standards for Accreditation of Law Schools*, Standard 301(a), 302(a)(4); 302(b)(1), 405(c). See, Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinic Faculty*, 75 TENNESSEE LAW REVIEW 183 (2008).

[18] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

[19] CLEA, BEST PRACTICES FOR LEGAL EDUCATION (2006), available at http://bestpracticeslegaled.files.wordpress.com/2008/08/best_practices-full.pdf , visited on March 20, 2009.

[20] Perhaps the most comprehensive such bibliography is the one introduced by Karen Czapanskiy, and maintained by J.P. "Sandy" Ogalvy, available at: http://faculty.cua.edu/ogilvy/Index1.htm (as of October 2005), visited on March 20, 2009.

[21] See, e.g.Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS LAW JOURNAL 971 (1992).,

[22] Aubrey McCutcheon, *University Legal Aid Clinics: A Growing International Presence with Manifold Benefits*, in MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD 267 (Mary McClymont & Stephen Golub eds., 2000).

[23] See, e.g., the Rule of Law Initiative's web page on *Legal Education Reform and Civic Education*, available at: http://www.abanet.org/rol/programs/resource_legal_education.html, visited on March 12, 2009.

[24] See, e.g., (author?)*Clinical Legal Education: Forming the Next Generation of Lawyers*, in PURSUING THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS 257 (Edwin Rekosh, Kyra A. Buchko & Vessela Terzieva eds., 2001).

innovations in clinical education in law.[25] The Mexico meeting discussed above produced a book,[26] the first of its kind on clinical legal education in that country, but not the first in the region.[27] There is a growing collection of books on clinical legal education in the United States,[28] in Australia,[29] in India[30] and even in Britain.[31] I say *even* in Britain because the United Kingdom is exceptional among the Western European nations in its acceptance, albeit recent, of clinical legal education.

III. Resistance to Clinics in Western Europe?

The continental countries of Western Europe, those of the civil law tradition, have been particularly resistant to innovations involving the implementation of clinical legal education. This short article explores why that is, and what to do about it. In the sections that follow, I will briefly describe just what I mean by clinical legal education. I will attempt to analyze why continental Western Europe has been so resistant to clinical legal education, and discuss a few innovation has begun to make headway, even in this last bastion of tradition. Some of those innovations have been or will be promoted through the recent process of educational reform embodied in the so-called Bologna process at work in Europe today. I will discuss why the Bologna process is a particularly appropriate context for innovations in clinical legal education. Finally, I will suggest that work in the area of human rights protection may provide a beachhead for clinical innovation in Council of Europe countries, but particularly in Germany and France, where the traditional lecture

[25] EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION (Jeremy Cooper & Louise G. Trubek eds., 1997)(discussing clinical innovations in Sri Lanka and Australia); EDUCATING FOR JUSTICE AROUND THE WORLD: LEGAL EDUCATION, LEGAL PRACTICE AND THE COMMUNITY (Louise G. Trubek & Jeremy Cooper eds., 1999) (discussing clinical innovations in Thailand, Chile and Argentina).

[26] ENSEÑANZA CLÍNICA DEL DERECHO: UNA ALTERNATIVA A LOS MÉTODOS TRADICIONALES DE FORMACIÓN DE ABOGADOS (CLINICAL LEGAL EDUCATION: AN ALTERNATIVE TO THE TRADITIONAL METHODS FOR LAWYER TRAINING) (Marta Villareal & Christian Courtis eds., 2007) (my translation)

[27] There is, for example, the series of books published by the Diego Portales Law School in Santiago, Chile on public interest clinics in Chile, Argentina, Colombia, Mexico and Peru. The first in that series is DEFENSA JURÍDICA DEL INTERÉS PÚBLICA: ENSEÑANZA, ESTRATEGIAS, EXPERIENCIAS (LEGAL DEFENSE OF THE PUBLIC INTEREST: TEACHING, STRATEGIES, EXPERIENCES) (Chile, Felipe González & Felipe Viveros eds., 1999).

[28] See, e.g., PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION (1998).

[29] See, e.g., S. RICE, A GUIDE TO IMPLEMENTING CLINICAL TEACHING METHOD IN THE LAW SCHOOL CURRICULUM (1996); MARLENE LE BRUN & RICHARD JOHNSTONE, THE QUIET (R)EVOLUTION: IMPROVING STUDENT LEARNING IN LAW (1994) (exploring clinical and other teaching innovations in legal education).

[30] A HANDBOOK ON CLINICAL LEGAL EDUCATION (N.R. Madhava Menon ed., 1998).

[31] HUGH BRAYNE, NIGEL DUNCAN & RICHARD GRIMES, CLINICAL LEGAL EDUCATION: ACTIVE LEARNING IN YOUR LAW SCHOOL (1998); EFFECTIVE LEARNING & TEACHING IN LAW (Roger Burridge et al. eds., 2002).

method of law school teaching has held sway for centuries, indeed, as many authors note, since the Middle Ages.

B. What is "Clinical Legal Education"?

I have a particular five-part definition for what constitutes "clinical legal education," as I technically use the term. However, let me make clear from the outset that a law school can call its clinical legal education program by any name – live-client clinic, legal aid, field placement (externship or internship), street law, simulation or role-play, apprenticeship or any other local name – so long as the focus is on student experiential learning – learning by doing – for academic credit.[32] Notice that the key is not teaching, but learning; the teacher is, as some of my clinical teaching colleagues abroad have commented, not the "sage on the stage" but the "guide on the side." Learning does occur when the student is more active than passive, and teaching techniques can be arrayed along a spectrum from most passive (lecture and case method) to most active (the live-client clinic).[33] The subject matter areas of clinics can cover any of a wide array of subject-matter areas, from the classic criminal and general civil legal services areas to more explicit areas such as tax, small business or intellectual property. My own clinic, in the area of international human rights law, has been operating for nearly twenty years, and provides a model that might be ideally adaptable to the new European legal education reforms under the Bologna process, to be discussed below. Finally, most clinics, like my own, are intensely aware of the mission of lawyers in serving justice, and in representing the weak against the strong.

Having prefaced my definition by those caveats, let me set out what I have called the particular, ideal model of clinical legal education.[34] The five components are: (1) academic credit for participation, within the law school curriculum; (2) students provide legal services to actual clients with real legal problems (this is the origin of the "live-client" appellation), within a framework permitted by local statute, bar or court rules permitting limited student practice, advice or other legal services; (3) clients served by the program are legally indigent; generally, they are not able to afford the cost of legal representation and/or they come from traditionally disadvantaged, marginal or otherwise underserved communities; (4) students are closely supervised by an attorney licensed to practice law in the relevant jurisdiction, preferably a professor who shares the pedagogical objectives of

[32] My colleague, Elliott Milstein, has set out this range of possibilities in his own writing. Elliott S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships and Simulations*, 51 JOURNAL OF LEGAL EDUCATION 375 (2001).

[33] See, Wilson (note 11), 241.

[34] Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN STATE INTERNATIONAL LAW REVIEW 421, 422-423 (2004). The article suggests six components. I deemed two components as redundant, and have combined them into one.

clinical legal education; (5) case-work by students is preceded or accompanied by a law school course, for credit, on the skills, ethics and values of practice, as well as the necessary predicate doctrinal knowledge for the area of practice of the clinic. One might see this constellation of components as a goal, with some of the components present during a process of development toward the ideal. While valuable experiential learning can take place in hypothetical or simulated cases, real people with real legal problems provide the best learning context. To use a comparison from medicine, one might see this as analogous to the use of an electronically wired, simulated human dummy to teach the Heimlich maneuver for prevention of death from choking, or to teach cardio-pulmonary resuscitation, CPR, in the event of heart attack. One can learn the proper technique for work with real human beings through the artificial dummy, but anything beyond the most basic skills is enhanced, if not required, by work with the complex reality of actual people in real medical crises. The judgment needed for proper diagnosis and problem-solving can be taught, but only by dealing with the complex interaction of factors presented by each unique human being. This is why clinical training in medical school now starts in the first year of medical school: "medical science is best taught in the context of medical practice, with integral connections between the fundamental knowledge base and the complex skills of professional practice."[35] This is no less true for law, if we similarly value protecting human lives through effective diagnosis and problem-solving.

C. Tradition in German and European Legal Education

I. An Outsider's View: Movement to Convergence?

As an outsider to both Europe and its largely civil law tradition, it is awkward, if not rude, to suggest shortcomings in the continent's system of legal education. Moreover, it is difficult to generalize about "European legal education", even after the advent of the European Union, given that the educational systems vary widely by country, and even within countries. Part of this is due to the enormous growth and variety of privatized legal education and law school enrollments, particularly women students, in capitalist nations beginning in the 1960's.[36] Also, in order to answer the question of whether clinical legal education is appropriate for Western European law schools, one must ask what lawyers in Western Europe do. If clinical legal education has, as its goal, the preparation of lawyers for the practice of law, what does that practice look like? This is a particularly difficult question in the rapidly changing legal culture of Europe during its transformation through the ongoing process of sometimes painful integration within the European Union and the much broader Council of Europe. It is sometimes said that it is hard to talk about a single

[35] SULLIVAN (note 18), 192.

[36] Richard L. Abel, *Lawyers in the Civil Law World*, in LAWYERS IN SOCIETY: THE CIVIL LAW WORLD (RICHARD L. ABEL & PHILIP C.S. LEWIS, EDS., VOL. 1) 1, 31-35 (1988).

German "legal profession", for example, simply because one is not talking only about the traditional practicing lawyer, or advocate, but about those who qualify to become judges, public prosecutors, civil servants, company employees, with little mobility between these categories, and at least as of 1995, fewer than half of law graduates in Germany practicing as traditional advocates.[37] There are, of course, suggestions that the civil and common law systems are on a long trajectory of convergence, that the large firm model of the United States is now fully a part of European law practice, and that universities "play increasingly similar roles in training lawyers throughout the world."[38] That observation seems to have been reinforced by the attempt, under the Bologna process, discussed below, to make European legal education uniform in length throughout the Continent. Finally, there are linguistic limitations, in that all of my reading on European legal education is in English, not in the mother tongue of each of the countries under study.

I will attempt, even with these limitations, to offer a few observations about the core subject of this article, the question as to why Western Europe is the "last holdout" in the global movement toward clinical legal education. Some of my conclusions are common to other countries and regions of the world where clinical legal education has been introduced. I will put these into one cluster, while those factors which I believe to be unique to the civil law legal tradition will be included in another. For purposes of this article, I do not include the United Kingdom in the critique, as it is outside of the civil law tradition and has, since the 1970s, maintained a tradition of legal clinics, though not as vigorous and thriving as that in the United States.[39] My focus, for this review, will lie on the German and French models, with some references to other civil law countries in Western Europe where appropriate.

II. Five Traditional Critiques of Clinical Legal Education

I will start with the "easy" critiques or bases for resistance by Western Europe to clinical legal education's innovations: what the legal education traditions of Germany and France share with other regions of the world, in terms of current or likely critiques of clinical legal education. I will suggest five such bases for resistance, and how history has addressed them in other regions.

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[37] Erhard Blankenburg and Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, in LAWYERS IN SOCIETY: AN OVERVIEW 92 (Richard L. Abel & Philip S.C. Lewis eds., 1995).

[38] Richard L. Abel, *Revisioning Lawyers*, in LAWYERS IN SOCIETY: AN OVERVIEW 1,4 (Richard L. Abel & Philip S.C. Lewis eds., 1995).

[39] BRAYNE (note 31), 5. Brayne and his colleagues note that there is a national organization of clinical teachers, the Clinical Legal Education Organization (CLEO).

1. Pre-existing apprenticeships

First, both Germany and France already have mandatory periods of apprenticeship before entry into the profession. These apprenticeship stages of entry into the profession are designed to accomplish the very thing that clinical legal education sets out to do, which is to move students from theory to practice just before they take on the role of practicing attorney. In Germany, students in the two-year period of practical training after formal classes end, called the *Referendariat*, receive a state-paid salary.[40] In France, recent reforms will bring the structure into conformity with the Bologna reforms, making it a system of three years for License, two additional years for a Masters, and three additional years beyond that for the Doctorate.[41] There is, however, nothing yet available in English to detail how formal classes will intersect with the transition to practice through an apprenticeship.

Under the prior system of legal education in France, after the completion of even the first three years of study, known as the *Licence*, the graduate could move directly into some careers such as banking, public administration, insurance or estate agencies.[42] Those who wished to become private or company practitioners, however, continued through a fourth year, obtained a degree known as the *Maîtrise*, then began a period of practical training in programs run by special Bar schools, known as *centres de formation professionnelle*.[43] Prior to completion of the *Maîtrise* in France, the student's studies are almost entirely theoretical, prompting one recent dual-degree student who had studied in both England and France to observe, "After studying in France, I have no idea what the practice of law in France must be like."[44]

The problem with apprenticeships is not the idea itself but the practice. In theory, the classic apprenticeship, so widely used throughout the civil and common law world outside of the United States, is testimony to the value of practical training prior to the entry into the profession. A well-designed, carefully supervised apprenticeship program could play the role that clinical legal education plays in the U.S. Practical problems with the modern, atrophied apprenticeship model around the world are many, but the most serious is

[40] Andreas Bücker and William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence Through Clinical Experiences*, 9 GERMAN LAW JOURNAL 575, 613 (2008).

[41] EVA STEINER, FRENCH LEGAL METHOD 193 (2002).

[42] See, *supra*, note 41, 192.

[43] See, *supra*, note 41, 192-193. Pierre Sanglade and Hélène Cohen, *The Legal Professions in France*, in THE LEGAL PROFESSIONS IN THE NEW EUROPE 127, 133 (Alan Tyrrell & Zahd Yaqub eds., 2nd ed., 1996); Andrea Nollent, *Legal Education in France and England: A Comparative Study*, 36 LAW TEACHER 277, 283 (2002). Professor Nollent refers to the diploma for a later, still-practical stage of training in France as a "DESS".

[44] Nollent, *supra,* note 43, 285.

exploitation and the lack of serious pedagogical content. Ed Rekosh notes that in many cases, students learn "more about how to be filing clerks and secretaries than about how to be practicing lawyers."[45] As one German professor notes, this very important phase of learning for students is "turned over to practitioners, bureaucrats and judges," rather than a rigorous faculty supervisor who can help the student draw knowledge from reflection on the new experience of practice.[46] In many countries, finding an apprenticeship is not easy, requiring the applicant to rely on family connections or personal relationships, rather than merit, to obtain the right appointment, if any, to a law firm or other coveted legal work. Prof. Abel cynically adds that an advantage of the apprenticeship system "is the opportunity for discrimination." He notes that it was only when law schools replaced the apprenticeship system in the United States during the first two decades of the Twentieth Century that "ethno-religious minorities entered the American profession in significant numbers."[47] He notes that the same is true for women, who entered the university more quickly than they entered the profession through the apprenticeship system on the Continent. Finally, two German experts conclude that the period of practical training gives undue emphasis to "the technical skills needed in the judiciary," an emphasis that reinforced by the tendency of examination panels to be made up of judges, prosecutors and public servants. "There is," they note, only a four-month period required in a private office, which means "little training in advocacy, drafting, negotiation, or legal advice."[48]

2. Large size of entering law school classes and age of undergraduate law students

The exaggerated size of all entering law school classes in Europe makes very real the problem of clinical legal education, which requires smaller numbers of students per faculty member in order to provide quality supervision of student work and competent representation of clients. While student-teacher ratios in the U.S. average somewhere in the range of 20:1, the ratios in Germany, at least a decade ago, were more than 100:1. The same is true with many European law schools, not only in Western Europe but in the Central and Eastern European countries, as well as in Latin America. High student ratios should not be an impediment to clinical legal education in Western Europe for three reasons. First, the privatization of legal education has produced a number of alternative law faculties in every country in which class sizes are smaller; clinical legal education need not be limited to the traditional, large state-funded institutions. Even in the large faculties,

[45] Rekosh, *supra* note 8, 2.

[46] Bücker and Woodruff, *supra* note 40, 610.

[47] Abel, *supra* note 36, 18.

[48] Blankenberg and Schultz, *supra* note 37, 100.

however, clinics can thrive.[49] Second, clinics are offered only in the last years of formal schooling, when only the most dedicated students remain in school; large numbers of entering students drop or fail out after the first two years.[50] Second, clinics are made available as an elective course, and are offered only to those who elect to take them. This tends to produce highly motivated students prepared to take the risks and excitement attendant upon experiential learning.

A related issue to the number of entering students is their age. Legal education in Europe is an undergraduate course of study, beginning immediately after high school. Some argue that these students are "too young to think for themselves and need first to accumulate a corpus of knowledge."[51] I have argued elsewhere, and proven, I believe, that the *relative* ages of students in a clinical program are similar (21-23 years old in the fourth or fifth year of undergraduate legal education, where clinics would be appropriate, and 22-25 in typical graduate clinical programs in the U.S.), and that adult learning theory places both of these groups of young people squarely within the "adult" cohort for mature learning purposes.[52]

3. Limitations on student practice of law, and student usurpation of paying clients

A third traditional reason for resistance is related to these first two. Large numbers of students engaged in even the limited practice of law may be seen by the profession or the state as taking away clients from the paying clientele. They are seen as a threat to the earnings of those lawyers who have "paid their dues" by going through the rigorous process of admission to the bar. This criticism can be met in two ways. First, students normally represent only those clients who cannot otherwise afford to pay a lawyer, or clients who could not retain a lawyer because of the complexity, novelty or controversy surrounding their legal claims. Many clinical programs follow local or national poverty guidelines to assure that they are not taking cases away from the private bar, and other look for novel issues involving wide impact on policies affecting the broadest of public interests, such as the rights to basic subsistence, housing or criminal charges. Second, student practice rules, where they exist, do not permit widespread representation but instead limit students to a narrow range of matters, often by permission of the presiding authority after proof is offered of the student's enrollment in an accredited clinical

[49] One can note, for example, that two of the most successful clinics in Chile are mandatory programs integrated into the last years of study at two of the largest-enrollment universities in the country, the University of Chile and the Catholic University of Chile. Wilson, *supra* note 13.

[50] Blankenberg and Shultz suggest that the drop-out rate in German law schools is about 50% in the first phase, and about 25% in the second phase, *supra* note 37, 99.

[51] Alain Lempereur, *Negotiation and Mediation in France: The Challenge of Skill-Based Learning and Interdisciplinary Research in Legal Education*, 3 HARVARD NEGOTIATION LAW REVIEW 151, 164 (1998).

[52] Wilson, *supra* note 13, 570-573.

program, the client's indigence, the client's permission to be represented by students, and adequate supervision by a lawyer present in court.[53]

4. The small and solo law firm as a model of practice in Europe

A fourth critique is structural in nature. Clinics tend to work best where the private bar is strong and independent, not scattered among extensive small firms and solo practitioners. Until recently, advocates in both Germany and France tended to solo or small firm practice; it is only in recent years that the big firm has made headway in both countries, providing needs for in-house counsel and large corporate firms, both local and international. The emergence of large firm practice has changed the character of the bar in Western Europe, as mergers and acquisitions accounted for 20-30% of German law firm revenues more than a decade ago, and probably more today.[54] This very phenomenon has created additional pressures for Continental lawyers to acquire the skills of negotiation and bargaining, all within the constellation of alternative dispute resolution, an area of practice growing exponentially in importance.[55] Clinics are the ideal vehicle to teach these skills, as well as the ethics and values of such practice.

5. Clinics as a way of filling the gap in needed legal services for the poor

In developing countries, clinical programs are often offered as an alternative to traditional government-funded legal aid, with students filling the gap of legal services for the poor that is not made up by the private bar. This is, in my view, an improper allocation of clinic resources, a quick fix for a problem that should more appropriately be addressed by governments assuming their responsibility to adequately fund essential legal services for the poor in both civil and criminal matters in the courts. The mission of clinics within law schools should properly be pedagogically driven, not service driven. Loading students down with too many cases of poor clients is a disservice both to student learning and client service, and even the most accomplished clinical supervisor cannot provide quality oversight with an excessive number of clients served by large numbers of students. Some in Western Europe may argue that clinics are not needed because the state already fulfills its role in providing legal services to the poor. The state's fulfillment of its role as primary funding source of legal services for the poor leaves law school clinics to their primary

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[53] See, e.g., David F. Chavkin, *Am I My Client's Lawyer: Role Definition and the Clinical Supervisor*, 51 SOUTHERN METHODIST UNIVERSITY LAW REVIEW 1507 (1998) (containing, in Appendix A, at 1546, a listing of student practice rules by state in the United States).

[54] David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE WESTERN LAW REVIEW 407, 447 (1994).

[55] See, Alain Lempereur, *Negotiation and Mediation in France: The Challenge of Skill-Based Learning and Interdisciplinary Research in Legal Education*, 3 HARVARD NEGOTIATION LAW REVIEW 151 (1998).

mission – the training of law students for the competent practice of law with a limited but closely scrutinized and reviewed caseload.

III. The Unique Traditions of Western Europe

A second set of reservations about clinic is more profound and more tenacious in Western Europe. The issue is, in a word, "tradition," but I will attempt to examine tradition through the lens of three related critiques: the conception of law, the status and role of the law professor, and lack of faculty autonomy and control over curriculum.

1. Conceptions of law in the common and civil law traditions: the common roots of German legal science

The first critique, differences in the conception of law, is one of the most complex and illusive, but at the same time one of the most basic systemic differences. One scholar suggests that the differences in conceptions of international law lie in what she calls the U.S. allegiance to pragmatism and realism, versus the French (and German) loyalty to formalism and positivism. Those deep cultural differences were no more graphically demonstrated than in the confrontation in the UN Security Council, prior to the second Iraq war, between the views of the French Minister of Foreign Affairs, Dominique de Villepin, and the American Secretary of State, Colin Powell. These were "diametrically opposed perspectives."[56] More on international law later, but for now, suffice it to say that the French and German systems tend to see law as "a series of fundamental principles", while the common law traditions of the U.S. and Great Britain tend to see law as "a means of providing remedies for certain cases: remedies precede rights."[57] Another way to put this comes from one of my clinical colleagues, Prof. Philip Genty, who argues that law in common law jurisdictions is "bottom up" and inductive, while civil law jurisdictions see law as "top down" and deductive. To the extent that law is seen as more "scientific" in the civil law than in the common law, judges become more like technicians, applying the appropriate norm to the specific facts, while the common law lawyer and judge might be seen more as social engineers. [58] Again, as summarized by a student participating in the French-British dual degree program, "I think in France we learn how to learn and how to think whereas in England we learn how to do things with facts."[59]

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[56] Emmanuelle Jouannet, *French and American Perspectives on International Law: Legal Cultures and International Law*, 58 MAINE LAW REVIEW 292, 294 (2006).

[57] Nollent, *supra* note 43, 283.

[58] Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and Its Implications for Clinical Education*, 15 CLINICAL LAW REVIEW 131, 137 (2008).

[59] Nollent, *supra* note 43, 287.

German "scientific method," within the academy, in fact, can claim a strong role in influencing the original vision of legal education promoted at Harvard University in the late nineteenth century, when law schools were being "invented" in the U.S. as a replacement for the traditional apprenticeship system.[60] The German university system, then at its apex, strongly influenced Harvard's president, Charles Eliot, and his law school dean, Christopher Columbus Langdell, in the design and implementation of the case method for study of common law jurisprudence in a structured way, together with the Socratic method of questioning in class. German scholars such as Leopold von Ranke put a strong emphasis on fidelity to sources and rigorous library research, and the influence of the German university also deeply affected the move from part-time to full-time law school faculty during the same period. That scientific method still dominates in the law schools of both Germany and the United States, through the lecture and the Socratic case method. It is the fidelity to science that makes clinical legal education so appropriate for the Continental academy.

This is not to say that clinical legal education is antithetical to Continental legal science. In fact, my own work, and that of scores of others involved in consulting in the civil law world, shows that the clinical methods work in Central and Eastern Europe and Latin America; clinical legal education has benefitted students and faculties alike in those countries, and the clinical method continues to demonstrate its acceptance by its ongoing rapid expansion. Both of the dominant systems of legal education purport to train the student to think like a lawyer, while clinical legal education teaches students to act like lawyers.[61] One might view the classroom as a kind of laboratory, Professor Genty suggests, "in which professors teach the scientific, substantive principles of law and then ask the students to engage in the central activities of the natural or social scientist: hypothesis, experimentation, and refinement of the hypothesis in response to test results."[62] Structured clinical teaching provides an excellent compliment – not replacement – for rigorous doctrinal analysis, whether of a statute or a case.

2. The nature and status of the professoriate

Second, in the civil law tradition, the law professor not only expresses the law but formulates it, while in the common law system the judge is the primary law-giver. This corollary of the first structural characteristic may account, more than any other, for the resistance to clinical legal education. "German professors (and those in many other civil

[60] SULLIVAN, *supra* note 18, 4; Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 NEW ENGLAND LAW REVIEW 251, 274-283 (2005).

[61] Roy T. Stuckey, *Preparing Students to Practice Law: A Global Problem in Need of Global Solutions*, 43 SOUTH TEXAS LAW REVIEW 649, 663 (2002).

[62] Genty, *supra* note 58, 152-153.

law faculties) regard themselves primarily as scholars, who also happen to teach."[63] One scholar, writing about candidates for the professoriate in Germany, notes that "[t]o begin with, he is seldom a practitioner."[64] The road to the professoriate is long and arduous, and is a career in the civil law tradition, much as is that of the judge and the prosecutor, beginning immediately after graduation, albeit at a higher level. Once tracked into a career as a professor, the Continental scholar is measured almost solely by her performance on examinations and by written scholarship, not by her courtroom victories, her time in practice or even her work as a judicial clerk, all of which are of high importance for the American aspirant to the academy. Again, I see this not as an obstacle to the introduction of clinical legal education but a challenge. At the time of its introduction in the United States, clinical legal education fought the established academic community, which felt that clinical legal education risked converting the legal academy from preparation for a profession to preparation for a trade. The echoes of legitimation through "science" resound in this critique. Let there be no mistake. If clinical legal education is grounded in the social sciences, as legal education originally purported to be in Europe, and still does in much of Latin America, it can justify its methods and principles in the current social science of adult learning equally as well, if not better than can the advocates for traditional classroom teaching.

3. State control over strictly structured legal education

The third and final hurdle to clinical legal education is a technical one involving state control over what are highly structured curricula in Europe. The standard course of study in Continental law schools is highly structured, leaving little room for elective course choices that are accorded to American law students in their final two years of study. This problem, like that of student practice of law, involves a process of persuasion outside of the law school, with both the bar and the legislatures. Some suggest that state control over law schools, combined with the tendency to condense legal education into a shorter period of time under the Bologna process, will increase pressures to strictly control the doctrinal content of law study.[65] Others assert, quite properly in my view, that an integrated

[63] Abel, *supra* note 34, 13.

[64] Jürgen Kohler, *Selecting Minds: The Recruitment of Law Professors in Germany*, 41 AMERICAN JOURNAL OF COMPARATIVE LAW 413, 417 (1994). The same appears to be true in France. C. Mouly and C. Atias, *Faculty Recruitment in France*, 41 AMERICAN JOURNAL OF COMPARATIVE LAW 401 (1993).

[65] See, e.g., comments by Heribert Hirte, current president of the European Law Faculties Association (ELFA), and professor at the University of Hamburg, in *Symposium, Enriching the Law School Curriculum in an Increasingly Interrelated World – Learning from Each Other*, 26 PENN STATE INTERNATIONAL LAW REVIEW 831, 897-898 (2008). Of interest is a recent study by the ABA Section on Legal Education, designated the "Out of the Box Committee", whose mandate was to try thinking "outside of the box," meaning a look beyond traditional boundaries, on needed reforms in legal education. One of their conclusions suggested the possibility of extending legal education in the United States to four years while cutting undergraduate studies to three years, primarily because of the growth in the fields of international law, health law, employment law and intellectual property, as well as administrative aspects of the "welfare state." The very first reform suggested by the committee was the

curriculum of training in legal skills and values has a place alongside the teaching of legal analysis, critical thinking and legal theory, "irrespective of any potential changes in the length or organization of the *Referenderiat*."[66] Let us move, then, to a fuller discussion of the impacts of the Bologna process on legal education in Germany and France.

C. Opportunities for Innovation: the Bologna/Sorbonne Process

In 1992, almost two decades ago, a German scholar and academic wrote of the "increasing Europeanization of the legal profession," as well as what she called "another eruption of discussions" in the "never-ending story" of German legal education. She noted complaints about many aspects of the then-current system, including the content of legal education, which tended toward "marginally important topics" driven by the demands of state examinations, which students must pass before moving on to any career in law. There was no room, she noted, for important new doctrinal areas such as environmental law, European law, tax law and immigration law. Most important, for our purposes, was her criticism of the lack of a "rapprochement of theory and practice." While she noted a 1984 reform to introduce a practice component into the university phase, she decried its reality as "just another motion for the students and educators to go through." She noted and endorsed what she called the movements toward a "European Law School" and a "European Common Law."[67]

These visionary critiques took shape later in the decade of the 1990s, when forty-six participating countries, including the entire European Union membership, signed onto the 1998 Sorbonne Declaration and the 1999 Bologna Declaration, along with several additional communiqués over the past decade, all collectively referred to today as the Bologna Process, with a goal to create a so-called European Higher Education Area (EHEA) by the year 2010.[68] This section discusses briefly the possibilities opened, through the Bologna process, for reform of curricula, in Germany and elsewhere in Western Europe, to include a component of clinical legal education. Particular emphasis is giving here to a project within the Bologna process called "Tuning", as well as the recommendations of the Council for Bars and Law Societies of Europe (CCBE), which will be discussed more fully below.

"shameful neglect" by law schools of what it called the "transformative effect of globalization of the practice of law." *ABA Section on Legal Education: Out of the Box Committee Report* (November 2008), on file with the author.

[66] Bücker and Woodruff, *supra* note 40, 611.

[67] Jutta Brunnée, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 Journal OF LEGAL EDUCATION 399, 413-414, 424 (1992). Prof. Brunnée was educated in law in Germany, then obtained a graduate degree and because a law professor at McGill University in Canada.

[68] Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It's So Much More than Degree Changes*, 41 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 107, 113-114 (2008).

I. Bologna Reforms in Germany

Much ink has been spilled, although less in English than in German, over the question of how Germany will adapt to the Bologna process.[69] Writing in 2001, one scholar suggested that "most important aspect" of the German debate focused on recommendations from an expert report on a model curriculum that includes "a stronger emphasis on the aspects of practical legal work." Under the proposed plan, a focus on practice would introduce "at a very early stage in legal education the aims and point-of-view of professional legal work." The problem, the group noted, was that "too many students who have finished university studies encounter severe difficulties when they are asked to define the interests of clients and work towards achieving them."[70] Four years later, the same critic identified a primary issue as integration within Europe. He queries "how far qualifications acquired in other member States will allow access to practical training," a much more complex question, implicating issues of deregulation by the German state of the giving of legal advice, "where German law traditionally has had a very strict approach requiring that only lawyers admitted to the Bar can give legal advice."[71] These are not small questions.

II. The Tuning Project, CCBE Proposals, and Clinical Legal Education

Clinical legal education is a natural fit for the Bologna Process. The Process creates "space for practice-oriented approaches in law school curricula."[72] Within the expansive agenda of educational reforms in Europe and the Bologna Process, which has been amply described elsewhere,[73] there are two aspects on which I will focus, for purposes of brevity, because of their possibilities for reforms to include aspects of clinical legal education. They are the so-called Tuning Project and the recommendations of the Council of Bars and Law Societies of Europe.

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[69] Two good examples of English-language critiques are both by Johannes Riedel, a civil servant in the Justice Ministry of North-Rhine/Westphalia in Düsseldorf. Johannes Riedel, LL.M., *The Reform of Legal Education in Germany*, European Law Faculties Association, available at: http://elfa-afde.eu/EJLEISSUES..aspx, visited on February 26, 2009; Johannes Riedel, *The Bologna Process and Its Relevance for Legal Education in Germany*, 2 EUROPEAN JOURNAL OF LEGAL EDUCATION 1 (2005).

[70] Riedel (2001), *supra* note 69, 4.

[71] Riedel (2005), *supra* note 69, 62.

[72] See, Lusine Hovannisian, *Clinical Legal Education and the Bologna Process*, PILI Papers, No. 2, December 2006.

[73] Terry, *supra,* note 68; Frans Vanistendael, *Blitz Survey of the Challenges for Legal Education in Europe,* 18 DICKENSON JOURNAL OF INTERNATIONAL LAW 457 (2000); Frans Vanistendael, *Curricular Changes in Europe Law Schools,* 22 PENN STATE INTERNATIONAL LAW REVIEW 455 (2004); Louis F. Del Duca, *Cooperation in Internationalizing Legal Education in Europe – Emerging New Players*, 20 PENN STATE INTERNATIONAL LAW REVIEW 7 (2001).

1. The Tuning Project

The Tuning Project was begun in 2000. It is an independent project of a group of European universities and not a formal part of the Bologna Process, although it does receive governmental funding. Co-ordination of the Project is done by representatives from the University of Deusto in Bilbao and the University of Groningen in the Netherlands. The goal of the project is to "develop a framework of comparable and compatible qualifications" in each signatory country of the Bologna Process, with a "checklist for curriculum evaluation and examples of good practices." Like the Best Practices project in the U.S., the Tuning Project attempts to develop a list of measurable outcomes that a student should be able to demonstrate in each of nine specified subject matter areas.[74]

2. The CCBE and QUAACAS

The Council of Bars and Law Societies of Europe (CCBE) represents three quarters of a million lawyers in Europe. The CCBE report, over two hundred pages long, includes a section similar to the design and structure of the Tuning Project. It covers conceptual and analytical abilities of a successful lawyer, as well as "the managerial, personal skills, knowledge and competences, necessary to be an effective lawyer." The report includes what it calls "deontological requirements," which Americans would recognize as ethical requirements of practice such as professional secrecy, client confidentiality, among others.[75] The recommendations of the CCBE on training outcomes include an entire section devoted to "Practical knowledge and skills," "Ability to consider the client's needs," "Ability to listen to the client's request and to analyse the client's request," and "Ability to communicate."[76] Again, these are skills, ethics and values that cannot be taught by lecture; they must be taught by doing, and clinical legal education, as I have broadly discussed it here, is, in my view, the best way to guarantee attainment of these compentences within the reformed law school curricula throughout the Bologna Process.

In 2008, QUAACAS (Quality Assurance, Accreditation and Assessment Committee), a committee of the European Law Faculties Association (ELFA) charged with tuning legal studies in Europe, issued its initial findings. The committee found four "competences" for law students. Competences measure outcomes, and can be written as "This student is able to . . ." after completion of a particular educational task. Their four competence areas are: "(1) ability to demonstrate an understanding of the concept map of a legal system *and to*

[74] Terry, *supra* note 68, 143-144.

[75] Julian Lonbay, *The CCBE and ELFA Projects on Internationalizing Legal Education in Europe*, in Symposium, *supra* note 65, 889.

[76] The *CCBE Recommendations on Training Outcomes for European Lawyers* are set out in the Symposium, *supra* note 65, at 902.

deploy it in the resolution of concrete legal problems, (2) *an understanding of core values* associated with law, (3) an *ability to use certain legal techniques*, and (4) an ability to *demonstrate a number of transferrable skills*." The emphasis here is mine, to make a point. Each of these four competences engages the student in measurable outcomes involving the practice of law, whether as an advocate, a prosecutor, judge or public servant. The short report, the beginning of a longer process, emphasizes that the competences are both procedural and substantive, including procedural "values such as hearing both sides before making a decision, or relying on convincing evidence, of impartiality before forming judgments, and the ability to give rational reasons as justifications." Substantively, the values are "associated with the rule of law, constitutional rights, and human rights."[77] The latter is implicated in my own recommendations below.

III. Beachheads in Clinical Legal Education in Europe

Law schools in Western Europe have not been idle during this rapid process of reform. There is evidence that a number of faculties have made efforts to integrate clinical offerings into their curricula. This section will identify a few of which I am aware, outside of the U.K. There are probably others.

Prof. Jon Johnsen, of the Oslo Law School in Norway, describes "voluntary" student clinics that have existed in that country since the early 1970s. He was the originator of a program called "Juss-Buss", a mobile clinic with students involved in providing legal services in the Oslo area, one of the first known such clinics in the region, although apparently not for university credit.[78]

Another early effort has been mentioned above. In France, during the 1990s, the growth of the Euro-law market contributed to the growth of law faculties. In Paris alone, eleven new law faculties came into being from the 1970s onward. One group of renegade legal educators began to develop what was, for that country, a radical new approach to legal education for business lawyers. The "Rennes School" of commercial law argued that "business law, like surgery, had to be learned in practice and through close contact with practitioners." Practitioners were recruited as Adjunct professors and the movement created a "quasi-academic degree called a DACE, of the "Certificate for Business Lawyers." Soon, multinational law firms began to develop links, and employment, with the new "practitioner-professors," and the Paris "old priests club" of professors, which had stood aloof from law practice and business, began to be eclipsed.[79] That process is still unfolding,

[77] *Tuning Legal Studies in Europe: Initial Findings, Report of QUAACAS to the General Assembly of ELFA*, Hamburg 2008, available at C:\Documents and Settings\My Documents\Research\QUAACAS\ Hamburg Report\QUAACAS Report 02.doc.

[78] Jon T. Johnsen, *Nordic Legal Aid*, 5 MARYLAND JOURNAL OF CONTEMPORARY LEGAL ISSUES 301, 328 (1994).

[79] David Trubek *et al.*, *supra* note 54, 449-453.

with negotiation and mediation skills teaching achieving some measure of legitimacy in French legal education.[80]

Other projects in Europe seem to represent the adoption of more recognizable clinical methods. In France, discussions about clinics have been advanced by Dean Norbert Olszak of the Robert Schuman University in Strasbourg.[81] Other efforts include movements in Spain to establish a Prisoner's Rights Clinic at the University of Tarragona and another to develop a clinic in international human rights at the Carlos III University in Madrid.[82] In the Netherlands, a Human Rights Clinic is reported to have begun work at the University of Amsterdam, and another has been considered for adoption at Utrecht University.[83]

Closer to home, the Hochschule Wismar in Germany has begun work on development of a clinical component in their curriculum since 2004.[84] Before leaving this look forward to the Western European law schools now considering or having started new clinics in the region, I cannot resist a brief historical reference to bring us full circle. Ed Rekosh, director of the Public Interest Law Institute in Budapest, notes in a recent article now awaiting publication that the origins of clinical legal education are not to be found in the United States during the 1960s, as the conventional wisdom suggests. Instead, he finds links from the earliest mention of clinical legal education in the United States, in a 1917 article, backwards to both Copenhagen, in 1907, and to Germany, in 1847![85] No doubt, these origins lie in the powerful pull of a truly effective apprenticeship model, the universally recognized and classic paradigm of learning by doing.

Given the substantive emphasis on human rights in curricular reform, and the focus of a number of clinics on human rights in Western Europe, the final question for this article is

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[80] Lempereur, *supra* note 55.

[81] Norbert Olszak, *La Professionnalisation des Etudes de Droit: Pour le Developpement d'un Enseignement Clinique*, 18/7203 Recueil Dalloz 1172 (5 May 2005), cited in Hovannisian, *supra* note 72, 20, n. 43.

[82] The Tarragona clinic is mentioned in Hovannisian (note 72), 16, and was contacted by the author for a visit during the summer of 2007. The author has held a seminar for aspiring clinical teachers in December of 2006 in Avila, Spain, with the collaboration of Diego Blázquez. See Diego Blázquez Martín, *Apuntes Acerca de la Educación Jurídica Clínica*, 3 Revista de Filosofía, DERECHO Y POLÍTICA 43 (invierno 2005/2006).

[83] The Amsterdam clinic is mentioned in Hovannisian, *supra,* note 72. The author made a visit to Utrecht to discuss formation of a human rights clinic there, in conjunction with the law faculty and the Netherlands Institute of Human Rights (SIM) during the winter of 2006, and will be in residence as a visiting scholar there during the fall semester of 2009.

[84] Bücker and Woodruff, *supra* note 40, 611.

[85] Edwin Rekosh, *Constructing Public Interest Law: Collaborative Development in Central and Eastern Europe*, (draft article for publication in the UCLA Journal of International Law and Foreign Affairs, March 2008, on file with the author. Cited with permission.), at 29, (*supra* notes 88 and 89).

the question of whether human rights clinics are the best, or at least a possible direction for the doctrinal development of clinical legal education.

D. International Human Rights Law Clinics as a Way Forward?

I have been a clinical teacher for almost twenty-five years, first at the innovative public interest-focused CUNY Law School, in Queens, New York City, and now at American. I began my career as a criminal defense lawyer in Illinois, and later as spokesperson for that segment of the bar in Washington. I never dreamed that I would be a law school professor when I graduated from law school, and would have laughed at that suggestion from any of my classmates. This hardly matches the typical career path of the European law professor. Nonetheless, I feel strongly that there may be a road forward for Europe in the adoption of human rights clinics as an area of practice.

Human rights law is now one of the most active areas of practice within the Council of Europe. The caseload of the European Court of Human Rights (ECHR), in fact, reached close to 100,000 pending matters last year. Most of these cases came from four countries: Russia, Ukraine, Turkey and Romania.[86] While the ECHR will have to adapt to this growing caseload by developing faster and more efficient methods for dealing with cases, this tremendous caseload speaks volumes about raised consciousness within Europe as to the extent of serious human rights violations. Europe, unlike the U.S., has developed a strong culture of acceptance of the decisions of the ECHR, unlike its regional counterpart in the Americas, the Inter-American Commission on Human Rights, in Washington, and its counterpart in Costa Rica, the Inter-American Court.

Our International Human Rights Law Clinic at American University has dedicated itself to work on both domestic and international human rights issues since its inception in 1990. We have been involved in ground-breaking issues such as the first case to raise the issue of the risk of female genital cutting in Africa as a basis for political asylum in the U.S.; the arrest of Augusto Pinochet in London and his possible transfer to Spain for trial, along with other military officers in both Chile and Argentina during the dirty wars there; and most recently, involvement in an array of cases and issues arising from the detentions of so-called enemy combatants at Guantanamo Bay, Cuba. These are the issues of our time, cutting-edge issues in which students have played a key role as student attorneys. We have traveled with clinic students to various parts of the United States, to Sierra Leone, Botswana, Mexico and Guatemala, and to Spain. Our clinic, immensely popular within the law school, now includes 32 students each year, mostly students in their final year who are

[86] European Court of Human Rights, Press Release: Press Conference with the President of the European Court of Human Rights, at http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=846335&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (Jan. 29, 2009), visited on March 20, 2009.

enrolled for the full academic year, and who earn one full semester of credit toward the six total semesters of study needed for graduation. We employ four full-time faculty and carry an average caseload of 50-70 cases at any time. We are, without question, one of the largest human rights law firms in the nation, if not the world.

Our law school is not alone in offering human rights as a clinical option. At the time I started teaching human rights in 1990, I gathered with five other faculty, scattered about the country, the hearty few involved in human rights activism within law schools at the time. This year, some 40 faculty will gather at Boalt Law School in Berkeley, California for an ongoing gathering of human rights clinics and centers from around the country.[87] A growing network of human rights academics called the Brining Human Rights Home network, based at Columbia University in New York, are working together to raise the profile of human rights here in the U.S., at the national, state and local levels.

Europe presents stronger possibilities within the academic community for the development of human rights clinics and centers. Somewhat ironically, one can note that there is an incredibly strong culture of human rights within Europe, while academic focus on the real of human rights is still largely theoretical, while in the United States, the clinical movement has given ever-greater focus to human rights, but the culture of human rights adherence, in both the U.S. judiciary and foreign policy, is struggling against a long traditional of exceptionalism. The educational reforms of the Bologna Process present a historic moment: the opportunity for a new clinical movement grounded in human rights activism within the law school community of integrated Europe.

My own motivations for becoming a law school teacher were driven by what I can only describe as the painful and intuitively poor methods of law school teaching that I personally experienced, on the receiving end, in the United States during the late 1960's and early 1970's. I took a three-year hiatus from law school to join the Peace Corps, during which time I served in Panama and worked in Puerto Rico, believing I might not return. I did return, happily for me, and I offer the suggestions in this article in the spirit of international collegiality, not because I have anything to gain personally from their adoption. I truly believe these are sound educational ideas, grounded in proven theories about adult learning. I can see proof of that in my students' eyes every time they appear in court to handle their first case under my supervision, win or lose. I see it in their faces after they successfully present a victim's poignant oral appeal to the Inter-American Commission on Human Rights, something that my students have done under my supervision on scores of occasions, often against a vast array of diplomats or counsel representing governments including the United States. This is the heaven-or-hell crucible of work, in role, as a student

[87] See, Deena Hurwitz, *Lawyering for Justice: The Inevitability of International Human Rights Clinics*, 28 YALE JOURNAL OF INTERNATIONAL LAW 505 (2003) (Identifying, in Appendix, at 549, 34 human rights clinics or centers in the United States); Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUMBIA HUMAN RIGHTS LAW REVIEW 527 (2004).

attorney for real clients in real cases. And it is vastly superior to any lecturing I could do on the code or cases involved in the resolution of their cases, or even a full thesis on "The Agony and Ecstasy of the Lawyer's Work in Role." Europe should try experiential learning in its law schools. The time is now.

SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

"Transnational Law" as Proto-Concept: Three Conceptions

By Craig Scott[*]

> I shall use, instead of 'international law', the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.
>
> PHILIP JESSUP, TRANSNATIONAL LAW 136 (1956)

A. The Nature of the Exercise

With this succinct and oft-quoted passage from his Storrs Lectures on Jurisprudence delivered just over a half-century ago at Yale Law School, Jessup posited "transnational law" as an expansive umbrella category for all "law" involved in regulation – what is called, with increasing frequency, the 'governance' – of *the transnational* ("actions or events that transcend national frontiers" whether involving state or non-state actors). While there need be nothing iconic about his formulation, there is a certain attractiveness in treating this very brief passage as a semantic jumping-off point for narrating several senses in which "transnational law" may be said to 'exist' (or not) in the contemporary world. No etymological pedigree for the term "transnational law" is hereby claimed, but whether Jessup coined the term or not is less important than the fact that his slim volume has been a common starting point for those seeking to get a handle on the use of this term.

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The purpose of this article is to identify three conceptions of transnational law, all of which have a certain integrity depending on one's premises about the nature and institutional operation of law. My method in discerning and then presenting these three conceptions is fluid, to say the least. Specifically, my discussion will blur the line between two usages, what we may call a practitioner's usage and a theoretician's usage.[1] On the one side, there are various uses of "transnational law" extant in normative discourses that invoke, however inchoately and impressionistically, "transnational" legal rules, legal principles, legal standards, and even legal systems as being 'applicable' or otherwise relevant in a given factual context. On the other side, we may discern something resembling a first-principles theorization of what, if any, uses of "transnational law" would be conceptually coherent, even if many legal practitioners and legal scholars may not currently speak of such law yet existing. To some extent, a search for what is immanent in contemporary legal discourse, both that of practitioners and that of scholars, straddles this blurred line.

What I do not wish to blur, however, is the distinction between the descriptive (what is or can count as transnational 'law') and the evaluative (is 'transnational law' (in a given conception) a form or species of law that is desirable (from any number of perspectives)?) That caveat aside, I will not hide from the reader that, in other work, I have found speaking in terms of "transnational law" and, more broadly in other contexts, of "transnational governance" to be not just possible but a useful way to approach aspects of law in the contemporary world;[2] the extent to which 'usefulness' counts as one measure of

[1] For a very small sampling of relevant articles, see for example: Harold Hongju Koh, *Transnational legal process,* 75 NEBRASKA LAW REVIEW 181-207 (1996); Zumbansen, Peer, *Transnational Law in* ENCYCLOPEDIA OF COMPARATIVE LAW 738-754 (Jan Smits ed., Edward Elgar 2006); Robert Wai, *Transnational private law and private ordering in a contested global society,* 46 HARV INTERNATIONAL LAW JOURNAL 471-486 (2005); Roy Goode, *Usage and its reception in transnational commercial law,* 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1-36 (1997); Charles Brower and Jeremy Sharpe, *The Creeping Codification of Transnational Law,* 45 VIRGINIA JOURNAL OF INTERNATIONAL LAW 200 (2004-05); L.M. Friedman, *Borders: on the emerging sociology of transnational law*, 32 STANFORD JOURNAL OF INTERNATIONAL LAW 65-90 (1996); E. Gaillard, *Transnational law: a legal system or a method of decision making?,* 17 ARBITRATION INTERNATIONAL 59-71 (2001); Eric Stein, *Lawyers, judges, and the making of a transnational Constitution*, 75 AMERICAN JOURNAL OF INTERNATIONAL LAW 1-27 (1981). Note also the forthcoming (2009 or 2010) book by MICHAEL GIUDICE AND KEITH CULVER, LEGALITY'S BORDERS (Oxford University Press).

[2] For pieces in which "transnational law" is more or less self-consciously referenced, see *The Alien Tort Claims Act Under Attack – Remarks ("Beyond the Sosa v Alvarez-Machain Terms of Debate: Conceptualizing International Human Rights Torts in Terms of 'Transnational Law'")*, 98 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 49, 58-61 (2004); *Introduction to Torture as Tort: From Sudan to Canada to Somalia*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 3-44 (C. Scott, ed.); *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, *in* TORTURE AS TORT 45-63 (C. Scott, ed.). For pieces in which law, not necessarily itself styled as transnational, adjusts itself to transnational contexts and situates itself in terms of transnational governance, see *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation*, *in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 287-319 (C. Joerges, P Sand and G Teubner, eds., 2004) (co-authored with Robert Wai); *Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK, 2ND EDITION 563-596 (A. Eide, C. Krause, and A. Rosas, eds., 2001); *Towards the Institutional Integration of the Core Human Rights Treaties, in* REACHING BEYOND WORDS: GIVING MEANING TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS 7-38, fn: 213-225 (Valerie

desirability is something I will set aside in this paper. However, it may well turn out that I will not succeed in expunging all elements of evaluative advocacy from the analysis to come: description almost always belies some fealty to underlying normative preferences. But I *am* genuinely open to being shown that, ultimately, "transnational law" is not a useful way and may even be a regressive way to think about law in the world of contemporary forms of transnational forces (many parading under various banners of globalization). It is for that reason that I seek to keep the present short paper at the level of a kind of explanatory analytical jurisprudence, albeit one that does contain elements of what could be thought of as an internal valuation of the discursive object of explication. An internal valuation arises from a form of performative commitment implicit in the exercise of making a given account of a concept the best it can be in light of the premises and more general assumptions the analyst attributes to the relevant field.

Many readers will recognize in the last sentence methodological overtones of Dworkin's view that interpretive accounts (including accounts of the practice of interpretation itself) should achieve some plausible equipoise between "fit" with a practice's core observable facts and "justification" of that practice from the perspective of relevant background morality.[3] For present methodological purposes, there is some general similarity of approach. That said, I have long been more significantly influenced in my understandings of an unavoidable aspect of is/ought blurring by a method adopted by Joseph Raz in various law journal articles and later carried over to his The Morality of Freedom.[4] One passage from this book has been particularly useful in my thinking on what it is to engage in conceptual analysis as both an insider to and critical observer of the social practice within which the concepts in question are invoked:

> Accounts of 'authority' attempt a double task. They are part of an attempt to make explicit elements of our common traditions: a highly prized activity in a culture which values self-awareness. At the same time such accounts take a position in the traditional debate about the precise connections between that and other concepts. They are partisan accounts furthering the cause of certain strands in the common tradition, by developing and producing new or newly recast arguments in their favour. The very activity is also an expression of faith in the tradition, of a willingness to understand oneself and the world in its terms and to carry on the argument, which in the area with which we are concerned is inescapably a normative argument, within the general framework defining the

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Oosterveld and Isfahan Merali, eds., 2001); *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 2 206-268 (co-authored with Philip Alston) (2000).

[3] RONALD DWORKIN, LAW'S EMPIRE (1986).

[4] JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

> tradition. Faithfulness to the shape of common concepts is itself an act of normative significance.[5]

Having invoked Raz's framework, I do not see the above quotation as either a precise methodological template or as necessarily fully transferable to the context of "transnational law" as the object of conceptual inquiry.[6] The extent to which the use of the expression "transnational law" amounts to a tradition, in the sense that may be intended by Raz, is of course open to question. The extent to which it does not would limit the applicability of Raz's methodological approach. On this score, it seems more likely that, with "transnational law", we are at most faced with a pluralistic landscape of "traditions" that vary in their referents and in the depth of their roots.[7] Directly related to this observation about pluralism of the social or cultural (linguistic) field, we might observe that Raz's formulation may point in an alternative direction, namely, the emergence of (and more extensive recent use of the expression) "transnational law" as partly a case of *breaking faith* with state-centred ideas of law (which are certainly part of two highly relevant traditions within legal discourse, those of public international law and those of jurisprudence). In some measure, then, theorizing the nature of "transnational law" probably tends much more to embrace the parts of Raz's ideal-type situation that lean towards "producing new or newly recast arguments" that may assist practitioners, theorists, and citizens alike to better understand themselves and the social world in which they operate. Either way, Raz's methodological preference could be viewed as serving the useful function of drawing to our attention two quite useful ways to understand conceptual analysis of "transnational law" or, viewed another way, to a continuum of ways that lie somewhere between poles of keeping (total) faith with dominant discursive traditions and of (completely) breaking faith with those traditions.

By way of further addressing why the ideal-type equipoise of Raz's methodology cannot be taken as a template for all cases of conceptual analysis, it is important to be aware when one has entered what is a more fractured than unified discursive field and also be aware that some concepts may not be analyzable outside their existing multivocality. Somewhere within this kind of awareness, the following may need to come into conscious play: recognition of the nature and extent of what I would call the power-beholdenness of a social practice (or Razian "tradition") and, in that context, the relevance of recognizing more marginalized or less mainstream perspectives (which perspectives, upon reflection, may sometimes be more faithful to a practice or tradition's pillar principles or core ethos). Thus, conceptual analysis may sometimes – and maybe more often than we tend to accept

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[5] *Id.,* 63-64.

[6] I owe what follows in this paragraph to observations offered by Michael Giudice.

[7] This pluralism of "transnational law" discourses will be further addressed briefly in the section called "Transnational Socio-legal Pluralism" and also in the "Final Comments", *infra*.

– require forms of paradigm-shifting "partisan[ship]", to use a term from the Raz extract, that exist in some kind of ironic interactive space between keeping faith and breaking faith. Often enough, this will involve digging into a mixture of inchoateness and inconsistencies in the practice or tradition and coming to grips with the epistemological pluralism of the field. This includes assessing the extent to which the practice or tradition embraces such epistemological pluralism as part of its own self-understanding versus whether the practice or tradition instead tends either not to see or even actively to obscure that pluralism. By way of what one then does with the foregoing assessments, it may be that we can benefit from thinking of conceptual analysis as involving the need sometimes first to excavate the possible or potential from the actual and then decide how to interpret the excavations in terms of the positions one takes on the best relationship, to return to Dworkin, between fit and justification.[8]

I conclude this methodological exploration of the nature of the exercise undertaken by this article by observing the similarities between the way in which Jessup thinks of "transnational law" as a linguistic concept in terms of its use-value and the way Raz approaches the task of explicating conceptual meaning as a kind of dialectic between the observed usage of the concept in practical discourse and reasoning and a kind of stipulative dimension that is involved in giving shape to a concept that is generally used more intuitively than self-consciously.[9] Like Raz, Jessup avoided the language of definition, instead choosing to invoke "transnational law" in a manner that was both performative and narrative in nature. By beginning this famous passage with "I shall use...", Jessup was setting up "transnational law" as an overarching premise for his lectures, and for the subsequent book, without developing as a prior step an argument for why this term should in fact be chosen. It would be in its very narrative use – implicit for the most part, although occasionally explicit – within the structure of the book's exposition and argumentation that would, by the end of book, circle back and add depth to that premise.

With the foregoing methodological forays in mind, thus it is that the present paper does not seek to make an argument for the single best reading of the *concept* of "transnational law" but instead seeks to outline three candidate *conceptions* of that notion. Importantly, it is not assumed at this stage that these are necessarily *competing* conceptions. Rather, they may all be compatible to one extent or another. Such compatibility may arise either at a linguistic level (if one is content with the notion of polyvocality of concepts and associated multiple meanings) or at a substantive level (if one discerns aspects of mutual coherence amongst the proffered conceptions that could lead to a higher-order analytical account of "transnational law").

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[8] A direct debt is owed to the explorations in ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996).

[9] On this way of framing conceptual inquiry, see Joseph Raz, *On the Nature of Rights*, 93 MIND 19 (1984). See also *supra* note 4 at 165ff. The *The Nature of Rights* chapter in THE MORALITY OF FREEDOM is largely identical to the preceding article except for an added treatment of Ronald Dworkin's notion of rights as trumps at 186-192.

In this sense, it might be said that "transnational law" operates in the present analysis not as an established concept but more as a kind of fuzzy or suggestive proto-concept, the viability of which will emerge 'from below' (as it were) through an exercise in comparing diverse conceptions that move back and forth across the above-mentioned blurred line that separates actual linguistic use and conceptually possible usage. While this approach may seem incoherent to some who assume that arriving at a given conception necessarily must refract off the notion of a prior concept that itself generates content and constraints for any given conception, the approach nonetheless seems to me to be appropriate to the subject-matter at hand. We are, I believe, still in search of transnational law, including the very concept of "transnational law," and not yet at the stage of fattening it out (as concept) into a debate over competing conceptions of the best accounts of a consensus abstraction.

What will be presented in this article, then, are three contrasting – and, to reiterate, not necessarily conflicting – approaches to the relationship between the "the transnational" and "law."[10] Reflecting the origins of this brief paper, the implications for legal education will be used on occasion as one way of expressing the significance of the conception. [11]

B. Six Linguistic Caveats with respect to the "Transnational" in "Transnational Law"

The phrase "the transnational" has already been used on at least two occasions so far in this paper. Before proceeding to the discussion of the three alternative conceptions of "transnational law", a cluster of caveats are in order with respect to this notion of "transnational" as used by Jessup and in relation to how this term is used throughout the present paper.

First of all, the present paper tends to use the terms "phenomena" and "situations" interchangeably – as in transnational phenomena or transnational situations – to refer to the empirical contexts at play in theorizing about what "transnational law" does, could or should mean. In contrast, Jessup's passage is arguably less inclusive in that "actions" and "events" are apt to suggest a) physical occurrences that b) have elements that are in more than one jurisdiction. What is not clearly covered in Jessup's passage is the notion of transnational "issues", which could include phenomena not involving physical acts or events across borders that are nonetheless understood by relevant participants and/or observers as "transnational" situations because of how the issue has come to be constructed by interacting normative (legal, policy, and moral) discourses as

[10] Especially given my methodology emphasizing "transnational law" as a proto-concept, no claim is made here that there are only three conceptions. But, it is claimed (at least at present) that the three conceptions in this paper appear to the author to be sustainable, even if there are others.

[11] See *supra,* note 1.

"transcending" (to use Jessup's own term) frontiers. In particular, such constructions of transnational issues might piggyback on the contexts in which public international law has come to construct some situations and related issues as no longer falling within 'reserved domestic jurisdiction' of states, notably much of international human rights law. For example, consider a manufacturing context in which all production inputs, legal ownership structures, personnel and sales of product are local but in which production includes the forced labour of children in a way that engages the 1998 ILO Declaration on Fundamental Principles and Rights at Work.[12]

Secondly, quite apart from the normativized construction of 'empirical' contexts such as just noted, it is also important to note that Jessup's passage at the very least needs to be read (as he almost certainly intended it to be read) as including contexts in which there are one or more actors with connections outside the jurisdiction in which all physical acts or events are taking place. For example, consider a mining context in which all affirmative acts and events occur in a single jurisdiction but in which legal ownership and/or control of an involved corporation includes persons or entities beyond that acts-or-events jurisdiction. It is of course the case that it does not take much imagination to think of ways in which, by dint of the operation of forces of contemporary economic globalization including interconnected production and distribution networks and deterritorialized information flows, both of the just-given examples (in the preceding paragraph and in the preceding sentence) are very likely to involve connections outside the local jurisdiction that may not be immediately apparent. To the extent this is the case, the task of ideational construction of a situation as transnational is aided by globalization's facts on the ground that turn some situations into transnational situations even in the Jessupian "acts or events" sense.

Thirdly, "transnational" is being used synonymously (in this paper, at least) with "trans-state". In this respect, it is not claimed that the term "transnational" is an ideal term in the contemporary semantic universe in relation to the identity of the "national" within the "transnational." Treating "nation" and "state" as fungible here is parasitic on the semantic tradition inherited from public international law and its historical foundations in (mostly tendentious) political theory revolving around the concept of the "nation-state". Thus it is that "international law" semantically colonized the earlier terminology of the "law of nations" which arose in epochs when the modern state had not yet evolved into either the dominant form of polity in the world or the imperially preferred form of polity for participation of a society in inter-polity law. Without discussing the various nuances that arise, "international law" in the 20th Century quite clear referred to "interstate law" (just as United Nations refers semantically to United Member States), whatever other actors were accorded some measure of status by international law including as international legal

[12] Available at http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm, last accessed June 15, 2009.

persons with clusters of autonomous rights (most notably international organizations, as conceptualized by the International Court of Justice in the *Reparations Case*). A pure first-principles approach to theorizing "trans-state law" would probably opt for using "trans-state" in order to shed any association with the specious connection between "nation" and "state", but the methodology employed in the present paper all but precludes such a clean break as the very point of the paper is to explore and to some extent leverage the very discourse of "transnational law." It is not as if use of "trans-state" is not doable – witness how Jessup's own usage a scarce fifty years ago has itself generated the very discourse that is referenced in this paper. At the same time, it is fairly safe to say that pretty well all users of "transnational law" discourse understand this in the sense of "trans-state" and, as such, from a theoretical perspective, it is arguable that nothing is lost to continue this convention.

If it has not been clear from the preceding paragraph, I should emphasize that alignment of "transnational" with "trans-state"does not entail that trans-state law must somehow itself be statist. "State" here is a reference to what is being transcended in one way or another (i.e. states and, more particularly, their legal systems including interstate law) and is most definitely not a reference to a constraining condition on the source of the law that can qualify as "trans-" in nature. Further, by drawing attention to the centrality of the state (as well as state law and interstate law) in relation to its simultaneous transcendence, I also do not wish to exclude coherent and useful employment of the idea of "transnational" in a context where a theorist might indeed wish to focus on "national" in a different term-of-art sense, as for example in relation to inter-nation norms that may be in play in such contexts as the relationship between groups sometimes called First Nations in Canada and other times Aboriginal Peoples.[13]

Fourthly, while dictionaries are arguably the last refuge of philosophical scoundrels, it is useful to note that pretty well any of dozens of dictionaries will define "trans-"(either on its own as its own prefix entry or as part of a range of words from transform to transcend to transubstantiate) in terms of any of "across", "beyond" or "through." It is either never or only marginally the practice of etymologists to also include "between", which term is reserved for "inter-". Thus it is that, while international law as interstate law is more or less the same as talking about law between or amongst states, transnational law can variously connote law across states, law beyond states, or law through states (i.e. states' legal systems). As well, to the extent "trans-" has a serious polyvocality built into it, it opens rather fecund possibilities for the kinds of legal relationships or structures that count as being trans-national, even as, linguistically, it tends to frown on an understanding of transnational law as being just another way of talking about interstate law.

[13] Just by way of two examples not unrelated to "nations" or "peoples" as law's reference points, consider the choice of title and analytical focus in JOHN RAWLS, THE LAW OF PEOPLES (1999). Consider also the notion of "intersocietal rules" in Brian Slattery, *The Organic Constitution: Aboriginal Peoples and the Evolution of Canada*, 34 OSGOODE HALL LAW JOURNAL 101, 109 (1996).

That said, it must be acknowledged, fifthly, that on occasion there can be some looser employment of the term "transnational law" as simply a different (perhaps viewed as edgier) way of speaking about "international law." But, upon further examination, such usages tend to be compendious understandings of "international law" without the adjectives "public" and "private" or, put differently, understood as meaning "public and private international law." This usage may reach back historically to periods when it was more common to think of private international law (conflict of laws outside federal or interpersonal law contexts) as a branch of the law of nations and not a branch of each state's own legal system. It may also have a prescriptive dimension to the extent some employers of the term "transnational law" believe private international law should become more and more understood as fused at the hip with public international law in modern times. But, whatever the motivations for or influences on usage, the key point for present purposes is that such usage, by including private international law, is at minimum not synonymous with "public international law" on its own and, again by including private international law, makes non-state actors central to some relevant contexts. As such, this looser employment of the term still does not map onto the notion of "interstate law" in the sense of law between and amongst states.

Sixthly and finally, we are left with some ambiguity as to whether the increasingly commonly seen term of "transgovernmental" should be caught by the term "transnational."[14] The usage of "transgovernmental" has tended to be in the context of discussions of what are called transgovernmental networks, governance and/or regulation in which persons within the executive arms of the state come together outside their own state's system to discuss problems, policies and regulatory solutions. These persons are usually bureaucrats closely integrated into the state, such as agriculture policy specialists, but sometimes they are public servants working for institutions with some degree of independence from (and certainly, 'within') the state, such as employees of central banks. The resulting regulatory solutions rarely include agreements that would be treated as interstate treaties by public international law; rather, they tend to include recommendations, guidelines, model laws, and so on, which each player in the process then must (or, simply, may) take back to his or her own state for some form of implementation within existing regulatory powers or by way of motivating law-makers in the state to legislate. There is clearly a sense in which so-called "transgovernmental" activity is apt to be understood as nothing but interstate activity in that states act through their governments and public international law assimilates the conduct of government to the conduct of states. However, the picture may not be so clear to the extent that most of these processes occur within functional or sectoral fields of regulation 'outside' of any

[14] See for example, Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1 (2002-2003). In the interests of the pluralism (and corollary semantic humility) gestured to earlier, it is also worth noting how others use the term "supra-" in preference to "trans-", as in Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?* 8 CHICAGO JOURNAL OF INTERNATIONAL LAW 513 (2008).

formal endorsement of 'the state' or even knowledge of this activity on the part of other state institutions; understood in a way similar to pluralistic understandings of 'the state' as involving multiple semi-autonomous players, it could be said that a significant range of "transgovernmental" processes are sufficiently decoupled from the state (and from formal interstate regulation) to be understood as activity that is more across, beyond or through states than it is between or amongst states. The picture becomes more palpably "transnational" for those processes that also involve non-state actors, such as corporations, as formal participants and also for those processes in which such non-state actors are significant informal interlocutors (whether as advisors, stakeholders, or active lobbyists) with the formal participants.

C. First Conception: Transnationalized Legal Traditionalism

As is the case for all three conceptions, the first of the three approaches begins with a focus on empirical context and environment – in other words, transnational phenomena attracting or indeed, in some cases, seeking to avoid regulation – and then, with some strong if implicit premise that such phenomena are heightening and broadening with every passing day. This approach then asks how/where "law", *as we currently know and practice it,* fits into the picture. This approach might focus on the first sentence of Jessup's seminal framing of a meaning for "transnational law" by saying it is "all law which regulates actions or events that transcend national frontiers." In other words, it is "law" as we know it that must deal with various phenomena consisting of "actions or events that transcend national frontiers," to which one might perhaps usefully add to "actions" and "events" something like "relationships amongst actors."

However, here we may have recourse to Raz's notion of keeping faith with traditions because the legal traditionalist, as I will call her, sees nothing about law responding to transnational phenomena that requires departure from a state-centred positivism.[15] By this approach, it is completely open for a legal scholar, practitioner and/or educator to take the view that, at a normative level, both the existing law that one appeals to (applies, interprets, rhetorically invokes, etcetera) and the desirable or even necessary future law (that one advocates, campaigns for, takes part in negotiating, urges judges to forge, and so on) is made up of rules, principles, and/or standards and related decisions and other juridical acts 'located' in one of two kinds of legal systems: public international law or the

[15] It is important to be clear that there are several distinct versions of what legal positivism entails, and state-centredness is not necessarily part of some conceptions. Also, legal positivism that emphasizes states as the ultimate source of all law invariably must have a prescriptive component (this is how law *should* be understood) and, in light of the extent and complexity of phenomena that seem to bracket the state in one way or another, cannot expect to persuade skeptics by claiming that state-centredness is purely and simply a description of observed social practice. That said, the thoughtful legal traditionalist will have answers as to why "fit" and "justification" do converge with retention of state-centred understandings of sources of law.

state (national/domestic/municipal) law of one of 195 or so states. Further, a person could divide the legal universe into public international law and national law in full knowledge that any given domestic-law system may itself embrace international law and that much domestic law may create, recognize, and delegate power to sub-systems like religious law, Aboriginal law, business custom, professional regulatory codes, and so on. The fact of regional law (e.g. European Union law) also does not disturb this basic division of the legal universe. On this account, there is not – and is no need for – something distinct called "transnational law" for such 'law' would invariably be given shape and be permitted to exist only as the combined functioning of public international law and domestic legal systems, and of their mutually regulated interaction.

All this said, for adherents to a state-centred traditionalist approach, the importance of the challenge that the non-legal transnational realm provides for law need not be under-emphasized: transnational phenomena will require the average lawyer to be educated in legal ideas, legal doctrine, and aspects of legal reasoning that can no longer avoid education/training in both public and private international law (an avoidance probably most common in North American common-law faculties of law). [16] As well, the most

[16] *Public international law* is traditionally understood as the system that deals with the legal regulation of interstate relations or the common consensual regulation by more than one state of a particular issue or problem (from human rights to the ozone layer). As traditionally studied and taught, it has been common to include interstate organizations (the UN being the most prominent) as both subjects of regulation and to some extent relatively autonomous law-generating agents within the public international law order. By way of nodding to points of overlap with "transnational" ways of viewing the world, it is important to note that any creation or recognition of rights and duties of non-state actors beyond international organizations (individuals, terrorist organizations, the Red Cross, pirates, multinational business entities, and near-endlessly so on) by two or more states acting collectively is viewed, from within mainstream contemporary public international law, as both conceptually part of public international law and empirically an ever-growing chunk of the corpus of public international law.

Private international law is the field of law that comes into play where persons have relationships, transactions or encounters in contexts of geographically-complex facts (involving more than one state's jurisdiction), and questions of how to adjudicate so-called 'private law' rights and obligations arise. Classically, in the conceptualization and, more especially, the teaching of private international law (whether under this label or that of 'conflict of laws'), the three core questions of the field relate to adjudicative jurisdiction, choice of (applicable) law, and recognition and enforcement of judgments. Note that the mainstream modern conception of private international law is that each jurisdiction has its own national rules on geographically-complex private law situations (jurisdiction, choice of law and recognition/enforcement), such that this area of law is actually a matter for each national legal system. That said, this area of law is "interstate" in the subject-matter sense that each system's domestic rules exist to regulate the interaction of the domestic legal system and foreign states' legal systems. Especially for the second and third conceptions of "transnational law" to be canvassed, it is deeply relevant that there was a time when what we now call private international law would have been more commonly categorized as a branch of an 'international law' that was tasked with regulating a multiplicity of actors and doing so by recourse to "law" that would not necessarily be (or be exclusively) the municipal law of states. The interstitial injection of public international law via treaties generated by the Hague Conference on Private International Law tends to be the clearest way contemporary public international law interacts with private international law, and then only as refracted through the rules of reception of public international treaty law by states' domestic legal systems.

nimble and adaptive lawyers will be those who have enough grounding in comparative law as an academic discipline to be able to engage with lawyers and legally-relevant 'facts' in a way that grasps as early as possible the assumptions, baselines of analysis and fundamental concepts that may be animating an interlocutor from a different legal tradition.

The bottom-line is either that no good law school should allow students to graduate who have taken nothing but 'domestic law' courses (at least where such courses do not systematically build in public and private international law dimensions). *Transnationalized legal traditionalists* will at the very least wish to facilitate law students choosing a less parochial path by proactively encouraging a more cosmopolitan curricular constellation in law schools – such that any given student is responsible for any limitations in her own education and, in turn, limited training as a lawyer for our times.[17]

D. Second Conception: Transnationalized Legal Decisionism

A second approach to transnational law would concede that the legal traditionalist may be correct to say that the "law" dealing with transnational phenomena can always in some respects be analytically traced to one or more domestic legal systems and/or public international law. But, the second approach would then borrow a bit from various strands of legal theory and legal practice to argue that there is a kind of transnational law *in the result* when one observes the gradual build-up of decisions with respect to a variety of transnational contexts/problems – decisions that have been informed simultaneously and self-consciously by domestic and international law together providing the pool of potentially applicable (including potentially modifiable) standards for a given rule of decision or interlocking rules of decision.

Some will recognize doctrinal techniques from private international law embedded in the foregoing description, with it being fairly common across conflict of laws traditions to

[17] Lest I be thought to be seeking to create a 'straw man' with my account of this approach, let me be clear that I see it as perfectly open for adherents to this approach also to be fierce advocates for a contextualized and interdisciplinary education of lawyers in addition to a more comprehensive traditional legal education. My only caveat here is that in my view it is particularly important to be conscious that the challenge of contextualization and interdisciplinarity is one of relating a more comprehensive legal education to *transnational phenomena* rather than assuming that the only phenomen*on* to be grappled with is "Globalization." In my view, the notion of transnational phenomena is more conducive to being understood as being more differentiated and as involving often less spatially extensive phenomen*a* than the notion of globalization. It may be true that one can take the monolithic edge off the assumption that there is something going on called "globalization" by self-consciously thinking about "globalization*s*" – as I have done when teaching Osgoode's first-year course called *Globalization and the Law* – but, in my view, this still only takes us so far because globalizing forces are not co-extensive with transnational ones, at least as long as one is even a wee bit semantic in one's understanding of the meaning of "global." To take a by-now-trite example, it is not particularly easy to approach the legal dimensions of the European Union if hamstrung by "globalization" as the organizing reference point.

admit the possibility (with varying degrees of comfort and ease) of different rules from different domestic-law systems being brought to bear on different aspects of the same over-all legal case or interlocking series of legal problems being disputed. Some will also discern a certain overlapping of positivist and realist legal theory to the extent that versions of each kind of theory take cognizance of the law-constituting 'power of decision' of duly recognized or authorized actors – notably judges but also including administrators, executives-in-council, regulatory institutions with delegated powers like law societies, and so on. One way or another, this approach to 'law' understands law in disaggregation, not as whole legal orders or systems but rather as discrete norms or normative clusters that are capable of reasoned extraction from the whole and then of being brought to bear on constantly changing particulars. It might be further said that legal-systemic elements are mostly in the form of the methods (and associated facts) by which one determines whether a given actor has the power of decision on which this approach hinges.[18]

Such it is that this second approach simultaneously stays quite firmly rooted in the notion that states' domestic legal systems (with private international law as one coordinating mechanism) and interstate-generated public international law jointly do two things. They create the pool of norms that may be thought of as rules of decision *in potentia* and they also bestow authority upon certain actors to exercise a power of decision that leads to some kind of resolution of a transnational issue, problem or dispute. In terms of the opening quotation by Jessup, this second approach would in some sense see transnational law as a result of "[b]oth public and private international law [being] included", with, first of all, generalization of private international law *method* being the mechanism for a variety of potentially applicable substantive rules from domestic legal systems to be identified and applied and, secondly, the interaction of domestic and public international law being the means by which a public international law norm could itself be chosen as a rule of decision in a given context.

To be clear, this conception of of transnational law does not reduce the law to the method or the process in which method is embedded. Rather, for immediate purposes, transnational law is understood as the resulting (institutionally generated) interpretations or applications of domestic and international law to transnational situations. Analysis of 'method' probably will turn out to be inextricably connected to this idea, but, to the extent the point being made here is that interpretations and applications coalesce into bits of law (i.e. legal-normative content), something (substantive) beyond a method also emerges.

[18] By way of contrast, statist legal traditionalism within legal theory tends to view (although I would not go so far as to say invariably views) law as always and everywhere systemic (with the corollary that all law either belongs to a state *legal system* or an international *legal system*.) This is a dominant presumption of state-centred theory, and one well worth questioning as part of generally reflecting on the adequacy of transnational legal traditionalism. I am grateful to Michael Giudice for the foregoing points.

This of course assumes that it makes sense to say that interpretations of legal norms are separable (if not separate) from the legal norms themselves; I can think of obvious ways in which this could be argued to be true or not true, but for present purposes there is no need to delve into the ontology of legal norms to sustain the foregoing points. [19]

In summary, this second approach involves the consideration of the relevance of the transnationalized empirical context, the juxtaposed and integrated consideration of one system's rule or principle here and another's there, the production of decisions thereby, and the gradual extrapolation from the body of decisions of principles and rules that can be argued before future decision-makers as being either governing or persuasive for similar transnational contexts in the future. Although I will not elaborate here, I would argue that such an approach to "transnational law" as the outcomes of legal decision-

[19] Although this article's contribution is schematic in the extreme, I cannot avoid the temptation to comment a bit further on the relationship between process and decisional outcomes. I note (rather than defend) my view that one strand within what some would call the *transnational legal process* school is what I am calling here *transnationalized legal decisionism*. Much emphasis in the process approach is placed on the imbrication of comparative law analysis in a given domestic law context, for example, looking for edifying insights in relevant constitutional decisions in other jurisdictions before deciding one's own case: see for example, Anne-Marie Slaughter, *Judicial globalization*, VIRGINIA JOURNAL OF INTERNATIONAL LAW 1103 (2000). In such writings (and in speech-making by a growing number of judges), comparative constitutional analysis is often linked to a sociology of transnational interjudicial discussion that is sometimes literal (actual meetings amongst judges to exchange insights on parallel constitutional challenges) and more often metaphorical, as when we speak of an evolving *ethos* of transnational dialogue amongst courts in the world with respect to a common human rights enterprise that, in its more through-going (and, I would suggest, sophisticated) versions, links constitutions and international human rights treaties in a shared value system: see for example, Craig Scott and Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on 'Soobramoney's' Legacy and 'Grootboom's Promise'*, 16: 2 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 206 (2000); Reem Bahdi, *Globalization of judgment: transjudicialism and the five faces of international law in domestic courts*, 34 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 555 (2002); Yuval Shany, *How supreme is the supreme law of the land? Comparative analysis of the influence of international human rights treaties upon the interpretation of constitutional texts by domestic courts*, 31 BROOKLYN JOURNAL OF INTERNATIONAL LAW 342 (2006).

Transnational judicial conversation has of course always been part of common-law decision-making to the extent extra-jurisdictional common-law precedents have always played a persuasive role in 'domestic' common-law reasoning, and I am fairly certain that a parallel phenomenon exists in many civil-law jurisdictions (for example, cognizance of decisions in other civil-law countries or consulting both *la doctrine* and the reasoning of doctrinal theorists further afield than one's own jurisdiction). It also must not be forgotten that transnational judicial interaction includes a core mechanism of private international law, namely the not-infrequent necessity for judgments in one state to be given effect only once formally recognized by judges in another state as having been properly rendered – with propriety ranging from jurisdictional to procedural to, less commonly, substantive propriety. Analogues to all these examples can be given with respect to how judicial, arbitral, codifying, law-developing, legislating and similar decision-makers in the public international law system similarly engage in a comparativistic borrowing process with domestic legal systems, and how the domestic level can 'receive' norms from the international level that then become part of the transnational dialogue amongst national courts and other decision-makers – i.e. comparing the different and potentially similar interpretations that can be given to the 'same' international law norm. The upshot of these examples, however, is that we still need not necessarily go further than assuming some authorized decision within a given state or interstate jurisdiction, albeit in a way that usefully helps us see how a decision is invariably part of a broader decision-making process.

making faced with a transnational problem and/or in a transnationalized context is what competent, well-trained lawyers, judges, arbitrators, and others already do in a growing range of transnationalized contexts. Let us dub this second approach the school of *transnationalized legal decisionism*.

E. Third Conception: Transnational Socio-Legal Pluralism

A third approach is an approach that we can perhaps think of as homing in on the final tag in the Jessup quotation – "other rules which do not wholly fit into such standard categories." This is an approach that in effect sees transnational law – or if one wishes to avoid conflating this tag with the whole category, at least the core of transnational law – as being in some meaningful sense autonomous from either international or domestic law, including private international law as a cross-stitching legal discipline. Rather than focusing on Jessup's broad definition that sees transnational law as some kind of umbrella within which "other [non-standard] rules" fall alongside public and private international law, this approach sees these "other" rules as the true – or at least the quintessential – transnational rules.

This approach sees in "transnational law" something more than decisions plus extrapolations from decisional results in transnationalized contexts.[20] Rather, transnational law is imagined as in some respects occupying its own normative sphere. For example, a not-uncommon way of speaking about transnational law is as a kind of law of the interface or, as I have elsewhere described this strand of thinking, law that is *neither* national nor international nor public not private at the same time as being *both* national and international, as well as public and private.[21]

A transnational-law theorist of the third sort may well assume that a separateness of "transnational law" in a systemic sense emerges from the gradual build-up of authorized decisions and extrapolated principles and rules that the transnationalized-legal-decision school sees as the end point of transnational(ized) law. The postulation of such systemic emergence tends to assume that "systemic" is flexible enough to encompass sub-systems that may be partially or totally isolated one from the other. But, whatever the scope or isolation of the system/s, here the key notion is that of "emerging from." Just as the International Court of Justice reasoned 60 years ago that the United Nations, while constituted by states acting collectively, came to assume an "international legal

[20] Note, however, that the second conception's focus on decisional outcomes can also be grafted onto the present (third) conception, once one has surmounted the hurdle of determining that non-state or other-than-only-state decision-making institutions have sufficiently recognized authority to generate decisions that are entitled to the label of "law."

[21] See, for example, the first three pieces cited in *supra,* note 2.

personality" independent of that interstate foundation and just as Westminster legal systems have been able to imagine an entrenchment of constitutional norms immune from the doctrine of the supremacy of Parliament, transnational law theorists of the third sort see "transnational law" as capable of being *at least* the organic outgrowth of cumulative decisions that are explicitly or implicitly authorized by domestic or international law that themselves may apply nothing but domestic law or international substantive norms. At minimum, on this view, transnational law can be treated as other than national or international in the sense of a body of law that gradually takes on a certain internal coherence in the form of a hybrid synthesis appropriate to a given normative subject-matter and surrounding context.[22]

If this were 'all' that one might mean by transnational law in the strong sense, it would still be something significant, I believe. We would have something that is an extension of the second conception, with an added dimension of systematicity (even as we would have to acknowledge that the systems in question are often embryonic – and/or fragmented *inter se* as sub-systems so as to still allow us to approach them as systems). However, in my view, there is an added layer for those adhering to the third approach that shores up even further its foundations as separate from, while always related to, public international and domestic law: this layer is provided by the impact on legal analysis and legal imagination when we fasten onto the insights of what is often called "legal pluralist" thinking.[23]

I have neither the time nor space to do more than observe that there is a fairly longstanding, vibrant and rapidly rejuvenating body of scholarship that draws on both legal history and existing 'marginal' realities to demonstrate that law need not be conceptualized as having to have either a direct or a derivative relationship to the state or to the interstate order. Law as both social practice and animating ideal may well be constructed and continue to exist independently of 'official' (in the sense of the modern state) law. Indigenous property law, the relations of Moroccan and Spanish fishers in the middle of the Straits of Gibraltar, church law, Gitano marriage ritual, the principles of lending in the Shar'ia, 'internal' corporate norms, commercial custom in all its varieties, the

[22] Albeit an internal coherence that will always be relational in the sense of necessitating coherent interconnections with the other fields of law from which it grows.

[23] For a (very) small cross-section of a (very) wide range of approaches that I would categorize as "legal pluralist" with transnational dimensions, see: Andreas Fischer-Lescano and Gunther Teubner, *Regime-collisions: the vain search for legal unity in the fragmentation of global law,* 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 999-1046 (2003-2004); J.H.H. Weiler, *The geology of international law – governance, democracy and legitimacy* 64 ZAÖRV 547 (2004); Paul Berman, *Global Legal Pluralism*, 80 SOUTHERN CALIFORNIA LAW REVIEW 1155 (2007); Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MODERN LAW REVIEW 183 (2008); Sally Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 LAW & SOCIAL INQUIRY 975 (2006); Ruth Buchanan, *Legitimating Global Trade Governance: Constitutional and Legal Pluralist Approaches*, 57 NORTHERN IRELAND LEGAL QUARTERLY 654 (2006).

complex normative nature of Internet regulation, the certification process of the Forest Stewardship Council, the guidelines produced by the International Union for Conservation of Nature, and so on.

These examples may suggest to some the marginality of law that is not directly rooted in state or interstate law, not least because the state and interstate order have for the last 150 or so years cast a commanding shadow over all other normative phenomena, constantly reminding other claimants to 'law' that they exist by dint of the space left for them by state and interstate law. However, what if one adds to legal pluralist challenges to the state-centredness of law the additional observation-cum-argument that much of what occurs under the auspices even of state or interstate law does not transpire at the formal level (of courts, etcetera) but in a complex informal world in which official law mutates and morphs as a function of delegated (even privatized) authority, social and economic power struggles, good faith mutual response to common needs, and interaction with unofficial normativities? So observed, a stronger case can be made that much of the transnationalizing world of law is "transnational law" in the sense of not being statist in any strong way as well as in the sense of involving multiple actors (who admittedly may owe their legal existence to state and interstate legal orders but who are nonetheless neither states nor interstate entities).

Although far from being an exegesis of Jessup's definition, to some extent the foregoing discussion of the third approach takes seriously both that part of the passage that speaks of transnational situations ("actions or events that transcend national frontiers") and that part which emphasizes the non-standard nature of some norms ("other rules which do not wholly fit into such standard categories"). For want of a better term at present, let us say this third approach involves a school of *transnational socio-legal pluralism*.

F. Final Comments

I end with two comments. The first relates to much wider questions of legal theory than have been addressed (or, at least, than have been disentangled) in this piece. Implicit in some of what I have said is that there are potentially multiple senses of "legal pluralism" relevant to thinking about the interaction of law in transnational contexts. There are at least two senses. One could be a legal pluralist about the sources of law (divine inspiration, state legislatures, courts, custom, extrapolated general principles, and so on) while still supposing there is one concept of law. Or, one could be a legal pluralist about both the sources and concept of law (i.e., there is no single concept of law). In this paper, I have avoided addressing these interacting senses of legal pluralism in a direct fashion, although it is also probably true to say that the general tenor of my narrative has been one of openness – at what I have called this "proto-concept" stage in the life of "transnational law" – to a double legal pluralism being a valid frame of reference. As my instincts tend towards ecumenical and interactive understandings of knowledge in the world, I lean

toward a provisional conclusion that reasonable disagreement over contending theories of the concept of law and over valid sources of law foretell a multivocal future for "transnational law" for many years to come.

The second concluding comment relates to the legal education context that generated the first version of this paper.[24] One purpose of all of the above has been to suggest that we (legal scholars, practitioners, educators) *may* be assisted by opening our minds to something extraordinarily fuzzy called "transnational law." It may turn out that, for some or indeed many, "transnational law" remains, at best, not just elusive but also undisciplined as a construct and, at worst, obfuscatory and distracting. Transnational situations, yes; transnational law, no. To adopt again a legal education frame of reference, I might be reluctantly content if legal education around the globe even went this far (i.e. dealing with the theory and practice of state and interstate law faced with transnational situations) because it would count as a distinct cosmopolitanization in a world of still-too-often-parochial legal education. However, the implications of the foregoing brief discussion is, I believe, suggestive of some reasons why we may be well served by asking whether understandings of "transnational law" beyond transnationalized legal traditionalism need to be more vigorously (and rigorously) explored for transnational legal education to be worthy of its name. In the end and at the very least, I hope I have somewhat succeeded in suggesting why "transnational law" is an idea that pushes the boundaries of the legal imagination in such a way that, at the very least, legal theory and legal education based entirely on 'domestic' (state) and 'international' (interstate) constructs of law must be open to developing in ways that might take us all out of current conceptual comfort zones.

[24] See *supra,* note * about the author.

SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

The Evolution of Legal Education: Internationalization, Transnationalization, Globalization

*By Simon Chesterman**

This article examines the evolution of legal education as it has moved through international, transnational, and now global paradigms. It explores these paradigms by reference to practice, pedagogy, and research. Internationalization saw the world as an archipelago of jurisdictions, with a small number of lawyers involved in mediating disputes between jurisdictions or determining which jurisdiction applied; transnationalization saw the world as a patchwork, with greater need for familiarity across jurisdictions and hence a growth in exchanges and collaborations; globalization is now seeing the world as a web in more ways than one, with lawyers needing to be comfortable in multiple jurisdictions.

> *"[L]aw is a science, and … all the available materials of that science are contained in printed books. … We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists."*
>
> Christopher Columbus Langdell,
> Dean of Harvard Law School, 1887[1]

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[1] Christopher Columbus Langdell, *The Harvard Law School*, 3 L.Q. REV. 123, 124 (1887).

> *"Students trained under the Langdell system are like future horticulturalists confining their studies to cut flowers, like architects who study pictures of buildings and nothing else. They resemble prospective dog breeders who never see anything but stuffed dogs. And it is beginning to be suspected that there is some correlation between that kind of stuffed-dog study and the over-production of stuffed shirts in the legal profession."*
>
> Jerome Frank,
> Report to the Alumni Advisory Board of the
> University of Chicago Law School, 1932[2]

Legal education has always borne an ambiguous relationship to the practice of law. Is a law degree a technical qualification, like carpentry or medicine, or a serious field of intellectual inquiry, like philosophy? The uncertain answer to that question is evident in the fact that so many jurisdictions require a professional qualification administered by the local guild — a pupillage, or a bar examination — as well as a degree in order to practice. Only a few allow lawyers to practice with only a degree, such as some civil law countries (notably in Latin America), or with only a professional certification, such as a handful of U.S. states[3] and, until recently, Japan.[4]

How one answers the question affects more than the careers of professional lawyers: it will have important implications for how one teaches in a law school. In Australia, for example, the undergraduate law degree is increasingly regarded as a kind of upscale Arts degree — only about half of all law graduates actually end up entering the private legal profession.[5] Singapore, by contrast, until recently treated law more as a technical

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[2] Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 912 (1932).

[3] National Conference of Bar Examiners & the American Bar Association Section of Legal Education & Admission to the Bar, Comprehensive Guide to Bar Admission Requirements 2005 (2005), available at: http://www.abanet.org/legaled/publications/compguide2005/chart3.pdf, 10-13, last accessed, 14 March 2009. Note that the requirement to attend law school in most other states is a comparatively recent phenomenon. In 1922, no state required a law degree as a condition of admission to practice and law school was seen by many as an unnecessary delay in a legal career. Alberto Bernabe-Riefkohl, *Tomorrow's Law Schools: Globalization and Legal Education*, 32 SAN DIEGO L. REV. 137 (1995).

[4] See generally Gerald Paul McAlinn, *Reforming the System of Legal Education: A Call for Bold Leadership and Self-governance*, 2 ASIAN-PAC. L. & POL'Y J. 15 (2001); Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 ASIAN-PAC. L. & POL'Y J. 89 (2001); Yoshiharu Kawabata, *The Reform of Legal Education and Training in Japan: Problems and Prospects*, 43 S. TEX. L. REV. 419 (2002); Masako Kamiya, *Structural and Institutional Arrangements of Legal Education: Japan*, 24 WIS. INT'L L.J. 153 (2006).

[5] DIRECTORY OF COMMONWEALTH LAW SCHOOLS, 1999/2000 3 (John Hatchard ed., 1999); Mary Keyes and Richard Johnstone, *Changing Legal Education: Rhetoric, Reality, and Prospects for the Future*, 26 SYDNEY L. REV. 537 (2004).

qualification, with the government's Third Committee on the Supply of Lawyers capping the number of law students at the estimated number of lawyers required in the republic.[6] As a result, Australia has more than six times as many law students per capita — 28,000 compared to around 1,000 in Singapore,[7] or one student for every 700 people in Australia as opposed to one for every 4,600 in Singapore — but has also embraced a more critical and theoretical approach to the study of law.

This article focuses not on how legal education is changing within any particular jurisdiction, but as a result of transformations across jurisdictions.[8] In some ways this is hardly a novel phenomenon; law has previously been spread through the expansion of empire in the form of Roman law (at least as it applied to Roman citizens) and the Napoleonic code.[9] The difference now is that the engine of change is not top-down politics but bottom-up practice. The transformations identified here have been led, first, by the profession, as changes in the way law is practiced have necessitated a change in the way in which it is taught. Such influences are linked to developments in transportation and communication and the enmeshing of diverse economies embraced by the loose term "globalization". A second influence has been the more mobile student population that law schools confront, with immigrants, expatriates, and exchange students making up ever larger proportions of our classes.[10] Thirdly, there has also been an intellectual shift, as those of us studying the law realized that there was far more to be gained from comparative analysis and, more recently, that something interesting was happening that transcended traditional jurisdictional analysis.

These influences have seen legal education move away from a purely local approach and through three broad paradigms, which one might term "international", "transnational",

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[6] Such a practice is hardly unique to Singapore. See, *e.g.*, Hikmahanto Juwana, *Legal Education Reform in Indonesia*, 1(1) ASIAN J. COMP. L. (2006).

[7] See, *e.g.*, Ministry of Education (Singapore), Establishment of the Singapore Management University School of Law (5 January 2007), available at: http://www.moe.gov.sg/press/2007/pr20070105.htm, last accessed, 14 March 2009.

[8] It is beyond the scope of this article to consider in detail the various transformations in education within Europe, through programs such as Erasmus and the European Credit Transfer System (ECTS). For a discussion, see Norbert Reich, *Recent Trends in European Legal Education: the Place of the European Law Faculties Association*, 21 PENN ST. INT'L L. REV. 21 (2002).

[9] TAN Cheng Han, *Change and Yet Continuity — What Next After 50 Years of Legal Education in Singapore?*, [2007] SINGAPORE J. LEGAL STUD. 201, 203 (2007).

[10] See, *e.g.*, Lana M. Manitta, *Broken Barriers in Legal Education: How Immigration and Integration Have Shaped the Way We Learn the Law*, 12 GEO. IMMIGR. L.J. 361 (1998); Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143 (2006).

and now "global" approaches to legal education.[11] The following three parts will explore these paradigms in turn by considering what each has meant for practice, pedagogy, and research. Part D considers two possible critiques of the move towards globalization in legal education — that it is primarily a discourse of the rich, and that "globalization" often means "Americanization". The conclusion sketches out some possible futures.

A. Internationalization

The law school — particularly the American law school as we understand it — is in many ways a twentieth century invention. Though Harvard's Christopher Columbus Langdell famously invented the modern common law curriculum in the 1870s,[12] it was only in 1921 that the American Bar Association recommended that admission to practice be linked to completion of a degree program.[13] This was distinct from the English tradition, according to which lawyers were educated not in universities but in court.[14] A different approach had long existed in civil law jurisdictions where Roman law was taught, beginning with its rediscovery at the University of Bologna in the 11th century.[15] Interestingly, courses in Roman law were also offered at universities such as Oxford and Cambridge — though they had little practical application.

Even with the standardization of legal education in common law jurisdictions, the guild-like nature of the profession encouraged a focus not merely on national but on sub-national jurisdictions. In the United States, for example, admission to practice in one state did not require either familiarity with or the ability to practice in another.[16] As interstate commerce and thus cross-jurisdictional legal practice increased, so did the need for lawyers to be familiar with other jurisdictions and, with the movement of professionals, to have a means of transferring accreditation.[17]

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[11] This schema broadly corresponds to that presented in by Alex Aleinikoff at a panel at the American Society of International Law annual meeting in 2007 and subsequently published as T. Alexander Aleinikoff, *Remarks on the Globalization of the American Law School*, 101 PROC. AM. SOC'Y INT'L L. 184 (2007).

[12] Howard Schweber, *Langdell, We Hardly Knew Ye*, 17(1) LAW AND HISTORY REVIEW 145 (1999).

[13] James P. White, *Rethinking the Program of Legal Education: A New Program for the New Millennium*, 36 TULSA L.J. 397, 400 (2000).

[14] KONRAD ZWEIGERT AND HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (3rd ed. 1998).

[15] Henry Mather, *The Medieval Revival of Roman Law: Implications for Contemporary Legal Education*, 41 CATH. LAW. 323 (2002)

[16] Colin Croft, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1296 (1992).

[17] Compare George A. Reimer, *A State of Flux: Trends in the Regulation of the Multijurisdictional Practice of Law*, 64 OREGON STATE BAR BULLETIN 19 (August-September, 2004).

Similar things happened in the first phase of transformation identified here as internationalization. As a modest advance on a purely local conception of the law, this international paradigm saw the world as an archipelago of jurisdictions, with a small number of lawyers involved in mediating disputes between jurisdictions or determining which jurisdiction applied. This is the world of traditional international law, with a majority of practice taking place within a given jurisdiction and educational institutions thus focusing on training students for that purpose.[18]

Specialized areas of practice and research developed within this paradigm. One was conflict of laws (or private international law) as the sub-discipline that helped to identify which jurisdiction applied to a specific problem. A second was public international law, which — despite a voluminous secondary literature — was applied in formal judicial processes in the far fewer actual cases of interactions between jurisdictions as states.[19] Though comparative law also went through a phase of development around this time, it was seen as largely confined to academic study rather than being integral to the practice of law.[20]

Students within this period rarely moved. The vast majority studied in the jurisdiction in which they lived and within which they would practice, with the exception of those living under colonial rule who might be sent to the metropole for instruction and recruitment into the ruling class.[21]

B. Transnationalization

The term "transnational law" is commonly attributed to Philip C. Jessup's Storrs Lectures at Yale in the 1950s, where he used the term to embrace "all law which regulates actions or events that transcend national frontiers."[22] For present purposes, it denotes the shift in

[18] Again, a contrast may be made with civil law education, which had a far richer tradition of exchanging faculty and ideas based on a shared heritage.

[19] Compare MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2001).

[20] Singapore, unusually, has included the study of comparative law as a compulsory subject at both its law schools. Harvard has added this more recently. Tan, *supra* note 9 at 204.

[21] Until the early 1960s, for example, most of Anglophone Africa's lawyers were trained in Britain. Many of the national programs that developed subsequently emphasized preparation for practice at the expense of critical analytical skills. Though such a criticism might also be made of American and European legal training, graduates typically begin work with more experienced colleagues. This was not always possible when starting up a domestic legal profession in the period of decolonization. Muna Ndulo, *Legal Education in Africa in the Era of Globalization and Structural Adjustment*, 20 PENN ST. INT'L L. REV. 487 (2002).

[22] PHILIP C. JESSUP, TRANSNATIONAL LAW (1956).

perspectives that came slightly later, in the 1970s and 1980s, where the world came to be seen not as an archipelago but as a patchwork of jurisdictions. The increasing mobility of capital and people required, and made possible, greater familiarity across jurisdictions. Within law schools, this took the form of collaborations and exchange programs.[23]

Practice continued to be jurisdiction-based, but this period saw the rise of firms with presences in many cities — acknowledging the need to be able to operate seamlessly when moving from one jurisdiction to another.[24] Law schools began to offer summer programs abroad: in the United States in 1975, five American Bar Association (ABA)-approved law schools offered such programs; a generation later 120 law schools did.[25] Some were regarded as little more than boondoggles. In the 1976-77 academic year, for example, the ABA's Accreditation Committee received notice of a program to be offered onboard a cruise ship: courses were to be taught by faculty from an unaccredited law school, excessive credit was to be awarded for the period of study, and there appeared to be no library or study facilities available to the "students".[26] But, for the most part, these programs demonstrated a desire on the part of students to get some measure of experience outside their home jurisdiction.

Of more lasting significance was the increase in exchange programs and the rise in the number of foreign students admitted into law degree programs. The National University of Singapore, for example, today has one of the most extensive exchange arrangements in the world. More than a third of its undergraduate law students spend a semester or full year on exchange to one of more than fifty universities in sixteen countries, with a corresponding number of students coming from abroad to study in Singapore.[27]

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[23] From 2004, the University of Michigan began requiring students to complete a course in "Transnational Law" prior to graduating. See Mathias Reimann, *Taking Globalization Seriously: Michigan Breaks New Ground by Requiring the Study of Transnational Law*, 82 MICH. B.J. 52 (2003).

[24] Skadden, Arps opened its first office outside of New York in 1973; Allen & Overy opened its first office outside of London in 1978. Today Clifford Chance has 28 offices in 21 countries. About Clifford Chance (2008), available at: http://www.cliffordchance.com/about_us/about_the_firm/?LangID=UK&, last accessed, 14 March 2009.

[25] James P. White, *A Look at Legal Education: The Globalization of American Legal Education*, 82 IND. L.J. 1285, 1287 (2007).

[26] *Id*. Thirty years later, Tulane University also proposed to house students on a cruise ship, though this was part of the response to devastation wrought by Hurricane Katrina in New Orleans the previous year. Piper Fogg, *At Tulane, Living on a Cruise Ship Is No Luxury Vacation*, 52(20) CHRON. HIGHER EDUC. A14 (2006).

[27] For a discussion of how the National University of Singapore's approach to education has evolved, see Alexander Loke, *Forging a New Equilibrium in Singapore Legal Education*, 24 WIS. INT'L L.J. 261 (2006); Tan, *supra* note 9.

The increasing diversity of the student population has had an important effect on the classroom, though a further shift is in process now as the movement across jurisdictions of transnationalization has given way to the emergence of a single globalized market.

C. Globalization

The third phase of evolution of legal education is where we are now: globalization.[28] This can be understood as the integration of countries and peoples brought about by deep reductions in the costs of transport and communication, and the dismantling of barriers to the flow of goods, services, capital, knowledge, and people.[29]

The world has moved from archipelago to patchwork to web — both in the sense of the rise of the Internet as well as in the sense that commercial and other activities do not simply overlap at the edges but may be structurally and inextricably linked. Leading law firms increasingly present themselves as "global", a status measured for the first time in 1998 when the *American Lawyer* first published its "Global Fifty" list of firms ranked by size and revenue.[30] This has been augmented by the increasing importance of non-traditional regulatory regimes that transcend traditional jurisdictional analysis. Whether it is compliance with ISO standards, controlling the behaviour of multinational corporations, or — to pick the most obvious example — regulation of the Internet itself, contemporary normative questions are frequently global rather than local.[31]

To operate effectively in such a world, individual lawyers need to be comfortable in multiple jurisdictions, often simultaneously.[32] In the words of one dean, we need to educate lawyers to be "residents" rather than "tourists" in new jurisdictions.[33] At the same time, the students entering law school are different. In the course of the twentieth century, we moved from a tradition of a person having one job as a career to expecting to move jobs once or twice.[34] We now deal with students who expect to move *countries* a few times, seeing themselves as part of a global elite in a worldwide market for talent.

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[28] See generally John E. Sexton, *"Out of the Box": Thinking About the Training of Lawyers in the Next Millenium*, 33 U. TOL. L. REV. 189 (2001).

[29] See JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 9 (2002).

[30] John E. Morris, *The Global 50*, AM. LAW., November 1998, 45.

[31] See generally Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 GLOBAL GOVERNANCE 39 (2008).

[32] TAN Cheng Han, *Law School Has to Keep Up with the Times*, STRAITS TIMES, 26 April 2007.

[33] Mary C. Daly, *Tourist or Resident?: Educating Students For Transnational Legal Practice*, 23 PENN ST. INT'L L. REV. 785 (2005).

[34] One study estimated that lawyers beginning in small U.S. firms move once every eight years; another found that within six years of graduating from law school, almost half of lawyers in private practice and almost two-thirds of

Within legal education, the first mark of globalization as distinct from transnationalization was the move from exchange programs to double-degree programs across national jurisdictions. Examples from the United States include Cornell University Law School, which offers double-degrees in partnership with universities in France and Germany;[35] Columbia Law School, which also has partners in France and Germany as well as England;[36] New York University School of Law (NYU), which partners with Osgoode Hall Law School in Canada and the National University of Singapore;[37] and American University Washington College of Law, which includes partner universities in Canada, Spain, France, England, the Netherlands, Hong Kong, Korea, South Africa, and Uganda.[38]

Such double-degrees are essentially an extension of traditional exchange programs. Though reflecting the value of holding qualifications in multiple jurisdictions, as an academic credential such programs are based on the recognition of transfer credits from the partner institution, typically involving some measure of double-counting in order for the double-degree to take less time than earning the two degrees seriatim. More interesting intellectually is when law schools actually start teaching together.

The NYU School of Law and National University of Singapore Dual Degree Program, known informally as "NYU@NUS", is a move in this direction.[39] It offers master of laws degrees from each of the partner institutions, but is taught entirely in Singapore with NYU faculty flying out during the northern summer months; students then stay on to take courses with NUS and visiting faculty. Its origins lie in a 2002 conversation between NUS Dean Tan Cheng Han and then Director of NYU's global program Joseph Weiler when they realized that they were both seeking to offer a new form of education that reflected the way

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those in government were no longer working with their first employer. Ronit Dinovitzer and Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 LAW & SOC'Y REV. 1 (March 2007).

[35]Cornell University Law School, Dual Degrees, available at: http://www.lawschool.cornell.edu/admissions/degrees/dual_degree.cfm, last accessed, 14 March 2009.

[36] Columbia Law, Foreign Double Degree Programs, available at: http://www.law.columbia.edu/center_program/intl_progs/ Double_degrees, last accessed, 14 March 2009.

[37] New York University School of Law, available at: http://www.law.nyu.edu, last accessed, 14 March 2009. (This refers to the LL.B.-J.D. and LL.B.-LL.M. double-degree programs. The dual degree program taught together with NUS will be discussed below.)

[38] American University Washington College of Law, Admissions, available at: http://www.wcl.american.edu/admissions.cfm, last accessed 14 March 2009.

[39] A different model can be seen in the Temple University and Tsinghua University LL.M. Program based at Tsinghua University, primarily intended for Chinese-educated students. See, Graduate Masters Law Beijing, available at: http://www.law.temple.edu/servlet/RetrievePage?site=TempleLaw&page=Graduate_Masters_Law_Beijing, last accessed 14 March 2009.

students were increasingly required to think and to practice: globally. What is novel about the approach is that it is a genuine collaboration between the two institutions, going beyond the exchange model to integrate courses into a whole that is greater than the sum of its parts.

The first year (being the academic year 2007-2008) of the program, which I direct, attracted thirty-nine students from twenty-one countries across six continents. When planning the program, it had been assumed that two broad categories of students would apply: first, Asian students who aspire to an American legal qualification but choose not to base themselves in the United States; and, secondly, American and European students who recognize the benefit of an NYU-brand degree, but see their intellectual or professional future in Asia. The partnership with NUS is an attraction in its own right, due to the extensive offerings in region-specific subjects as well as partnerships such as that with the East China University of Politics and Law, allowing the possibility of completing some of the NUS LL.M. in Shanghai.[40]

Interestingly, we had assumed that the largest contingent would be in the first, Asian, category — in fact Asians made up less than half of the inaugural cohort. In the second year of the program, over fifty students from two dozen countries enrolled, once again touching every continent and with well under half from Asia itself. This reflects the extraordinary international interest in Asia as the future of globalization, as well as the suitability of Singapore in general and NUS in particular as a gateway to that region. Such collaborations seem likely to be replicated elsewhere, much as NYU's "global law school", first conceived in 1993,[41] has become a touchstone adopted by other leading law schools such as Harvard[42] and Yale.[43]

D. Two Critiques

The above description of the changing paradigms of legal education is not intended to suggest that the evolution that has taken place is either equitable or progressive in the political sense of the term. Indeed, on the face of it the exact opposite would appear to be true, as the ability of graduates to enter into the top jobs is increasingly tied to their ability

[40] The NYU@NUS program is the foundation for increasingly close cooperation between the two law schools, which recently launched combined LL.B.-LL.M. and LL.B.-J.D. programs. In addition to degree programs, greater faculty collaboration in teaching and research will enrich the intellectual life of both institutions.

[41] Norman Dorsen, *Achieving International Cooperation: N.Y.U.'s Global Law School Program*, 51 J. LEGAL EDUC. 332 (2001).

[42] Harvard: A Global Law School (interview with Bill Alford), available at: http://www.law.harvard.edu/news/today/2002/11/5alford.php, last accessed 14 March 2009.

[43] Yale Law School, International Law, available at: http://www.law.yale.edu/internationallaw.htm, last accessed 14 March 2009, (describing Yale as a "first-class global law school").

to study in the most expensive or exclusive institutions. Is this new global legal education, then, simply a discourse of the rich?[44]
It is. Or rather, it is true that we are indeed talking about the privileged few, but one has always been able to make that argument about lawyers. In this context, a small ray of hope in the phenomenon of global legal education is that it is essential for lawyers to be able to cope with diversity. This offers an incentive — heavily litigated in the United States — for law schools to use scholarships to expand opportunities to candidates that are diverse in every sense.[45] Nevertheless, the emergence of "global law schools" will certainly be an elite phenomenon.[46]

A second critique that might be made of the phenomenon and the way it has been described in this article is that what is occurring is not so much globalization as Americanization. This is also partly accurate, reflecting the U.S. dominance in the practice of law and its cultural influence more generally. Of the "Global Fifty" law firms cited earlier,[47] thirty of the top firms by size were American; when ranked by revenue all but seven were.[48] Within the academic world, one can see the shift of English-speaking educational pedigrees from Oxbridge to the United States (for example within the faculty of the National University of Singapore[49]) as well as the gravitational effect of U.S. institutions on pedagogy and U.S. journals on research.

The U.S. model of legal education has also exerted its own pull, clearly influencing reform initiatives in Japan and Korea, which have moved to adopt J.D.-style graduate law degrees.[50] The same may happen in Australia, where the University of Melbourne has

[44] Compare Tamar Lewin, *U.S. Universities Rush to Set Up Outpost Abroad*, N.Y. TIMES, 10 February 2008.

[45] See, *e.g.*, Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201 (2006).

[46] Tan, *supra,* note 9 at 206-207.

[47] See, *supra,* note 30.

[48] Morris, *supra,* note 30; Silver, *supra* note 10 at 146.

[49] A loose measure is to look at the highest level degrees held by the different levels of academics on the faculty: Professors and above (6 Oxbridge, 4 U.S.); Associate Professors (11 Oxbridge, 13 U.S.); Assistant Professors (1 Oxbridge, 7 U.S.). (This excludes faculty on long-term secondment.)

[50] Tom Ginsburg, *Transforming Legal Education in Japan and Korea*, 22 PENN ST. INT'L L. REV. 433, 437 (2004); Kyong-Whan Ahn, *Law Reform in Korea and the Agenda of "Graduate Law School"*, 24 WIS. INT'L L.J. 223 (2006); Chang Rok Kim, *The National Bar Examination in Korea*, 24 WIS. INT'L L.J. 243 (2006). For a discussion of similar debates in Taiwan, see Chang-fa Lo, *Driving an Ox Cart to Catch Up with the Space Shuttle: The Need for and Prospects of Legal Education Reform in Taiwan*, 24 WIS. INT'L L.J. 41 (2006).

adopted a similar approach.[51] Comparable developments appear to be underway in Hong Kong[52] and the Philippines,[53] where the J.D. is offered alongside the LL.B.

Nevertheless, programs like NYU@NUS also exemplify the limitations of the U.S. model — and a recognition (by Americans and others) that a truly global legal education requires not simply the exporting of U.S. ideas but a genuine engagement with the people and the places that make up today's global profession.

E. Conclusion

As an Australian educated in Europe working for an American law school based in Asia, these reflections are of more than academic interest. The transformations driven by changes in the practice of the law, by the types of students pursuing degrees, and — somewhat belatedly — by research developments in the loosely defined area of "global law" have radically changed the nature of legal education. This is true even if not all law schools have recognized this, and these forces are going to continue exerting pressure as the notoriously protectionist world of lawyers becomes exposed to market forces. Professions such as law that have inherited the characteristics of guilds are notoriously resistant to change.[54] Yet, as we have seen, law has moved from internationalization to transnationalization, and then to globalization in the space of about a generation each. Moving forward, some things will remain constant but many others will change.

One constant is that basic law degrees will remain within the province of individual jurisdictions. (Similarly, admission to practice will continue to be controlled at the jurisdictional level — though there will be pressure from industry to liberalize the recognition of foreign-trained lawyers.) Nevertheless, the push for standardization in the global market for legal talent will encourage more states to move in the direction of an American-style J.D. graduate law degree. England will probably remain an outlier with its three-year undergraduate program, but a higher proportion of its students will seek graduate qualifications elsewhere. The content of the basic law degree will continue to emphasize the traditional subjects, but the move away from the memorization of black-

[51] See Melbourne Law School <http://jd.law.unimelb.edu.au>.

[52] See Chinese University of Hong Kong, available at: http://www.cuhk.edu.hk/law/prospectiveStudents/jd.html, last accessed 14 March 2009; City University of Hong Kong, available at: http://www.cityu.edu.hk/slw/english/programmes/courses/jd.htm, last accessed 14 March 2009.

[53] Ateneo Law School, available at: http://law.ateneo.edu/index.php?p=32&PHPSESSID=97d98dc928359b3878cd843fd362e354, last accessed 14 March 2009; Far Eastern University Institute of Law, available at: http://www.feu.edu.ph/il.php last accessed 14 March 2009.

[54] Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917 (2002).

letter law will become irresistible: faculties will seek ways to ensure that their graduates are both intellectually and culturally flexible, capable of adapting not merely to new laws but to new jurisdictions. Comparative and international subjects will receive greater emphasis, with comparative and international perspectives also being introduced to a wider range of subjects. There will be resistance, but not for long.[55]

In addition, at least some international experience will increasingly be seen as essential to the practice of law at the upper echelons, with more law schools offering exchange and double-degree programs. Early collaborations were transatlantic, but many future tie-ups will focus on Asia, recognizing the important role that Asia now plays in economic terms and the role it will assume — eventually — in political and cultural terms.[56] A second locus will be the Gulf, offering enormous financial resources but less conducive to genuine partnership given the dearth of English-language scholarly institutions. As universities seek to take advantage of these opportunities, there is a danger of overstretching resources and diluting brand names: some partnerships will be established that work well for a couple of years but become unsustainable; other relationships that primarily exist on paper will eventually be seen as compromising the reputation of one or both institutions. The push towards globalization is unlikely to diminish, but there will be both successes and failures as law schools attempt to adapt.

Oliver Wendell Holmes, Jr. once noted that "[t]he life of the law has not been logic: it has been experience."[57] Though he was speaking of the common law, this is at least partly true of legal education. Where universities are often the driving force of advances in areas of scientific research, professional schools frequently lag behind. Law's ambiguous status as both a professional qualification and a subject of serious research has seen it evolve fitfully, driven by the demands of the profession and the needs of students, with pedagogy often being more ex post justification than forward looking agenda. It is an exciting time to teach law, but an even more exciting time to study it.

[55] Compare Max Planck's observation that "a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it". Quoted in THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 151 (3rd ed. 1996).

[56] See KISHORE MAHBUBANI, THE NEW ASIAN HEMISPHERE: THE IRRESISTIBLE SHIFT OF GLOBAL POWER TO THE EAST (2008).

[57] Oliver Wendell Holmes, Jr., *Lecture I*, in THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1962).

Born to be Wild: The "Trans-systemic" Programme at McGill and the De-Nationalization of Legal Education

By Helge Dedek & Armand de Mestral[*]

A. Introduction

Legal education is changing. What is changing is our understanding of "education", of how we learn and how we should teach.[1] Also changing is our understanding of how to define what is "legal" about "legal education". Most will nowadays agree that legal education should be more than a vocational training for the practice of the profession in a particular jurisdiction. In analyzing the development of legal education in recent years, we can distinguish two trajectories. Firstly, there is the ongoing attempt of specifically the North American legal academy to make legal studies a transdisciplinary endeavour, a development closely connected to the major "paradigm shifts" in legal theory in the 20th century.[2] Secondly, it seems that jurisdictional boundaries have lost significance in an internationalized, globalized and post-regulatory environment.[3] This calls into question the very notion of "law" itself, at least as traditionally understood as a system of posited norms within a given jurisdiction. How should both developments be reconciled?

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[1] See, e.g., Martha Cleveland-Innes & Claudia Emes, *Principles of Learner-centered curriculum: Responding to the Call of Change,* 35 THE CANADIAN JOURNAL OF HIGHER EDUCATION, 85-110 (2005).

[2] See, e.g., PAUL MAHARG, TRANSFORMING LEGAL EDUCATION, LEARNING AND TEACHING THE LAW IN THE EARLY TWENTY-FIRST CENTURY, 77-98 (2007).

[3] See, for an introduction, Peer Zumbansen, *Transnational Law*, in ENCYCLOPEDIA OF COMPARATIVE LAW, 738 (Jan Smits ed., 2006).

I. USA: Challenging disciplinary rather than jurisdictional boundaries

North American legal education has a longstanding tradition of self-reflection. The situation here is different from that in Europe, where there is little incentive for legal scholars to devote a considerable amount of time to a serious scholarly treatment of the issue of legal education. In North America, particularly in the USA, well-established institutions such as the "Journal of Legal Education", first published in 1948, stand witness to a lively discourse that is willing to engage in a discussion of curricular questions, methods used in the classroom, and, more broadly, the purpose of legal education as a whole.[4] This discussion is connected to the debate about the "paradigm" of legal scholarship:[5] what does it even mean, at this day and age, to talk about "legal" scholarship after the iconoclastic thrust of the realists, and the demise of "formalistic" doctrinal scholarship? What is the place of legal scholarship in the intellectual landscape of the university?[6] For the "discipline" of law, which has traditionally defined itself as a "science" in its own right, these are truly existential questions. Many have answered the challenge by adopting interdisciplinarity as the new paradigm of legal scholarship (a paradigm which is, however, hard to define).[7] This new paradigm also figures prominently in the way that law is now being *taught*: besides many courses focusing not only on "law", but on "law and…," even first year courses on "lawyer's law" such as Contracts or Torts include and embrace interdisciplinary perspectives on law, whether economic, historical, critical or otherwise.

Despite the courage displayed in facing such disconcerting and uncomfortable self-reflection, and despite the dedication to pedagogical progress, legal education in the USA has, however, traditionally been influenced by the fact that the USA is a whole continent – and to a certain extent: a whole world – in itself: the prospect of looking at developments outside the USA might seem less tempting for Americans (one might add: especially for certain Supreme Court judges), than for scholars and lawyers in smaller or less powerful countries. The theoretical abstraction brought about by law schools' re-definition as "outpost of the graduate school"[8] has not instigated a comprehensive process of re-

[4] See, e.g, Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle,* 65 SOUTHERN CALIFORNIA LAW REVIEW, 2231-2298 (1991-1992), on the interplay between scholarship and teaching from the perspective of a critical race scholar.

[5] Robert MacCrate, *Paradigm Lost – or Revised or Regained?,* 38 JOURNAL OF LEGAL EDUCATION (J. LEGAL EDUC.), 295 (1988); George L. Priest, *Social Science Theory and Legal Education: The Law School as University,* 33 J. LEGAL EDUC, 437 (1983).

[6] Priest (note 5) See also Thomas S. Ulen, *A Nobel Prize in Legal Science? Theory, Empirical Work and the Scientific Method in the Study of Law,* 2002 UNIVERSITY OF ILLINOIS LAW REVIEW, 875, 916 (2002).

[7] Charles W. Collier, *Interdisciplinary Legal Scholarship in Search of a Paradigm*, 42 DUKE LAW JOURNAL, (DUKE L. J.) 840, 842 (1992-1993).

[8] Paul Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L. J, 741, 789 (1992).

thinking jurisdictional boundaries. What remained "legal" in American legal education has so far primarily focused on American law.

Comparative law scholarship, for example, has a prominent tradition in the US, which is particularly closely linked to the names of the generation of Jewish-German émigré scholars fleeing from persecution. However, the role played by this "classical" comparative law in particular (and of other subjects that transcend national boundaries in general) in the curriculum of the American law school has been relatively insignificant. In 1998, Mathias Reimann noted that "in the United States today, comparative law does not play nearly as prominent a role in teaching, scholarship, and practice as one would expect in our allegedly cosmopolitan age. Perhaps the discipline is not in an outright crisis but it surely does not occupy a prominent place in the American legal universe either."[9] However, he also observed that "[i]t is quite common to blame the parochial attitude and lack of international sophistication of American lawyers for the marginal role of comparative law. But, as a matter of fact, interest in international legal subjects, ranging from human rights to foreign trade law and international litigation, is currently high and growing fast." American pedagogical discourse has begun to acknowledge the extent of the challenge posed by globalization, and has started to reflect on the question: how should students be prepared for "transnational challenges"?[10]

II. EU: "Europeanization" of Legal Education?

In the EU member states, the situation is to some extent similar; there major are differences, however, in the weight of the driving factors. While the challenge of internationalization, particularly in its emanation of "Europeanization", has literally become omnipresent in legal discourse, legal education is still dominated by a traditionalist view of its primary goal: an almost exclusive focus on training lawyers (or judges) for the practice within the boundaries of a national jurisdiction.

1. Europeanization and Traditional Positivism

The internationalization and "Europeanization" of law has been a phenomenon that legal academia simply could not afford to ignore, and that was quickly recognized as a cornucopia of scholarly opportunity: while some found their calling in defending the

[9] Mathias Reimann, *Stepping out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 AMERICAN JOURNAL OF COMPARATIVE LAW, (AM. J. COMP. L.) 637 (1998). See also William Twining, *A Cosmopolitan Discipline? Some Implications of 'Globalisation' for Legal Education*, 8 JOURNAL OF COMMONWEALTH LAW AND LEGAL EDUCATION, (J. COMMONWEALTH L. & LEGAL EDUC.) 13, 25 (2001): "America might have been more inward-looking, but which legal culture has developed more sophistication in dealing with multiple jurisdictions and multi-culturalism?"

[10] See, for example, Louis Del Duca, *Introduction to Educating Lawyers for Transnational Challenges,* 23 PENN STATE INTERNATIONAL LAW REVIEW, (PENN ST. INT'L L. REV.) 741 (2004-2005).

technical and cultural achievements of their respective national legal orders, numerous scholars embraced "Europeanization" and embarked on projects that studied or even actively propelled the *rapprochement* and harmonization of national laws in the EC.[11] The most recent example of the latter tendency is the draft of the Common Frame of Reference, the joint effort of a great number of private law scholars to develop a body of principles and rules of a European contract law.[12]

However, the influence of this development on legal education has been less noticeable than one might expect. A general shift to a truly "Europeanized" learning environment has so far not been effected. Until very recently, the debate on the "Europeanization" of law or even the actual "harmonization" of the legal orders of the member states had not had a didactic counterpart as to how to teach law in the face of Europe growing together.[13]

The discourse around the harmonization of law – particularly of private law – in the EU frequently invokes the historical *"ius commune"*, the Continental "common law" based on "received" Roman law, as the lodestar of a new legal unity.[14] It would be a mistake, however, to perceive the actual historical *"ius commune"* as a "uniform" system of legal norms that was "in force" on the continent, irrespective of regional traditions and local customs.[15] On the contrary, the *"ius commune"* was rather an idea, a legal *"lingua franca"*

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[11] See, e.g., TOWARDS A EUROPEAN CIVIL CODE 3RD ED, 353 (Arthur Hartkamp & Martijn W. Hesselink et. al. eds., 2004); JAN SMITS, THE MAKING OF EUROPEAN PRIVATE LAW, TOWARDS A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM (2002).

[12] PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW, DRAFT COMMON FRAME OF REFERENCE, INTERIM OUTLINE EDITION (Christian von Bar, Eric Clive & Hans Schulte-Nölke eds.,, 2008). For a recent critical assessment, see, e.g., Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner, and Reinhard Zimmermann, *The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems,* 28 OXFORD JOURNAL OF LEGAL STUDIES, 659 (2008). Cf., on the politics of European private/contract law harmonization, the "Action Plan" of the Commission: Communication from the Commission to the European Parliament and the Council*, A More Coherent European Contract Law, An Action Plan*, COM (2003) 68 final, 12 February 2003. See also, e.g., Hugh Beale, *The Future of the Common Frame of Reference*, 3 EUROPEAN REVIEW OF CONTRACT LAW (E.R.C.L.) 257 (2007); Pierre Legrand, *Antivonbar*, 1 JOURNAL OF COMPARATIVE Law, 13 (2006); Hugh Collins et al., *Social Justice in European Contract Law: a Manifesto*, 10 EUROPEAN LAW JOURNAL, (EUR. L. J.), 653 (2004); Martijn.W. Hesselink, *The Politics of a European Civil Code*, 10 EUR. L. J., 675 (2004).

[13] Pierre Larouche, *Recueils Jus Commune pour le Droit Commun de l'Europe,* 3 REVUE DE LA COMMON LAW EN FRANÇAIS 99 (1999). Some scholars, however, have drawn an explicit connection between the scholarship that focuses on the "Europeanization" of law and the possibility of a "European law school": see, e.g., Ugo Mattei & Mauro Bussani, *The Common Core Approach to European Private Law*, 3 COLUMBIA JOURNAL OF EUROPEAN LAW, (COLUM. J. EUR. L.) 339, 341 (1996); Aalt-Willem Herringa, *Towards a European Law School! A Proposal for a Competitive, Diversified Model of Transnational Co-operation*, *in* TOWARDS A EUROPEAN IUS COMMUNE IN LEGAL EDUCATION AND RESEARCH 3-13 (Michael Faure, Jan Smits & Hildegard Schneider eds., 2002),

[14] See, e.g., Smits (note 11), 5-6; see also, on the "*ius commune* of family law" – focusing on Canon law rather than on Roman law – Masha Antokolskaia, *The "Better Law Approach" and the Harmonization of Family Law, in* PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 159, 169-172 (Katharina Boele-Woelki ed., 2003).

[15] H. PATRICK GLENN, ON COMMON LAWS 16 (2007).

of communication about law, a common mentality, mainly brought about by a common culture of legal scholarship – *and legal education.*[16] How is it possible that, in spite of this historical insight about lost unity, European (private) law discourse emphasizes the harmonization of positive law, and seems to forget about fostering a truly European culture of legal education, in the spirit of the medieval schoolmen who moved freely between places of learning all over Europe?[17]

Yet this lack of pedagogical discourse is not as surprising as one might, at first glance, think: European law professors have traditionally defined themselves almost exclusively through their scholarship, not through their teaching. Reflection on legal pedagogies is not, and has never been, widely accepted as proper scholarship.[18] Furthermore, one always has to keep in mind that neither England[19] nor the Continent[20] has been exposed to a "realist" ideology as influential as the "realist" iconoclasm in the US, which sparked the tendency to critically re-assess not only the methods of legal scholarship, but also of legal pedagogy.[21] The consequences are far-reaching: in Europe, the "paradigm" of legal scholarship never completely shifted away from that of 19th century "legal science". This "paradigm" implies that what makes a great scholar is the mastery of law as a "system", and a command of the body of doctrine that surrounds the primary "sources of law". But the law-as-science paradigm also implies that judges and lawyers should employ the "scientific" approach in their work as well, and that students, too, should be brought up in its spirit. The positivist

[16] For a first introduction see, e.g., PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 71-101 (1999). On the debate on the importance of the historical *ius commune* for the advent of the "new" *ius commune europaeum* see R.C. VAN CAENEGEM, EUROPEAN LAW IN THE PAST AND THE FUTURE: UNITY AND DIVERSITY OVER TWO MILLENNIA 22-37 (2002); Reinhard Zimmermann, *Roman and comparative law: The European perspective (some remarks apropos a recent controversy)*, 16 JOURNAL OF LEGAL HISTORY (J. LEGAL HIST.) 21, 25 (1995); Klaus Luig, *The history of Roman private law and the unification of European law*, 5 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT, (ZEuP) 405 (1997); Reinhard Zimmermann, *Harmonisation of Private Law in Europe*, in Hartkamp & Hesselink et. al (note 11), 21.

[17] See also Bénédicte Fauvarque-Cosson, THE RISE OF COMPARATIVE LAW: A CHALLENGE FOR LEGAL EDUCATION IN EUROPE, WALTER VAN GERVEN LECTURES (7) 1-25 (2007); Ewoud Hondius, *The European Private Law Movement and the changes it requires in legal education and research*, in Faure et al (note 13), 39-55, calling for a "fundamental shift" in legal education (id., 55).

[18] Which is, of course, not to say that such scholarship does not exist: see, e.g., Stephan Leibfried, Christoph Möllers, Christoph Schmid & Peer Zumbansen, *Redefining the Traditional Pillars of German Legal Studies and Setting the Stage for Contemporary Interdisciplinary Research,* 7 GERMAN LAW JOURNAL (GLJ) 661 (2006); see also the recent essay collection JURISTENAUSBILDUNG IN EUROPA ZWISCHEN TRADITION UND REFORM (Thomas Finkenauer, Christian Baldus &Thomas Rüfner eds., 2008).

[19] See Neil Duxbury, *English Jurisprudence between Austin and Hart*, 91 VIRGINIA LAW REVIEW 54 (2005).

[20] See Kristoffel Grechenig and Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism,* 31 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW, 295 (2008).

[21] See, e.g., Jerome Frank, *Why not a Clinical Lawyer-School?,* 81 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, (U. PA. L. REV.) 907 (1933); Jerome Frank, *What Constitutes A Good Legal Education?*, 19 AMERICAN BAR ASSOCIATION JOURNAL, (A.B.A.J.) 723 (1933).

mindset gravitates naturally towards the law that is actually *in force*, and, consequently, to a strong focus on jurisdictional boundaries. This is not conducive to a way of thinking about law as transcending the nation state.

As a result, efforts at "Europeanization" of legal education have so far mostly taken the shape of programmes that consecutively expose students to national legal studies in different member states. The well-known Erasmus programme seeks to assist students of many disciplines to study in other community countries. Additionally, an increasing number of joint programmes exist in Europe where students are expected to spend an appreciable period of time studying another legal system abroad.[22] The more ambitious of these programmes expect students to develop a sound understanding of the law in both jurisdictions of study; after years of study in two different jurisdictions, they bestow double degrees on their graduates.[23] This approach is more consciously focused on the mastery of more than one system. However, it does not necessarily provide an integrated framework from which students could develop a synergetic understanding of law; that is to say, it may not go beyond merely adding knowledge about another "legal system" to what one has learned in one's home jurisdiction. The third and most ambitious approach has so far been adopted by the Faculty of Law of the University of Maastricht in the European Law Studies programme.[24] In this programme, students having finished a first year of Dutch law enter a three year course of studies focused upon the general principles of law common to the Member States of the EC.[25]

However, these undoubtedly laudable initiatives affect only a small percentage of European law students, most of whom are still taught as though only one legal system

[22] Xavier Blanc-Jouvan, *Bijuralism in Legal Education: A French View* 52 J. LEGAL EDUC., 61 (2002).

[23] See, e.g., on double degree programmes Anne Klebes-Pelissier, *Double degrees in the context of the Bologna process*, 4 EUROPEAN JOURNAL OF LEGAL EDUCATION (EUR. J. LEG. EDUC.), 173 (2007); Audrey Guinchard, *The double degree experience between England and France: a contribution to an integrated European legal education*, 4 EUR. J. LEG. EDUC. 3 (2007). Examples would be the well-established partnership between universities of Cologne and Paris I, available at: http://www.mastercologneparis.info/, or the cooperation between the universities of Groningen, Bremen, and Oldenburg, available at: http://www.hanse-law-school.de/about_hls.htm. It is worth mentioning that several European law schools are also involved in innovative global initiatives such as the *Center for Transnational Legal Studies*, founded under the aegis of Georgetown Law available at: http://ctls.georgetown.edu/, or the *ATLAS* programme ("Association of Transnational Law Schools", available at: www.atlasdoctorate.com), which is geared towards graduate students.

[24] *Maastricht University,* Available at: www.unimaas.nl/default.asp?template=werkveld.htm&id=TQTGGH3RV45E65RJGTRQ&taal=en.

[25] Another experiment in educating law students in several legal systems is the Hanse Law School Programme, see*, (*note 23).

existed, by professors who know only one legal system.[26] William Twining, professor at University College in London, commented on this state of affairs in 2001:

> "I suspect that professional qualifications and other requirements for initial certification will continue to act as both a barrier to and barometer of the extent of transnationalisation of primary legal education and training. And until university law teachers take the idea of life-long learning seriously and act on it, our law schools, especially in the common law world, are likely to continue to be like parochial primary schools."[27]

One might add that, despite the fact that common lawyers tend to believe legal education in the Continental civil law jurisdictions to be more of an academic and less of a vocational training, the situation there - still – is by no means different.

2. The "Bologna-Process"

In recent years, the most radical agent of change that might ultimately affect many more students is the so-called "Bologna process". This process is supposed to create the "European higher education area" by making academic degree standards and quality assurance standards more comparable and compatible throughout Europe.[28] The Bologna process affects, first of all, the institutional structures of legal education by calling for a re-organization of legal studies within the framework of Bachelor and Master degrees. This structural re-organization impacts the traditional methods of evaluation and affects the curriculum as well.[29] One might expect that these changes to institutional structures would

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[26] See the resolution of the "European Law Faculties Association" on S*trengthening the European Dimension of Legal Education,* 4 EUR. J. LEG. EDUC., 115 (2007), which is quite telling as to the current state of affairs:

"ELFA-Resolution II/06: European Law Teachers

ELFA encourages a European dimension of legal teaching that presupposes an educational experience abroad as a desirable feature of the career of a law teacher. The same should also be true for the judiciary. Law schools should be encouraged to require for newly appointed law teachers to have studied law abroad for at least one semester. Studies abroad have become possible by means of the Socrates-Erasmus Programme. To require such an experience for law teachers appears as a logical consequence.

Yes 55; No: 2; Abstentions: 3".

[27] See Twining, (note 9), 25.

[28] On the "Bologna process" and the EHEA in general see Laurel S. Terry, *The Bologna Process and its Impact in Europe: It's so much more than degree changes,* 41 VANDERBILT JOURNAL OF TRANSNATIONAL LAW, (VAND. J. TRANSNAT'L L.) 107 (2008); Laurel S. Terry, *The Bologna Process and its Implications for U.S. Legal Education*, 57 J. LEGAL EDUC., 237 (2007).

[29] Frans J. Vanistendael, *BA-AIA Reform, Access to the Legal Profession, and Competition in Europe,* 21 PENN ST. INT'L L. REV. 9 (2002); Frans J. Vanistendael, *Blitz Survey of the Challenges for Legal Education in Europe,* 18 DICKINSON JOURNAL OF INTERNATIONAL LAW, (DICK. J. INT'L L.) 457 (2000); Frans J. Vanistendael, *Curricular Changes in*

inspire a process of re-thinking the goals of national legal education in the European context. Such a development would reflect the spirit of the Bologna process, whose ten "Action Lines" not only call for the promotion of mobility and the compatibility of degrees, but also for the promotion of the "European dimension" in higher education.[30]

Within the context of legal studies, the promotion of the "European dimension" can be taken to imply an even stronger emphasis on the law of the EC and the EU in the curriculum. It could also mean much more. EU-related content is, of course, already the subject of intense study in European law faculties. EU-related law is, however, mostly studied as another body of positive law of another – in this case "supranational" – jurisdiction. Taken seriously, the promotion of the "European dimension" calls not only for the addition of more EU-related content to an already content-laden curriculum; it also calls for a paradigm shift away from the study of law as the study of a "system" of positive law of a certain jurisdiction, and towards a de-contextualized, maybe more abstract study of legal questions that reach beyond jurisdictional boundaries.

In many jurisdictions, the effects of the Bologna process on national legal education, even so far as they only pertain to formal organization and methods of evaluation, have been perceived as changes for the worse. Particularly in Germany, where the academic study of law does not lead to university degrees but to the (in)famous "State Examination" – an extremely intense examination administered by the provincial ministries of justice – resistance has been fierce.[31] The major concern voiced in the German debate is that a structural re-organization will undermine the institution of the "State Examination" and, therefore, will inevitably lead to a decrease in "quality" among German graduates. The "quality" fostered by the "State Examination" is, however, modeled on the paradigm of doctrinal mastery of positive law.[32] Not only practitioners, but also academics have warned against the possibly detrimental consequences of giving up the "State Examination". Only a few scholars, such as famous comparatist Hein Kötz, have openly declared that the Bologna process could be seen as an opportunity: an opportunity to transcend the fixation on positive national law.[33] Kötz is well-known in the Anglophone world for his and Zweigert's treatise on comparative law, which is often derided as representing

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Europe Law Schools, 22 PENN ST. INT'L L. REV, 455 (2004); and Frans J. Vanistendael, *Quality Control of Students and Barriers to Access in West-European Legal Education,* 43 SOUTH TEXAS LAW REVIEW, (S. TEX. L. REV.) 691 (2002).

[30] See, e.g., available at: http://www.europeunit.ac.uk/bologna_process/10_bologna_process_action_lines.cfm.

[31] See, for an English summary of the debate in Germany Laurel S. Terry, *Living with the Bologna Process: Recommendations to the German Legal Education Community from a U.S. Perspective*, 7 GERMAN LAW JOURNAL, 863 (2006).

[32] Leibfried et al., (note 18), 678; see also Helge Dedek, *Recht an der Universität: "Wissenschaftlichkeit" der Juristenausbildung in Nordamerika*, 64 JURISTENZEITUNG, 540, 541 (2009).

[33] Hein Kötz, *Kurzbeitrag: Bologna als Chance,* 61 JURISTENZEITUNG, 397 (2006).

conservative "functionalism";[34] nevertheless, according to German standards, he rather seems a rebel. He has long criticized the German system of legal education that fosters a culture of positivism, most visibly embodied in the "State Examination", and has even suggested that this system fails a whole generation of students who are not duly prepared for the expectations of a globalized legal world.[35] The answer to this modern challenge could be, according to Kötz, a legal education that teaches comparatively and avoids the "branding" of lawyers by national positivism.[36] But, of course, the question is: can it be done? What would such a programme look like, and would it be viable in practice?

III. An Experiment: "Trans-systemic" Legal Education at McGill

As a contribution to this debate on the challenges posed to the teaching of law we would like to offer the following brief analysis of the efforts made at the Faculty of Law of McGill University, situated in Québec, Canada to develop a new approach to the teaching of law. Founded in 1848, the Faculty of Law of McGill University has always been characterized by a strong tradition of teaching and scholarship in comparative law. In 1968 the Faculty established a four year National Programme, subsequently amended in 1985. Ten years ago, in 1998, the Faculty undertook the effort to elevate this pedagogical project to a higher plane and to offer an integrated comparative three year curriculum, known as the McGill Programme, that teaches even first year introductory courses, such as Contracts and Torts, from a comparative perspective. The ultimate aspiration of this programme, however, is to transcend the fixation on the study of law as the study of "legal systems" – hence the label "trans-systemic" legal education. In this article, we will try to outline the background and major goals of this programme, and attempt to take stock, ten years after the inception of the programme.

Reactions of observers, so far, have been mixed: in the United States, the new sensitivity for the challenge of globalization has created a certain interest in McGill's initiative. Most reactions have been positive; Professor Strauss of Columbia University even went so far as to ask whether the introduction of the McGill Programme marks the advent of a *"*New Langdellian Moment*"*.[37] It is an indicator of the general willingness to open up to the international aspects of legal education in the USA that more schools now find a place for comparative and international law courses in their regular curricula. More than a century

[34] Pierre Legrand, *Paradoxically: Derrida, For a Comparative Legal Studies,* 27 CARDOZO LAW REVIEW (CARDOZO L. REV.) 631, 632 (2005); Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, 340 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[35] Hein Kötz, *Europäische Juristenausbildung,* 1 ZEUP, 268 (1993).

[36] HEIN KÖTZ AND KONRAD ZWEIGERT, AN INTRODUCTION TO COMPARATIVE LAW 3RD ED., 21-24 (Tony Weir trans., 1998).

[37] Peter L. Strauss, *Transsystemia – Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?,* 56 J. LEGAL EDUC. 161 (2006).

after Langdell, Harvard Law School (HLS) has been leading the American charge towards a new internationalism: in 2006, HLS changed its "Langdellian" first year curriculum and added mandatory courses with international implications to the classic first year canon in order to prepare students, as Dean Kagan put it, for the "new complex global challenges of this millennium". Each student now has to take one of three courses "introducing global legal systems and concerns - Public International Law, International Economic Law, [or] Comparative Law". [38]

Reactions from Europeans have been more cautious.[39] McGill hosted two conferences ("Roundtables"), gathering American and European scholars to discuss the workability of "trans-systemic" legal education in different contexts, and particularly to highlight the connection between substantial *rapprochement*, which is at the heart of so many European projects at the moment, and a change of "legal culture" that is unthinkable without changing the culture of legal education. Opinions voiced at these occasions seem to indicate one main objection: a "trans-systemic" approach is viable only in the particular environment of a mixed jurisdiction. Only in this particular environment, goes the argument, might it be the case that teaching students a comparative approach to law will help to achieve the primary goal of legal education: providing students with a sufficient understanding of their domestic legal system.

Given the persistent predominance of the positivist paradigm of legal education in Europe, these reactions are not surprising. We want to argue, however, that to perceive the "trans-systemic" project as simply another oddity to be encountered in a mixed jurisdiction would be a misunderstanding. To be sure, the programme has, as its history underlines, grown out of the particular condition of mixedness in Québec. Nevertheless, at its core lies an ambition that is not tied to the specific idiosyncrasies of the mix of common and civil law in Québec. This ambition is, in short, to bring about an approach to legal education that liberates it from its ties to a positivistic training in the law in force in a certain jurisdiction. It is rather, as it has been pointed out, "an opportunity to locate law more resolutely in the university, not as a matter of geography, but of ideas, and to situate it there as an example of what might be called a foundational discipline."[40] Its aspiration is to eventually

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[38] Available at: http://www.law.harvard.edu/news/2006/10/06_curriculum.php.

[39] With the notable exception of Paul Maharg, who, reporting on developments in North American legal education, groups together curriculum reforms at Harvard, Stanford and McGill and calls McGill's innovation "perhaps one of the most radical". He commends all these reformative efforts, pointing out that the "key to their innovation is a profound re-alignment of curriculum structure and methodology, from the most theoretical aspects to the most practical" (Maharg, (note 2), 98).

[40] Nicholas Kasirer, *Bijuralism in Law's Empire and Law's Cosmos,* 52 J. LEGAL EDUC., 29, 30 (2002). On the broader intellectual project and philosophical imagination behind the curriculum change see also Richard Janda, *Toward Cosmopolitan Law*, 50 MCGILL LAW JOURNAL, (MCGILL L.J.) 967 (2005); Roderick A. Macdonald and Jason MacLean, *No Toilets in Park*, 50 MCGILL L.J., 721 (2005).

overcome the traditional Western bias of conceptualizing law as nothing but a "system" that is enacted by a state, and to free the educational discourse about law from its positivistic constraints.[41] In that sense, the programme is not tied to Québec as a mixed jurisdiction, given that its ambition goes far beyond the teaching of the mixed law of Québec. More important is the intellectual climate that forms the condition of possibility for such a project. Without a doubt, the mindset prevalent in a mixed jurisdiction, the experience of being mixed, interstitial and in flux, is particularly conducive to an experiment such as McGill's.[42] Eventually, however, the *conditio sine qua non* for its existence is a *mindset*, such as the particular North American tendency towards a less positivistic and more intellectual legal education: a culture rather than a place.

B. Historical Background: Legal Education in a Mixed Jurisdiction

I. Mixité: Civil and Common Law in Québec

It is true, however, that the origins of the "trans-systemic" programme are to be found in the ambition to accommodate the particular challenges posed by Canadian bijuralism.[43] Canada is a federal country where two systems of private law, a civil law system in Québec and one or several common law systems outside Québec, have coexisted since the late 18th century.[44] After their victory over France, the British attempted to "anglicize" the colony of New France that was now called "Québec". This included an attempt to introduce English law. It was an ill-conceived attempt, soon to be abandoned. British pragmatism knew better than to provoke unnecessary frictions, and with the promulgation

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[41] H. Patrick Glenn, *Doin' the Transsystemic,* 50 McGILL L.J. 863 (2005). It is important to note that, despite the connection frequently made between the ambit of the programme and the process of "globalization", "law", which is still the object of study of the programme, is not just another, now "global" legal system or "world law" brought about by a process of "harmonization" or "convergence". The programme attempts to understand global legal diversity as a cultural plurality by, for example, using the heuristic tool of the "tradition", as most notably suggested by H. Patrick Glenn. Conceptualizing "law" as "tradition" allows, according to Glenn, for a "normative engagement" with otherness (as opposed to the hierarchic dominance of the positivist,"systemic" approach), while explaining, at the same time, the necessity to sustain diversity. See H. Patrick Glenn, *A Concept of Legal Tradition,* 34 QUEEN'S LAW JOURNAL 427, 440-445 (2008); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 3RD ED 358-365 (2007).

[42] Nicholas Kasirer, *Legal Education as Métissage*, 78 TULANE LAW REVIEW, (TUL. L. REV.) 481 (2003).

[43] In this context, it is interesting to contrast the approach of the McGill programme, which attempts to connect the experience of mixedness with a globalized "mindset", with another innovative Canadian attempt to rise to the "global challenge": cf. Craig Scott, *A Core Curriculum for the Transnational Legal Education of JD and LLB students: Surveying the Approach of the International, Comparative and Transnational Law Program at Osgoode Hall Law School,* 23 PENN ST. INT'L L. REV., 757 (2004-2005).

[44] For a succinct but scholarly and well-documented overview of the origins and modern implications of this reality, see Part One of JOHN E.C. BRIERLEY AND RODERICK .A. MACDONALD, EDS., QUEBEC CIVIL LAW – AN INTRODUCTION TO QUEBEC PRIVATE LAW, 5-198 (1993).

of the so-called Québec Act of 1774, the British guaranteed freedoms important to the "French" identity of the populace. That private disputes would continue to be adjudicated according to the rules of French civil law – meaning, at this point, according to the *Coutume de Paris* – was one of these guarantees. The fact that law figures so prominently next to religion underlines that even "legal culture" can be the focal point of a group identity. Thus, the ingredients of the mixture were defined: French civil law within the framework of English public law and laws of procedure.

In addition to the *Coutume de Paris,* Québec private law has its historic origins in the original 1865[45] and the contemporary 1991 Civil Code, in its provincial statutes and in federal private law. With its predominantly French heritage, the private law of Québec has however benefited from many English contributions, particularly in the field of commercial law. Particularly the city of Montreal developed, after the defection of the USA, into the Empire's most important bridgehead for English trade in the New World.[46] Former Dean Morissette explains the relationship between the civil and the common law influences in Québec private law as follows:

> "[T]here are large swaths of private law proper (divorce, for example), as well as commercial and business law (business associations, banking and bills of exchange, bankruptcy, intellectual property, securities, etc.), or procedural and adjectival law (the structure of the courts, the adversarial system and civil procedure, statutory interpretation), where the common law tradition dominates or occupies the field through and through, or where law has become asystemic."[47]

Moreover, many of Québec's legislative, judicial, executive and administrative institutions and processes belong to the English public law tradition, hence the singular situation of a body of civil law evolving within a common law institutional structure.[48] The manner of reporting judicial decisions in Québec is inconsistent with the civil law theory that there

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[45] See John E.C Brierley, *Quebec's Civil Law Codification Viewed and Reviewed*, 14 McGILL L. J., 523 (1968).

[46] See also Stanley B. Frost, *The Early Days of Law Teaching at McGill*, 9 DALHOUSIE LAW JOURNAL (DALHOUSIE L.J.) 150 (1984).

[47] Yves-Marie Morissette, *McGill's Integrated Civil and Common Law Programme,* 52 J. LEGAL EDUC. 12, 15 (2002). Morissette also notes that the particular configuration of this mixity explains why certain commentators have raised questions about the density of the civil law tradition still present in Canada, citing Catherine Valcke, *Legal Education in a 'Mixed Jurisdiction': The Quebec Experience,* 10 TULANE EUROPEAN AND CIVIL LAW FORUM, (TUL. EUR. & CIV. L.F.) 61 (1995); Catherine Valcke, *Quebec Civil Law and Canadian Federalism,* 21 YALE JOURNAL OF INTERNATIONAL LAW, (YALE J. INT'L L.) 67 (1996); and Peter Stein, *Roman Law, Common Law and Civil Law,* 61 TUL. L. REV., 1591, 1602 (1992).

[48] John E.C. Brierley, *Bijuralism in Canada* in CONTEMPORARY LAW: CANADIAN REPORTS TO THE 1990 INTERNATIONAL CONGRESS OF COMPARATIVE LAW, MONTREAL 1990 (H.P. Glenn ed., 1992).

can only be one answer to a legal question; not only do judges give individual opinions, but frequently dissenting ones, too.[49] "Although *stare decisis* is not part of Québec law, court decisions are given very considerable weight in judicial analysis."[50]

II. Legal Education in a Bijuridical and Bilingual Jurisdiction

In a mixed jurisdiction such as Québec, legal education takes on a particular importance. To some degree, all students must possess both the civil law tools necessary to analyze a private law problem, and the common law training to apply Canadian public law. In the words of Catherine Valcke:

> "[L]egal players must be capable of playing two games at once, which requires that they be trained to juggle with, and yet never confuse, two distinct set of rules. Only if legal players can properly accomplish this will the integrity of the various games being played be preserved. In mixed jurisdictions, therefore, it is the very identity of the legal games, not just their respective dynamism, that is at stake for legal education."[51]

Québec therefore presented itself as an intellectual breeding ground for exploring the plural character of law, using the methodology of comparison. And McGill has, from the outset, played its part in this story – again, in the words of Dean Morissette:

> "[I]t bears repetition that McGill's Law Faculty, from its earliest days, perhaps because of the proximity of a vastly influential other legal tradition, has always been habited by the conviction that a great deal can be gained in legal scholarship from a sustained and humble dialogue with otherness."[52]

III. Law Teaching at McGill: From the Beginnings to the National Programme

This "humble dialogue" was, at first, born out of sheer necessity. The reaffirmation of the *Coutume de Paris* by the *Quebec Act* of 1774 had caused a state of legal confusion in the minds of the Montreal English merchant class; in 1787, James McGill himself testified in the Court of Common Pleas that he had never heard any complaints touching the

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[49] Julie Bédard, *Transsystemic Teaching of Law at McGill: 'Radical Changes, Old and New Hats',* 27 QUEEN'S L.J., 237, 246 (2001).

[50] *Id*. Bédard comments that the situation has changed and that the Supreme Court no longer considers itself bound by its own decisions, whether they involve civil law or common law matters.

[51] See Valcke, (note 47), 62.

[52] Morissette (note 47), 22.

administration of justice until the re-affirmation[53] of the *Coutume de Paris,* but that "since that period, they have been loud and frequent, and in my humble opinion have arisen from the Anarchy and confusion which prevail in the laws and the Courts of Justice in the province."[54] Looking for guidance through education, requests to McGill College were made, particularly by the Montreal Anglophone community, to offer courses in law; in 1848, University records first mention the "Law Class of McGill College".[55]

In a speech held in 1859, M. Desiré Girouard, later a Supreme Court justice, still decried the state of confusion that resulted from the multitude of legal sources, and from having to consult French, Roman, English, American and Canadian authorities in every judicial decision.[56] In this hotchpotch of real-life everyday legal plurality, the Faculty of Law of McGill University was a pioneer in recognizing and developing the potential for teaching law comparatively. In the mid-nineteenth century, at a time when Montreal was considered Canada's financial and industrial centre of gravity, the Faculty had to face a particular reality.[57] As the only English-speaking law school in Québec, "many of its graduates would practice law, and notably commercial law, across systemic boundaries, and they needed some exposure to private common law."[58] More significant, however, was the appointment of two successive deans who brought to the Faculty a high degree of commitment to the scholarly study of law.[59] Under their influence, the major elements of McGill's first polyjural, universalist and bilingual curriculum were put into place, reflecting the dual origins of Canadian law.[60] During the decade of the 1920's, common law courses

[53]Andre Morel, *La Reaction des Canadiens devant l'administration de la justice de 1764 a 1774: une forme de resistance passive* 20 LA REVUE DU BARREAU DE LA PROVINCE DE QUEBEC 53 (1960). As to the "uncertain status of civil law" in the years immediately preceding the Quebec Act of 1774, see, also, Brierley & Macdonald, (note 44), 14-16.

[54] Stanley B. Frost, *The Early Days of Law Teaching at McGill*, 9 DALHOUSIE L.J., 150, 151. (1984).

[55] *Id.,* 153.

[56] Cited to Edouard-Farbre Surveyer, *Une école de droit a Montréal avant le Code Civil*, 6 REVUE TRIMESTRIELLE CANADIENNE, 142 (1920). It should be noted that recourse to a multitude of legal sources was not unique to the courts of Québec but was also common in the common law colonies until well into the Nineteenth Century, see, e.g., Oliver Mowat, *Observations on the Use and Value of American Reports in Reference to Canadian Jurisprudence,* 3 UPPER CANADA LAW JOURNAL, 8 (1857).

[57] Morissette (note 47), 4.

[58] *Id*.

[59] Frederick Parker Walton, appointed Dean in 1897, was a Scottish civilian and romanist from Glasgow, while Robert Warden Lee, appointed Dean in 1915, was an English romanist from Oxford. Another influential addition to the Faculty was Herbert Arthur Smith, trained in Oxford, who had spent a number of years in the United States, and who was recruited by the Faculty in 1920 as Professor of Jurisprudence and Common Law.

[60] For a thorough account of this period in the Faculty's history, see. Roderick A. Macdonald, *The National Law Programme at McGill: Origins, Establishment, Prospects* 13 DALHOUSIE L.J., 211, 243-260 (1990). See also John E.C. Brierley, *Developments in Legal Education at McGill, 1970-1980*, 7 DALHOUSIE L. J., 364. (1982).

were offered alongside the regular civil law program. However, it took another fifty years before a "National Programme" was formally offered to incoming students.[61]

The philosophy of this National Programme, first adopted in 1968, was fairly straightforward. It was based upon the conviction that knowledge of both Canadian legal traditions was an asset, intellectually and professionally.[62] In the broadest sense, it could be seen as contributing "to the promotion of mutual understanding between different regions of the country."[63] By providing students with training that allowed them to qualify as lawyers in both civil law and common law jurisdictions, the National Programme not only increased professional mobility in the country but also began to produce jurists who could more easily find work in transnational and international environments. Indeed, double degree graduates were fully qualified to practice law across Canada, and were increasingly qualified for practice in a number of American and other jurisdictions. Moreover, as one professor pointed out, "it is noticeable that students proceeding to graduate work, at McGill and elsewhere, are more often than not those with the full dual training."[64]

During the first thirty years of its existence, the National Programme offered three possibilities to students entering law school: (i) completing a civil law degree in three years and in 95 credits, or (ii) completing a common law degree in three years and in 95 credits, or (iii) completing both degrees in four years and in 125 credits. The approach adopted in the early years of the programme was sequential. Rather than integrating the teaching of both legal traditions, the programme juxtaposed them in such a manner that students entering law faculty were branded as belonging to one or the other of the two traditions. As such, those in the civil law stream completed their basic private law courses in civil law in Year I; and in Year II, or over the course of the following three years, they had to complete the corresponding basic private law courses in common law.[65]

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[61] As early as in 1919, Dean Robert Warden Lee made efforts to give legal education at McGill a new direction and push it beyond a training for the admission to the local bar, integrating pan-Canadian and international elements into an academic course of study. In an intellectual climate that was not quite ready to embrace such a non-instrumental view of legal education, Lee met strong resistance from the local bar. See MacDonald (note 60), 253-254. It is interesting to note the "interdisciplinary" thrust of Lee's ambitions, promoting the study of legal history and Roman law; see, e.g., Robert W. Lee, *The Place of Roman Law in Legal Education,* 1 CANADIAN BAR REVIEW, 132 (1923).

[62] Brierley (note 60)*.,* 365.

[63] *Id.*

[64] *Id.,* 369.

[65] For a detailed discussion of the National Programme from 1968-1998 see *id.*; Macdonald, (note 60).

Over time, it became apparent that students who had at least one year of exposure to the study of law would not learn the basics of the other tradition in the same manner as their first-year counterparts and that, therefore, they should be taught differently. From 1985 to 1999, a second pedagogical approach emerged with the development of "cross-over" courses designed specifically for students having completed their basic training in one tradition.

> "[S]econd-year courses were taught in an explicitly comparative basis, drawing insight from the student's prior exposure to the same ideas in their first year. In the third and fourth year of the program, students would have various options to take courses in the civil law or common law tradition, in order to graduate with both degrees."[66]

Despite the Faculty's effort to develop the comparative law potential of the National Programme, bijuralism continued to be understood as the cohabitation of two largely autonomous orders of private law and any comparative endeavour remained, for the most part, secondary. In the words of one professor: "[b]ijuralism at McGill […] meant peaceful cohabitation rather than active dialogue between the common law and the civil law."[67]

C. Beyond Jurisdictional Boundaries: The McGill Programme

I. Merging the two branches of the National Programme

Three decades after the institutionalization of the National Programme came the third major reform of the curriculum. The 1998 reform, known as the McGill Programme, was a response to a number of external and internal pressures. These included the desire to make the Faculty more attractive to a wider array of students and the perceived need to locate the teaching of law "more resolutely in the university, not as a matter of geography but of ideas [...] as an example of what might be called a foundational discipline."[68] The new curriculum developed as the logical extension of its predecessor, diverging from the National Programme largely in degree rather than in kind. In fact, as one professor recently noted, "the history of McGill's law curriculum after 1968 is one of progressive and ever increasing integration of the civil and the common law traditions, from juxtaposition to partial amalgamation where subjects permit it."[69] Under the new program, implemented in

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[66] Daniel Jutras, *Two Arguments for Cross-Cultural Legal Education, in* GRUNDLAGEN UND SCHWERPUNKTE DES PRIVATRECHTS IN EUROPÄISCHER PERSPEKTIVE, VOL. 3, 75 (H.D. Assmann, G. Brüggemeier & R. Sethe, eds., 2001).

[67] See Kasirer, (note 40), 29.

[68] *Id.,* 3.

[69] Morissette (note 47), 6.

1999, streaming has been abandoned. All students are admitted into a single integrated program, and all graduate with both degrees. Basic private law courses are no longer taught in function of a single legal system but in function of overarching categories of law such as contracts and civil responsibility.[70]

The cornerstone of the reform has been the advent of trans-systemic courses in which an area of law is treated as a unified field across the divide of different legal traditions. Some of the "core" courses that currently that are taught trans-systemically are: "Extra-contractual obligations / Torts", "Contractual Obligations / Contracts", "Business Associations", "Comparative Federalism", "Family Law", "Evidence (Civil Matters)", "Private International Law", "Secured Transactions" and "Sale". In first year, Civil Law Property is the one private law course that is not taught trans-systemically because of its systemic development and its cultural specificity, and in order to give students an opportunity to experience the internal "logic" of either system.

By integrating what used to be two courses into one, trans-systemic teaching is designed to promote a more profound and coherent understanding of fundamental legal principles, rather than to simply teach the logic of a single system of law. Considerations of space do not permit to elaborate in great detail on the pedagogical challenges that come with the attempt to teach "trans-systemically".[71] Suffice it to say that one of the major challenges the teacher faces in the "trans-systemic" classroom is to resist the temptation to simply juxtapose legal "solutions", but to develop a synthesis of the different approaches capable of conveying a synergetic surplus that justifies the integrated format. Moreover, the omnipresent experience of difference leads almost naturally to the attempt to explain discrepant and distinct developments in the respective legal traditions, which, from early on, connects legal discourse with the discussions of historical, sociological, economic, philosophical etc. questions in the classroom – another aspect that makes teaching in the trans-systemic format an exciting, but also difficult task.

This integrated approach has the practical effect of permitting a reduction of the number of credits required to graduate with both degrees, from 125 to 105. Students are thus able to complete their studies in three (very heavy) years of study rather than the four years required until 1998. That said, some students still choose instead to pursue their studies for a further term or even another full year in order to participate in exchange programmes, to pursue further research work or even simply to proceed towards their degree at a slower pace.

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[70] See, e.g., Rosalie Jukier, *Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom*, 50 MCGILL L. J., 790. (2005); Rosalie Jukier, *Transnationalizing the Legal Curriculum: How to Teach What We Live*, 56 J. LEGAL EDUC., 172 (2006).

[71] For a full description see Jukier (note 59).

II. From "Law's Empire" to "Law's Cosmos"[72]

The new program fits in the movement toward a more academically ambitious model of legal education. While a trans-systemic legal education is without a doubt "an open door on the world"[73], its architects thought of it, first and foremost, as "an invitation to students and scholars to think of law in a new way, in terms other than those of the jurisdictional or geographical representations of law that have dominated North American legal education in the past."[74]

The reform of 1999 was also the occasion for an introspective debate on the skills imparted by the programme and on the particular form of jurisprudential awareness it can cultivate in students.[75] With a view to developing new learning opportunities, the Faculty approved an ambitious Human Rights internship programme, Minors in other disciplines, Majors in particular fields of legal specialization and an Honours thesis.[76] Again, the rationale for these innovations stemmed from a vision of law as a discipline with a firm place in the academy among the social sciences and humanities.

McGill has always been committed to a liberal education, but with the new programme, the liberal endeavour is raised a notch by challenging the temporality and territoriality of legal normativity: "[I]f the study of law can be conceived as an end in itself, as an academic discipline, as an inquiry into one dimension of culture and social organization, why should it be confined to the norms and culture of the positive law of the jurisdiction in which a given faculty happens to be located?"[77] It is believed that trans-systemic teaching has a potential for sharpening, deepening and expanding the lenses through which one perceives law.[78]

However critical this pedagogical approach might be of the traditional "jurisdictional or geographical representations of law that have dominated North American legal education", it is obvious that it can only exist in an intellectual climate that does not reduce the scope of legal education to the study of doctrine of positive law. The trans-systemic experiment is, in that sense, intellectually closely related to the tendencies in

[72] See Kasirer (note 40).

[73] *Id.*, 31.

[74] *Id*.

[75] See Morissette (note 47), 21.

[76] *Id.*

[77] See Jutras (note 66), 83.

[78] See Bédard (note 49), 279.

American legal education to overcome the boundaries of the study of law as an exercise in doctrinal positivism. Only if it is a given that legal education should be about more than the mastery of positive rules, a programme such as McGill's can hope for acceptance. This culture of legal education is the intellectual foundation on which the programme rests; this is why European scholars, coming from an entirely different culture of legal education, must perceive the programme as the odd product of a mixed jurisdiction. Both pedagogical innovations and innovative responses to what has been called the "complex global challenges of our new milennium" are predicated on the existence of a culture of legal education that is able to re-imagine itself beyond its own traditional parochialism.

III. For Instrumentalists: Practical Advantages

Cui bono some readers may ask. The theory surely sounds nice. But does this approach actually help students to better understand the law? There exist, as we have seen and as, e.g., Professor Blanc-Jouvan has noted,[79] excellent programmes in Europe in which students can study for two years in France and two years in England, or another EU country, thereby acquiring a solid grounding in both the civil and the common law. Why go this extra very complex mile? What is gained?

A first result of the McGill Programme is that students cease to be "branded" as common or civil lawyers and as a result can be said to have a more complex legal identity, arguably one better suited to the complexities of the world. Secondly and equally important from the pedagogical perspective, students cease to carry the sole burden of comparative analysis. They are no longer taught by professors whose perspective is unisystemic, but rather by professors who are engaged in the same complex enterprise that they have embarked upon. Thirdly, comparative analysis ceases to be an addition and becomes central to their work as law students. Finally, law teaching from a trans-sytemic perspective is much more easily aligned with the broader social sciences and the humanities; the search for general principles becomes more necessary and the study of law is less likely to be dominated by the professionalist ethic.

Broadly, the result is that students cease to think in terms of a single national legal paradigm and are instinctively prepared to cope with several jurisdictions in any given situation. Law ceases to be seen from a single national perspective. Surely this is a message that is relevant to the European Union. The true framework within which modern law is developing has ceased to be the single jurisdiction: the sources of legal rules are increasingly multinational and trans-systemic. Jurists, whether academics, judges, lawyers, legal counsel employed by governments, corporations or NGOs, must have a broader frame of reference within which to work. In this respect, the EU is the exemplar of what is happening in the broader world.

[79] Blanc-Jouvan (note 22).

Whether they are engaged in drafting or analysis of contracts, litigation, advocacy, policy-making in government service or work for NGOs, jurists need to be sensitive to the influence of different systems. Within the EU a lawyer called upon to apply the *ECT* article 288 will surely benefit from training that calls for the ability to think of legal rules outside a single jurisdiction. A jurist called upon to work with a common code governing commercial contracts will understand the principles of the code far more readily if she comes at it from a perspective which is not tainted by the instinctive belief that there is only one genuine legal system – that in which they were first trained. Administrative lawyers working with the EC concept of general principles of law can do so much more readily if their judgment is not clouded by instinctive fidelity to their system of origin. Complex commercial contracts no longer can be understood in function of a single legal system, yet most law students are not taught this fact or trained to deal with it. A trans-systemic training is designed to meet this need.

IV. Critique: "Madly off in one direction"?

After ten years of pursuing the "trans-systemic" experiment, it befits us to ask whether the programme has actually reached its goals. An answer to this question is not easy to give. One has to distinguish between the expectations of intellectual progress in legal education – a somewhat lofty goal whose very nature makes it difficult to judge one's own achievements – and the "instrumental" goal to prepare students for a transnational, globalized job market. The impact of the curriculum change on the employment opportunities of graduates of the McGill Programme is difficult to measure as well, given the lack of reliable statistics. The response of the Canadian legal profession, which had been skeptical in 1968, was much more enthusiastic in 1998. Surveys undertaken in the context of the attempt to rank Canadian law schools, involving the assessment of Canadian employers, indicate that McGill graduates are doing well on the job market;[80] so do the McGill graduates clerking at the Supreme Court of Canada, whose number, during the last years, has been higher than that of any other law school graduates in Canada. As to the international success of graduates of the programme, there only exists anecdotal evidence, documenting single successful careers with American or European law firms or international organizations, but recruitment of McGill graduates by international firms is now a well-established practice. Until an actual empirical study is undertaken, it will be difficult to draw firm conclusions. However, judging from the data so far available it seems fair to say that the curriculum change has not hurt, and even appears to have enhanced the prospects of McGill graduates. The concern that the comparative approach might have been purchased at the price of a less thorough training in the positive law, thus

[80] In McLean's ranking of Canadian law schools, McGill comes 2nd after the University of Toronto in the category "Elite Law Firm Hiring"; this survey, however, categorized McGill as a "common law school" and completely ignored its Civil Law Branch (available at: http://www.macleans.ca/education/universities/article.jsp?content=20070917_204046_1504&page=2).

endangering graduates' "employability" – the European positivist objection to the ideology underlying the programme – seems unfounded.

It is also hard to assess whether the programme has come up to its own intellectual expectations. As Harry Arthurs, former Dean of Osgoode Hall Law School and former President of York University, has remarked: given the complex theoretical justifications for the curriculum change, judgments about the operation of the programme are confronted with the conceptual problem that "the standard of judgment the programme has defined for itself is not how it functions at any given moment, but rather how it evolves over time".[81] Indeed, to assess whether the programme has evolved even further before concluding that it "functions" in the first place seems hardly feasible. However, it can be said that the whole faculty at least is engaged in a permanent attempt to propel such an evolution: at McGill there is an ongoing process of critical self-assessment and self-reflection, documented by faculty seminars, conferences and scholarly publications on the topic of legal education. At the moment, a committee struck by the faculty is charged with a review of the achievements of the programme. Critique from the outside has been taken seriously, such as Peter Strauss's admonition to better include other emanations of the civilian tradition than French and Québec law[82] – one of the considerations taken into account when it was decided to hire civil law-trained faculty from Puerto Rico and Germany.

In addition to pointing out the difficulties of realistic self-assessment, Harry Arthurs has put forward what is probably the most challenging critique in regard to the substantive focus of the programme: In its strong belief in the value of comparative law, Arthurs claimed, the McGill programme went "madly off in one direction". Its revolutionary fervor, he implies, is somewhat stuck in a "legal" perspective, while a true effort to make legal education an interdisciplinary endeavour has so far been lacking.[83]

The programme does already include a number of courses with an interdisciplinary ambit. Nevertheless, Arthurs's point is well taken, and the commensurability of the "trans-systemic" programme and an even more trans-disciplinary approach to legal studies is a much debated question. The trans-systemic project, which is at heart a comparative project, still emphasizes "law" and the comparison between "laws" as a major focal point. From the perspective of a radical claim to anti-formalism and interdisciplinarity, Arthurs's critique must seem, to a certain degree, well-founded: relying on comparative law as a pedagogical tool shows a remaining (if unspoken) belief in the heuristic potential of an

[81] Harry Arthurs, *Madly Off in One Direction: McGill's New Integrated, Polyjural, Transsystemic Law Programme*, 50 McGILL L.J. 707, 711 (2005).

[82] See Strauss (note 37), 167.

[83] See Arthurs (note 81), 715.

approach that starts from an internal analysis of law. Indeed, the organic integration of more trans- or interdisciplinary courses in the curriculum, and, on a more general level, the adoption of a more trans-disciplinary epistemology is perceived by many as marking the necessary next stage of development for the programme.

The European observer, however, might read in disbelief that McGill's experiment is being criticized for its traditional fixation on law. Indeed, if we ask the question whether the ideology of the McGill programme could be exported to Europe, those parts of the programme that involve – from Arthurs's point of view – an overly legalistic and rather conventional comparative approach might be potentially viable in and most interesting for the European context. It might already seem counterintuitive to the European tradition of positivistic legal education to move away from the paradigm of vocational training in a certain jurisdiction. A comparative curriculum has long been on the wish list of (Continental) comparatists.[84] While Europe surely is not yet ready to embrace the "interdisciplinary paradigm", a comparative, transnational approach that at least still focuses on "law" might – someday – be more acceptable.

D. Conclusions

What is happening at McGill is not simply a utilitarian effort to alert students to the complexities of life that await them as jurists and lawyers in the future. Much more is at stake. Once one begins to approach the teaching of law from a trans-systemic or multisystemic perspective, it is quickly apparent that what is at stake is the very nature of law. The teaching of law at McGill reflects both the coexistence of two legal cultures that meet with particular intensity in Québec and the sense that single jurisdictions no longer, if they ever did, contain within themselves a true understanding of the meaning of law. The programme is the attempt to answer the challenge of the "cosmopolitanism" of law, enabled by an intellectual climate in North America that has long left behind the positivistic paradigm of legal education.

Does this programme have any relevance for legal education in the EU? We have tried to emphasize that the philosophy of the programme reaches beyond the particular and singular condition of one single (and small) mixed jurisdiction. Moreover, European jurisdictions are "mixed" as well; the process of mixing, merging and blending is surely even more complex in the EU than in mixed jurisdictions where only two legal traditions meet. EU law has already begun to seek common principles of law, and now draws heavily upon a number of legal systems. The EU has also embarked upon the search for constitutional legal principles to govern a multi-polar and multisystemic political system. What it has yet to undertake is the development of a system of legal education adapted to

[84] See, e.g., Kötz & Zweigert (note 36), 23-24; Dedek (note 32), 540, 548.

the training of jurists for this new reality. As this process accelerates, it is important that the process be understood as one of the central features of the development of the EU, not only as a legal undertaking but also as a human and political community. It calls for a new mentality, for a true understanding of pluralism rather than the extension of the positivistic mindset to a multitude of legal orders. Europeans should remember their heritage: regain the insight that the *ius commune* that is so readily invoked in current discussions was a *common culture* rather than a common legal system; and embrace the seminal role of legal education in the formation of such culture.

SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing the Pluralistic Legal Mind

By Jaakko Husa[*]

"Though this be madness, yet there is method in't."
Shakespeare's HAMLET (Act 2, Scene 2)

A. Introduction

As is well known, comparative law enters the curriculum normally only after some substantive law has been learned. The traditional approach first takes the law student's national legal system, with the comparison or foreign law element only coming later as a form of supplement to the standard curriculum. This paper offers some thoughts concerning the teaching and learning of law in a world in which pluralistic and/or transnational elements are commonplace. These plural features stem from the declining authority of the nation state as well as from the strengthening of various forms of sub-national law being in tension with the central system of the state. These developments also include growth of supranational or transnational legal regimes (e.g. EU).[1] The growth of the significance of human rights, especially the considerable growth of the system of the European Convention on Human Rights, has caused national and international legal spheres to overlap. This paper is based on a belief according to which future legal education ought to respond more seriously to the globalisation of law.[2] However, the argument here is preliminary and it offers merely a sketch of essential features with scarce details i.e. this paper is of a somewhat rough design. The theme itself, i.e. transnational law and its effects, is most certainly somewhat fashionable these days.[3]

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[1] About the concept of transnational law, see Peer Zumbansen, *Transnational Law, in* ELGAR ENCYCLOPAEDIA OF LAW, 738 (Jan Smits ed. 2006).

[2] This is also the basic rationale behind the North American Consortium of Legal Education (NACLE). See Barbara Atwood, Graciela Jasa Silveira, Nicole LaViolette, and Tom Oldham, *Crossing Borders in the Classroom: A Comparative Law Experiment in Family Law*, 55 JOURNAL OF LEGAL EDUCATION 542, 542-547 (2005).

[3] For example, when the Association of American Law Schools organised the Annual Meeting in January 2006 there was an all day workshop called Integrating Transnational Perspectives into First Year Curriculum.

The problem with the traditional law-teaching approach is that it constructs a primary epistemic foundation for legal understanding, which is based on the one mother-system. This creates an implicit mono-epistemology, which makes lawyers regard their own system as 'normal' and other systems as 'not-normal' or, at least, something that is 'less-normal'. From this mono-epistemic platform, the law-student is first immersed in the one-approach-thinking, which later makes it difficult to epistemologically adapt to transnational pluralism and to genuinely accept different approaches. Here it is tentatively argued that today's law-teaching should start from general legal questions without compulsory prior epistemic embedding to one's own national law. Shortly afterwards, students should first be introduced to different solutions and different ways to construct legal questions and ways for answering them. What is important to note in this context is that this is something more than just adding traditional international law or comparative law as a field of legal science in the law curriculum.[4]

The sketch-like argument in this paper draws inspiration from the pedagogical theory of so-called constructivism. In following this theory, one may say that in reality no one can teach law. Accordingly, an effective law curriculum is one which can stimulate students to learn legal thinking. So, law students learn law well when they construct their own legal understanding from multiple sources. If this idea is taken seriously, most teaching of national law should take place only after the first steps of the self-construction of the student's legal thinking have taken place. In this kind of pedagogic vision, it is presupposed that the role of the learner is not primarily to assimilate whatever one legal system presents. The constructivist approach suggests that the learner is more actively involved in a joint enterprise with the law teacher of constructing new legally relevant, and perhaps competing, meanings. Comparative law and/or foreign law and even approximate knowledge of different foreign approaches to similar types of questions may be regarded as a valuable tool for the construction of a primary pluralistic legal mind.[5]

[4] So, "a quickie version of international law" is simply not enough if we are to take transnational challenge seriously, as Anita Bernstein has pointed. See Bernstein, *On Nourishing the Curriculum with a Transnational Law Lagniappe*, 56 JOURNAL OF LEGAL EDUCATION 578, 593 (2006).

[5] If one has followed the intense debate within comparative law, one may raise one's eyebrows while reading expressions like "similar type of questions". Some might detect 'a functionalist bias' in this line of argumentation. For more details see, Jaakko Husa, *Farewell to Functionalism or Methodological Tolerance?,* 67 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT, 419 (2003). Be that as it may, here the underlying idea is that law teaching and learning should be focused on something which is: "deeply rooted or profound…that which pervades all of" legal systems as H. Patrick Glenn puts it. See H. Patrick Glenn, *Doing the Transsystemic: Legal Systems and Legal Traditions*, 50 MCGILL LAW JOURNAL 863, 867 (2005).

B. Law Curriculum as a Hidden Epistemic Curriculum

We may speak of a law curriculum in many senses. Obviously the most basic manner to conceive a law curriculum is to regard it as some kind of aggregate of courses given in a law faculty or law school. Accordingly, debate or discussion about a law curriculum tends to concern questions like: what courses should be included, how much material should include criminal law and how much should students study constitutional law or should the law curriculum be expanded also to cover other disciplines such as economics, political science, or sociology. Undoubtedly this is something that all academic law teachers are very much familiar with i.e. the constant battle between public law and private law or the eternal question of how much legal history and how much philosophy of law should necessarily be included. And, as we are well aware, comparativists have played their part in these debates. Such arch-type comparative lawyers as *Konrad Zweigert* and *Hein Kötz* have presented the standard comparative law argument by stressing the general importance of comparative law in all legal education: "Comparative law offers the law student a whole new dimension, from it he can learn to respect the special legal cultures of other peoples, he will understand his own law better…".[6]

Basically, comparative law adherents have said and are still saying that we should have more comparative law and foreign law included in national law curricula. As such, there is nothing wrong with this argument. The basic idea is to have deeper integration of comparative law into the teaching of national law.[7] Certainly, these kinds of arguments and discussions are not irrelevant, however this kind of debate is not really what is sought after here. And, yet, what is claimed in this paper does not differ drastically from the old idea of comparativists that there should be more comparative and foreign law in law curricula. Nonetheless, the argument behind this outcome is constructed differently from the old ideas. More importantly, in some aspects the argument presented here is completely different from what has been said before about the role of comparative law in teaching. The key question here concerns law curricula and their clandestine dimension.

But what is there is in the law curriculum that does not meet the instant eye? During the 1960s a concept of *hidden curriculum* was presented in the critical study of education.[8] Without going into details of educational science one may generalise a great deal and claim that the most important single finding in the hidden curriculum debate was the fact that teaching and curriculum lost their innocence. In other words, it was brought into the

[6] ZWEIGERT AND KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 3RD ED., 21 (1998).

[7] Cf. Helmut Coing, *European Common Law: Historical foundations*, *in* NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 31-44 (Mauro Cappelletti ed., 1987) (national law's ideas presented against the common legal background). See also ZWEIGERT AND KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 3RD ED., 21-23 (1998).

[8] See especially PHILIP JACKSON, LIFE IN THE CLASSROOMS (1968).

open that while teachers teach and follow the official curriculum something else takes place *i.e.* it is not just offering knowledge and skills. There is also something else going on that does not meet the eye instantly. This something else is also very important in the teaching of law. The way studies are organised and the way different subject areas are positioned in the total-structure of a curriculum is a key factor in moulding the law student's way of thinking without thinking or questioning certain invisible theoretical commitments about law. Therefore, law curriculum is a sort of embodiment of how epistemic basic spheres like 'law', 'legal' or 'non-law' and 'non-legal', and 'valid law' and 'non-valid law' are understood. Doing so, law curriculum offers a representation of the inner order of the world of law.[9] It makes one think like a lawyer, although, this outcome is not solely a learning product of official curriculum, but also a by-product of hidden epistemic curriculum (offering one-system-centred provincialism). In a similar vein, *H. Patrick Glenn* has rightly pointed out that:

> "If law is no longer considered exclusively in terms of national sources, then it is the discipline of law in its entirety which must assume the cognitive burden of providing information on law beyond national borders."[10]

Law, from the point of view of world-of-law representation, is characteristically a national being and the boundaries of this "normal world of law" are that of the national legal system *i.e.* one system, the mother-system. Legal entities or dimensions like foreign, comparative or transnational entities come only as a form of supplement, which may enrich the nationally defined epistemology of law, but do not really challenge the national boundaries of "normal world of law".[11] Implicit representation and verification of "normal world of law" is what is meant here by hidden epistemic curriculum: the picture that looks so ordinary that no professional lawyer in a country would question the basic parameters in it, even while many lawyers may have different ideas about the content of law itself. There may be more to it as *Jan Smits*' concept of "vicious circle" seems to suggest: in a nationally defined world a lawyer may end up being "better off simply studying national law".[12] This is the outcome of thinking in which nationally applicable law is stressed heavily and in which foreign and comparative material, although interesting and even fascinating,

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[9] In the sense of Heinrich Rickert (see HEINRICH RICKERT, THE LIMITS OF CONCEPT FORMATION IN NATURAL SCIENCES (1986)), this representation is *Darstellung*, containing not only a form of conceptualisation (*i.e.* logical construct) but it also having a certain cognitive purpose.

[10] H. Patrick Glenn, *Aims of Comparative Law*, *in* ELGAR ENCYCLOPAEDIA OF COMPARATIVE LAW 57, 59 (Jan Smits ed., 2006).

[11] International law (both public and private) is left out here on purpose. This is done because public and private international law is actually based on certain commitments that in many senses embrace the idea of sovereign state and its law; the international aspect is subjugated to this primary national/state law dimension. In accord, transnational legal questions do not concern *only* international lawyers (see *supra* note 1, 748).

[12] JAN SMITS, THE MAKING OF EUROPEAN PRIVATE LAW, 55 (2002).

does not appear legally relevant. From the point of view of legal education, the epistemic outcome may be described by the words of *W.J. Kamba*: "One is inclined to think that the solutions of one's own legal order are the only possible ones".[13] So, it is not claimed that one necessarily prefers one's own law knowingly, but that one is in an epistemic sense inclined to do that. As such, this is certainly not anything new for traditional comparative law where it has always been understood that the law that is taught, "fixes the minds of those who administer the respective legal systems".[14]

I. Legal Weltanschauung

Globalisation and the expansion of transnational law changes law in the sense of rules, principles, institutions and procedures. But to truly deal with this change something more than knowing the new body of law is needed. In a similar vein, it has been recently noted that we need not only globalisation of law or legal science but rather "a globalisation of the mind".[15] To globalise the mind has necessarily also to do with the epistemic legal curriculum.

What is sought after is to claim that when one follows a curriculum it is not only important what is in the curriculum but also what *places* different subject areas are to be found, and in what *order* they are presented to law students. For instance, if comparative law or foreign law comes only at the very late stages of studying, it also reflects an implicit idea concerning the "right place" of these subject areas in the world of law; they come only after the 'normal stuff' and represent something that is 'extra'. The theoretical character of comparative law teaching tends to fortify this impression of 'extra'. This is a kind of legal *Weltanschauung* or world-view-of-law that contains the epistemologically defined manners, which a professional law person uses when he or she is trying to perceive the world of law.[16] In this sense law may be conceived as a form of discourse because there is no direct cognitive access to legal reality.[17] The world of law cannot be touched or seen and yet no jurist would deny that in some miraculous way it simply exists. But, how does comparative and foreign law fit in?

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[13] W.J. Kamba, *Comparative Law: A Theoretical Framework*, 23 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 485, 491 (1974).

[14] Hessel E. Yntema, *Comparative Law and Humanism*, 6 AMERICAN JOURNAL OF COMPARATIVE LAW 493, 499 (1958).

[15] Xavier Blanc-Jouvan (partly quoting Harry Arthur), *Book Review: The Oxford Handbook of Comparative Law* (Mathias Reimann and Reinhard Zimmerman eds.), 56 AMERICAN JOURNAL OF COMPARATIVE LAW NO. 4, 1076, 1084 (2008).

[16] About the concept of *Weltanschauung*, see e.g. HANS-GEORG GADAMER, TRUTH AND METHOD 98-99 (1994). Here this philosophical concept refers to a shared comprehensive mental image of world of law in general.

[17] See also Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOCIETY REVIEW, 727, 743 (1989).

Comparative law or the study of foreign law may be regarded as a form of competing discourse as it could offer a different way for organising the world of law and different ways of how to seek answers to social problems that are regarded as having something to do with legal order. The problem is, however, that comparative law and foreign legal material have a very small role in law curricula around the globe; this is true regarding the amounts as well as the positioning of comparative and foreign law material in curricula. In the circles of comparative law, the criticism of law curricula being too provincial or parochial are, of course, well known and widely spread. And yet, it is very much the standard manner to have little if any comparative and foreign law material in a curriculum. In most typical cases comparative and foreign law may be chosen freely as supplementary studies at the very late stages of studying.[18] Paradoxically, this does not differ drastically from what many classical comparativists have said about the educational role of comparative study of foreign law: that it is an auxiliary educational tool having a role in lawyer education.[19] The crucial pedagogical question is, however: is this auxiliary or complementary role enough for contemporary purposes?

Some things appear to be quite clear. Without a shadow of a doubt, little comparative and foreign law is better than none, but from a pedagogical point of view this is way too little in order to help constructing genuinely competing legal discourses alongside one's own national law.[20] This is simply because the hidden epistemic curriculum has already been implicitly constructed in a much earlier phase. To put it concisely: too little and too late. Accordingly, even though a student may learn some details or technicalities of foreign law she or he does not really receive alternative ways to think 'legally right'. Grand theories of comparative legal science or comparative legal studies do not change the prior epistemic embedding that has already taken place. Moreover, this also means that the challenge to teach lawyers to think like global lawyers is generally not met.[21] So, the question boils down to this: where else should comparative/foreign law be placed then? it is common wisdom that one must first know one's own law and only after having gained this

[18] It is not necessary to go into the details of thousands of law curricula here. However, based on my own experiences and quite extensive internet searches, the state of affairs, which is referred to above in the text, appears to be the most common. Also inquiries from colleagues have produced largely the same result. In this context I thank specifically Professors Michael Bogdan, H. Patrick Glenn, and Mathias Siems for providing their own personal findings concerning the use and role of comparative law in countries that they are familiar with. For a larger European picture see also Juristenausbildung in der Europäischen Union (http://www.europaeische-juristenausbildung.de), last accessed 17 June 2009.

[19] See, e.g., Ernst Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, *in* GESAMMELTE AUFSÄTZE BAND III, 19-21 (1967, originally published in 1924) on "*Bildungselement*", and PIERRE ARMINJON, BORIS NOLDE, MARTIN WOLFF, TRAITÉ DE DROIT COMPARÉ TOME I 14-18 (1950) on "*rôle educatif*".

[20] Even in the best, most well intentioned attempts aim to integrate a supplementary "component in the national legal education" (*supra*, note 12, 56).

[21] Here the text is in debt to Catherine Valcke who has offered an inspiring argument to this discussion in her seminal article Catherine Valcke, *Global Law Teaching*, 54 JOURNAL OF LEGAL EDUCATION 160 (2004).

epistemic basic embedding may one safely enter into such perilous areas as comparative and foreign law. Furthermore, of course one needs to know about theories and methodologies of the comparative study of law before anything can be done properly. Are these ideas not part of the healthy common comparative law wisdom that should be respected and followed? Perhaps this is not the case. Now, what is argued in the following is completely opposite to most traditional wisdom concerning legal education and learning.[22]

C. Clearer Distinction between Research and Tool for Education

In the above it has been claimed that national law in the epistemic sense dominates national law curricula: it has an important position in constructing the invisible and implicit legal *Anschauung*, or immediate intuition, of a legal mind. If this is so, then we might regard national law as a kind of epistemic community. In this community, legal professionals from a variety of fields of law and professional backgrounds have a shared set of normative and principled beliefs, which provide rationale for the action of community members in their capacity as legal professionals. This legal epistemic community has also shared causal beliefs concerning possible legal solutions and their desired social outcomes: what rule should be applied and what rule should not be applied, how and where to find these rules *etc*. Also shared notions of validity are part of this community *i.e.* there are internally defined criteria for weighing and validating knowledge in the domain of their legal expertise (to answer what is valid law and what is not). And finally, this epistemic community also has a set of common professional practices associated with a set of legal problems to which their professional competence is directed. These common professional practices are based on implicit conviction of "right" legal solutions or "proper" way to look and assess legal dimensions in social problems (*i.e.* members of the community think like lawyers). In a word, this epistemic community has a shared legal-world-view, which is not openly displayed, and yet it exists.[23] The law curriculum is a part of this epistemic community and they cognitively initiate students to this community.

Now, legal education is not itself the same as this epistemic community, but what education does is take part in constructing this epistemic community (or to be precise builds some of its basic ontological and epistemological commitments about law) by providing a world-view-of-law, which is based on one national system *i.e.* mono-understanding. What follows, is a certain way to conceive one's own law as being 'natural'

[22] Education refers in this text to the *process of acquiring* legal knowledge or skills. Learning, on the other hand, refers to those skills and knowledge *which are acquired* by systemic study of law (*i.e.* following the curriculum).

[23] These ideas (or rather applications of certain ideas) originate from PETER M. HAAS (ED.) INTERNATIONAL ORGANISATION, 46 (1992).

and other laws as 'not-natural'.[24] The learning outcome, provided by the hidden epistemic curriculum, is a kind of a mono-system-thinking, which has proved to be a problem for today's and tomorrow's legal education, because legal education should be able to answer the call of the wild *i.e.* face the promises and perils of transnational legal education.[25] Here it is suggested that comparative/foreign law might have an important role in this, but there are some problems with this. If one reads comparative law literature at all, one cannot avoid the fatherly atmosphere in which older and more seasoned comparativists are constantly reminding their younger colleagues about studying foreign law carefully and not making any such foolish assumptions that originate from their own legal cultural background.[26] In fact, much of the comparative law literature genre consists of warnings stressing the perils and difficulties lurking behind every corner. It is all so a very serious business, which, accordingly, starts to look very much as something for only those truly initiated.[27] Surely, this risky field of ambitious legal science cannot form the base of law teaching even in the transnational world? Or could it?

hese warnings make perfect sense if we are dealing with the comparative *research* of law i.e. comparative law or comparative legal studies as a separate academic field of legal science.[28] However, it may be useful to separate the teaching of law (especially at undergraduate level) and the research of law when we are dealing with comparative law. From the perspective of teaching, comparative law should not be understood exclusively as a field of legal science but rather as a pedagogical instrument.[29] Now, if comparative/foreign law's full pedagogical potential is going to be used we cannot simply start from similar ideas about the required skills: first year students and professors at the age of sixty do not have similar skills. Accordingly, if comparative law material is going to be situated in the curriculum in a very early phase (first year or second year) it is practically

[24] This is very close to Valcke's (*supra*, note 21, 177) idea according to which this kind of globally oriented law teaching offers a possibility to: "penetrate another system, to decipher the 'law in minds'…to get acquainted with a new way of thinking".

[25] See *Second Call for Contributions to contribute to a Symposium Issue of the German Law Journal: "Following the Call of the Wild: The Promises and Perils of Transnationalizing Legal Education*". Online at: http://www.germanlawjournal.com/article.php?id=1010. Last accessed, 17 June 2009.

[26] See MICHAEL BOGDAN, COMPARATIVE LAW, 48-50 (1994).

[27] Much of Pierre Legrand's work seems to say that comparative law/legal studies are not for everyone. See, e.g., Pierre Legrand, *How to Compare Now?* 16 Legal Studies 232, 239 (1996).

[28] Of the high scholarly ambit in the field see, e.g., Nicholas HD Foster, *The Journal of Comparative Law: A New Scholarly Resource*, 1 JOURNAL OF COMPARATIVE LAW 1 (2006) for comparative law or rather comparative legal studies being a necessary science of tomorrow.

[29] Traditionally comparative law has been deemed to have many purposes of which one has always been education. See, e.g., Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MODERN LAW REVIEW 1 (1974) for comparative law seen as a tool of research, tool of education, and tool of law reform.

impossible for any of the students to have the required skills. So, comparative/foreign law as a teaching-tool must be separated from comparative law scholarship. And, the requirements concerning these two must also be different.[30] This is not as easy to conceive of as it may appear,m because it would require turning upside down some of the most persistent paradigmatic wisdoms in comparative law. Namely, what is required is to abandon, in the teaching-context, the famous idea of *Paul Koschacker* according to which: "*Schlechte Rechtsvergleichung ist schlimmer als keine*."(Bad comparative law is worse than none.)[31]

But, if we are to use comparative law as a fully-flexed educational tool it might, instead, make perfect sense to have a 'bad comparison' provided that 'bad comparison' may produce a better epistemic embedding for law studentss legal minds *i.e.* better learning results in the long run. The core pedagogical point here is straightforward: to try to make students *to actually attempt to use* the laws of systems that differ from their own. In order to make this idea clearer we should look into different theories about education and learning. In this respect, the constructivist ideas look especially promising.

D. Constructivist Law Curriculum?

Constructivism in education or in educational psychology may be regarded as a certain kind of loose theoretical approach to teaching and learning. Its core idea is to regard each individual learner as an active person who is actively building or constructing knowledge and skills. [32] In previous theories about learning, the information was provided by the teacher and the role of learners was passive in their relation to the teacher who was providing the knowledge and skills that were needed to be learnt. Rather, in constructivism it is thought that information exists within the constructs made by learners themselves as opposed to in any external environment provided by the teacher. The material provided by the teacher is regarded as a kind of stimulus that sets the learner's learning process into motion *i.e.* the stimulus (what is taught) is not as important as the *cognitive process* that stimulus is producing in active learners. So, learning is regarded as an active process in which learners construct new ideas or concepts based upon their current or past knowledge.

[30] In a similar vein it has already been suggested that as a subject comparative law should be integrated into other law courses. See, e.g., Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TULANE EUROPEAN AND CIVIL LAW FORUM 49 (1996).

[31] Quote taken from LÉONTIN-JEAN CONSTANTINESCO, TRAITÉ DE DROIT COMPARÉ TOME II, 15 (1974).

[32] This is very much what Kamba (*supra*, note 13, 492-493) has said about comparative law's role in legal education: "The student is compelled to question the soundness of the solutions, norms and many other aspects of his own law…prompted to investigate the inarticulate assumptions on which the institutions of his own law rest".

What the learner actually does is select and transform information, construct hypotheses, and make decisions, relying on a cognitive structure to do so. In this kind of process it is the cognitive structure (e.g. schema or a mental model) that provides meaning and organisation to experiences and allows the learner to *go actually beyond the information given*. In this kind of process the teacher or rather the instructor tries to get students to discover 'legal things' by themselves. Further, the teacher and the learner should engage in an active dialog, which facilitates the process of learning.[33]

The idea is not to forget to teach skills but to change the manner in which the required skills are taught; skills are taught and learned discretely. In this kind of constructivist theory of learning there are some basic principles that should be followed. We may mention two of those principles here. An important principle is to structure the teaching so that it may be easily understood by the student. In other words, students should have an active role in law learning. The second important principle is to design the teaching so that it would help students learn to fill the gaps. This is precisely what is meant by, "going beyond the information given". What is hoped for in this kind of teaching is to help students to expand and further develop their knowledge by enhancing their willingness to go further toward new learning. Or as the participants in NACLE transnational family law experiment formulate it, though without referring to constructivist learning theories: "Students would therefore be called upon to research…".[34]

Of course, all this may sound nice and all, but we may wonder how this works in practice.[35] It is not the task of this paper to delve deep into the practical issues, yet something seems to be very clear.[36] There are at least two points which are important to take into account. The first one deals with the nature of questions that can be used in the early-phase of comparative/foreign law teaching. To begin with, we should not start from classical

[33] These ideas here are all based on the groundbreaking work of Jerome Bruner. For a larger picture of his work see, JEROME BRUNER, TOWARD A THEORY OF INSTRUCTION (1966), GOING BEYOND THE INFORMATION GIVEN (1973), ACTUAL MINDS, POSSIBLE WORLDS (1986), and ACTS OF MEANING (1990). Obviously, constructivism is a large framework in philosophy and science and the ideas of Bruner represent only one stream, even though from the point of view of education Bruner's ideas are most likely best known.

[34] *Supra* note 2, 544. This would be needed in order "to encourage…to research and analyze the legal questions on its own, much as students will have to do after graduation" (*id*. 550).

[35] In practice, it may be a true challenge, see Atwood, *supra,* note 2, 552-557.

[36] In practice, such attempts as the NACLE Cross-Border Family Law Module is one possible practical example of how to involve the deep and practical comparative/foreign law dimension into the law courses in three different jurisdictions and three different legal languages, see Atwood, *supra* note 2. Also the transsystemic or bijural teaching (at undergraduate level) at McGill University in Canada offers another type of practical example. See for more detailed discussion Yves-Marie Morissette, *McGill's Integrated Civil and Common Law Program*, 52 JOURNAL OF LEGAL EDUCATION 12 (2002). See also H. Patrick Glenn, *Doing the Transsystemic: Legal Systems and Legal Traditions*, 50 MCGILL LAW JOURNAL 863, 865-866 (2005) on explaining the theoretical background of studying simultaneously, in the same classroom, civil law and common law.

comparative law questions like: "What is comparative law? What are its purposes? What are the subject's particular aims, approaches, methods, and how is it used?"[37] These do not enhance the readiness of students to be willing and able to learn, but rather, they may even block the growth of interest and direct the focus to points that are overtly theoretical and do not seem fascinating to an average law student. Rather, we should start from questions (*i.e.* stimuli) that are as to their nature something like: "Is the administration liable on the same basis as a private individual? How far is compensation sought through the courts and how far are there special compensation schemes for particular kinds of injury or activity?"[38] These are the kind of questions that do not require students to know about foreign law extensively or their own law for that matter. In other words, questions like these practical ones can be answered roughly with the help of some valid basic legal literature of a country. Further, these kinds of practical questions (being "answered" in simulation-type exercises) also teach the student implicitly that there are different approaches to the same type of questions.[39] All this would probably help to build the epistemology of law that resides on multiplicity rather than mono-systemic legal thinking.

This, nevertheless, is in direct opposition to the classical paradigm concerning using comparative law as a tool in teaching. Namely, it has been suggested by *Kamba* that it is of importance first to know about the theories of comparative law and things like methodology, classification and general features of legal systems.[40] Now, if one seeks accurate knowledge about foreign law Kamba's idea is certainly plausible. However, if one uses comparative/foreign law material as a constructivist tool in primary legal learning while building the legal epistemology of a learner (undergraduate), then, the situation may be completely different. Instead of accurate and rigorously gained knowledge, comparative/foreign material would be used to build a legal mind that starts from many possible solutions, instead of one legal base, with the additives of "something extra", something "not normal".

The other important question has to do with the role of the law teacher.[41] It seems clear that law teachers should pose rather general legal questions and then require the students to find out themselves. Obviously, the material used may be defined in the curriculum and

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[37] Esin Örücü, *Developing Comparative Law*, *in* COMPARATIVE LAW: A HANDBOOK, 42, 63 (Esin Örücü and David Nelken eds., 2007).

[38] John Bell, *Administrative Law in a Comparative Perspective*, *in* COMPARATIVE LAW: A HANDBOOK, 287, 310 (Esin Örücü and David Nelken eds., 2007).

[39] Theoretically this seems to require accepting some kind of universalism or generalist assumption according to which there, indeed, are common legal questions in different legal systems.

[40] *See supra* note 13, 518-519.

[41] This concerns multiple aspects: description of given assignment, discerning and building a meaningful learning objective, gathering suitable readings for the assignment etc.

the teacher is there to provide help as to how to use this material, and how to read textbooks about foreign law while trying to find out about different approaches.[42] The teacher has great significance in this kind of teaching because there is always a risk that those students who have poorer skills do not simply make any true progress in their learning. So, it is highly relevant for the teacher to keep those students without adequate basic-abilities up to speed with the learning process. This is simply because there is an inevitable risk that some of the students may adequately develop their skills, but may still have gaps in their legal knowledge and skills that are based on that knowledge. Also there is a further risk that the teacher must try to avoid: students may develop knowledge and skills in legal thinking and making legal questions and finding different answers to those questions, but all this may possibly have no meaning to the learner who may end up stressing the importance of national law. And, there is always a risk that the comparative/foreign law knowledge and skills may be forgotten.

In more practical terms, if comparative law and foreign law would be taught in the way that has been proposed here, we may assume that the second and third year of law school would be possible places to include it in the law curriculum.[43] Also, it is not difficult to grasp that these sorts of courses should not involve classical lecturing but rather lengthy seminars requiring those taking part to concentrate fully on the learning process. The first year of the studies should be reserved for such basic skills as languages, computer skills and general legal studies and/or legal theory. In any case, these sorts of comparative/foreign law courses or rather large study-modules should have much larger roles in the curriculum than is the situation today. This is, of course, only if we want to take seriously the transnational challenge to legal education. To be sure, what is not meant here is "modest, supporting role in introductory courses" as has been suggested by one American professor.[44] Accordingly, the task suggested here may be just too huge to be realistic: national traditions are very influential in shaping thinking about education and university reform.[45] Without a shadow of a doubt, turning the law curriculum upside down might be regarded by most law professors as sacrilege.

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[42] Of course the number of comprehensible legal languages and availability of relevant materials pose certain restrictions, although Internet has to an extent diminished some of the difficulties. For a more detailed discussion on the significance of linguistic skills see HEIKKI MATTILA, COMPARATIVE LEGAL LINGUISTICS 19-21, 33-39 (2006).

[43] This refers to the undergraduate type of law program. If a law programme is a graduate programme, then this does not fully fit. However, this paper keeps in mind especially European law programmes of which most are five-year programmes consisting of both undergraduate and graduate level law study. In the American scene, however, things are somewhat different.

[44] Neil S. Siegel, *Some Modest Uses of Transnational Legal Perspective in First-Year Constitutional Law*, 56 JOURNAL OF LEGAL EDUCATION 201, 215 (2006). See also M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First Year Property Class*, 54 JOURNAL OF LEGAL EDUCATION 183 (2004).

[45] See *supra* note 1, 749. It seems that he certainly has a point when stating that: "While this insight is beginning to take hold in curriculum reform committees everywhere, there is still a long way to go to bridge the gap

E. Conclusion – Toward Multijuralism?

The preliminary discussion above suggests that comparative/foreign law might gain a novel function in a (hidden epistemic) law curriculum designed to better serve the construction of the pluralistic legal mind for the transnational legal world. At the beginning of this paper it was argued that the problem with the traditional law-teaching approach is that it constructs a primary epistemic foundation for the legal understanding, which is based on one mother-system. What is suggested above, is the promotion of a change in the manner of how legal curriculum is constructed and especially how comparative/foreign material is taken in and how it is taught. The crucial dimension in this cursory argument is the clear separation of comparative law as an educational tool from the comparative research of foreign law; what works in education might not fit at all in serious comparative research and vice versa. When stressing the importance of law curriculum as a builder of the legal epistemology of a learner and when relying on constructivist learning theory, the accurateness of comparative/foreign material is not the primary concern; rather what is crucial is the primary experience of world-view-of-law in which there are *several* possibilities and one's own national law is seen – from the very beginning – as only one possible path to (legally) arrive at a solution.

The proposed change contains both qualitative and quantitative elements. When it comes to quality the idea is to build the legal learning so that law students start from questions rather than answers provided by one national system. This would probably make it easier for future lawyers to adapt to different legal cultures and different non-national bodies of law, which overlap with the national law. Simply, the first question might be, 'from what legal materials, stemming from various sources, can we find those solutions that might lead us to solve the present legal problem' instead of 'in my legal system?…'. Quantitatively speaking, obviously the amount of comparative and foreign law material should be larger than what it normally tends to be. Importantly, this does not only concern the teaching of transnational law as such, but perhaps even more importantly it would facilitate law students' possibilities to actively construct a plural epistemology of law; law learners would become "more aware of the range of possible legal responses to common…disputes".[46] In practice, this would require taking a step further from McGill's famous transsystemic/bijural thinking toward transsystemic/*multi*jural type of thinking. In short, this would mean simultaneously studying in the same classroom fully transsystemically i.e. mixing civil law, common law, chtonic law, Nordic law etc. So, instead

between the mostly traditional canon of First Year courses and the crème de la crème curriculum specializations that are usually restricted to Upper Year programmes" (*id*).

[46] *Supra*, note 2, 549.

of two kinds of solutions (common law or civil law) we might have more solutions when the jurist goes beyond the legal information given by any one system.[47]

All this, of course, requires not only injecting more comparative/foreign material into law curricula, it requires some kind of *pedagogic vision*. *Catherine Valcke* has rightly pointed out that too little attention has been paid to the question concerning the overall pedagogic design of injecting transnational/global material into the law curricula. She has criticised the fact that "coherent pedagogical vision" is lacking.[48] Now, it is not possible to boldly claim that constructivist learning theory would solve this problem effortlessly; however, it does seem like a fare possibility if we are trying to find ideas of how to build the lacking coherent pedagogical vision. And, if we are not able to step into a world in which law curricula might follow these ideas presented here, we may at least hope that the growth in number of study-modules that embrace such a hidden epistemic curriculum would more and more enable the cultivation of a kind of legal *Anschauung* that would make it cognitively easier for future lawyers to adapt in pluralistic global and transnational law. As pointed out already fifty years ago by *Hessel E. Yntema*, the main goal for comparative legal instruction is to provide jurists of the future adequate general preparation for facing new problems of a changing world.[49]

An effective law curriculum of today is that which can stimulate students to learn legal thinking without being hopelessly stuck in an epistemic sense with one's own legal system. But to acquire this, something more than a few more piecemeal courses in traditional international law and theoretical comparative law are required: most crucially students should be made able to construct their own legal understanding from various competing and overlapping sources. Finally, this would mean that the law teacher would be more of a law instructor or a legal education coach structuring the student's learning of law as a joint enterprise with the law student. To say the least, this would offer something else than simply giving lengthy and tedious reprimands to an audience of law students who can barely stay awake.

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[47] When stepping out from the bijural thinking, one might really approach near to the kind o outcome described by H. Patrick Glenn. See H. Patrick Glenn, *Doing the Transsystemic: Legal Systems and Legal Traditions*, 50 McGILL LAW JOURNAL 863, 866, following: "Legal education would necessarily have to track, and even foreshadow," various non-positivist developments within legal theory/philosophy.

[48] *Supra*, note 21, 160.

[49] See *supra*, note 14, 499.

The Association of Transnational Law Schools' Agora: An Experiment in Graduate Legal Pedagogy

*By Phillip G. Bevans and John S. McKay**

A. Introduction

The Association of Transnational Law Schools [ATLAS] is a consortium of seven law schools from four continents that launched an annual academic summer program, called the Agora, for doctoral students this past July 2008. As the name of the consortium would suggest, the program focused on transnational law.[1] The Agora is one of several multi-school initiatives aimed at furthering the study of the globalizing legal environment. The Agora both reflects and furthers a trend in legal scholarship, and as a consequence legal education, toward a focus on a set of interrelated concerns, which include globalization, international governance, transnational law, comparative legal studies, legal transplantation and the apparent conceptual challenges that these pose.[2] In important

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[1] "Transnational law" is a coinage generally attributed to Phillip Jessup. Jessup delivered the prestigious annual Storrs lectures at Yale Law School in 1955. The lectures were published the following year as a short monograph: PHILLIP JESSUP, TRANSNATIONAL LAW, (1956). Jessup's idea, and the general idea of the ATLAS program, is that the focus on an interlocked system of domestic/municipal law and international law no longer provides an adequate conceptual description of the realities of the legal apparatus that functions within and across borders and functions in ways both more complicated and unanticipated by such a description. On the fiftieth anniversary of their publication, Peer Zumbansen revisited Jessup's Storrs lectures in: Peer Zumbansen, *Transnational Law*, in THE ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, (Jan Smits, ed., 2006); also available at http://ssrn.com/abstract=1105576.

[2] The Association's *MEMORANDUM OF UNDERSTANDING* [MOU] sets out the focus of the program "around the general themes of 'transnational law and governance' and 'comparative law and globalization' (MOU, at 1). The MOU is an internal document to the participating institutions and was 'opened for signature' on October 16, 2007. While the focus on transnationalization is at the core of the ATLAS and the Agora, both in its name and description, the program is conceived as having room for participants who are not wholly focused on issues of

respects these new conceptual challenges have a long pedigree in questions about the scope of legal pedagogy and theory. The pedagogical controversy is rooted in questions about the purpose of legal education, namely, whether it is trade training and should focus on practical legal skills, or whether it should be conceived of as broader than this. Intimately connected to this pedagogical controversy is a legal-theoretical controversy about the scope of legal theory (and thus the nature of law and its investigation). Does the word "law" designate the organizational instruments of state power, or should we think of "law" as referring to a more diverse set of social-organizational systems that may have greater or less affinity and connection with state law?

The paper has three sections. First, we outline the history of the creation of the Agora. Second, we describe, in varying degrees of detail, different elements of the Agora. Finally, we situate the Agora in the context of the scope issue, both as an issue within legal pedagogy, and as a broader question of legal theory generally.

B. History of the ATLAS Consortium

Law schools around the world have been seeking new ways to present themselves as global institutions, recruiting students from abroad, especially into graduate (LL.M. or equivalent) programs. Several schools offer double-degree programs across national jurisdictions or operate branch locations abroad. Many integrate international, transnational, or comparative law into their core curriculum and now seek to market themselves as "global law schools." Finally, numerous international collaborations have sprung up focused on pushing the study of law beyond parochialism. Examples include the Maastricht European Institute of Transnational Legal Research [METRO][3] or the new Center for Transnational Legal Studies in London,[4] but of course various law schools are

transnationalization, but who may benefit from participating in the program. Member schools are responsible for selecting participants from their own cohort of doctoral students to participate in the program. The selection criteria for participating students are academic excellence and research potential (MOU, at 2). A focus on legal transnationalization, while a desideratum for selection, is not requisite. The consortium is said to be "dedicated to the intellectual formation of highly talented doctoral students and fostering reflection and research on issues broadly related, but not limited, to comparative legal and regulatory responses to various forces of globalization, international governance challenges and the evolution of transnational law." (ATLAS web site, http://www.atlasdoctorate.org, last consulted 10 March 2009).

[3] See *Metro Research Institute,* MAASTRICHT UNIVERSITY , available at: http://www.unimaas.nl/default.asp?template =werkveld.htm&id=7L70CD04720O0M4KAOC7&taal=en .

[4] The Center is a collaboration between ten law schools from around the world spearheaded by Georgetown University. It is a semestered program aimed at first-degree law students. *Center for Transnational Legal Studies,* Available at: http://ctls.georgetown.edu/info/index.html#Newctrtranslegal Another example demonstrating the interest in global law, though not at a law school, is Brown University's Advanced Research Institute in Law, Social Thought and Global Governance, a program for emerging scholars proposed to be held annually, starting in June 2009 available at: http://www.brown.edu/Administration/International_Affairs/initiative/index.html.

involved in any number of bilateral arrangements.[5] This proliferation in global outreach efforts by law schools around the world reflects developments in the profession and in the legal academy generally,[6] and, to some extent, the opportunities for collaboration that presented themselves at an increasing number of conferences that have been held in the past ten or more years concerning global law, law practice, and legal education.[7] Among other things, these resulted in the foundation of the International Association of Law Schools.[8] Though unique in its focus on doctoral legal students, ATLAS is undoubtedly part of this wider shift toward the globalized study of law.[9]

The ATLAS consortium evolved from discussions in 2002 between Professor Craig Scott, then Associate Dean of Research and Graduate Studies at Osgoode Hall Law School in Toronto, Canada, and Professor Stephen Parker, then Dean at Monash University Law

[5] Among United States law schools alone, Cornell University Law School, Columbia Law School, New York University Law School, American University Washington College of Law, and no doubt others, offer dual degree programs with other law schools in North America, Europe, Asia, and Africa: see Simon Chesterman, *The Globalisation of Legal Education*, SINGAPORE JOURNAL OF LEGAL STUDIES 58, 63-64 (2008).

[6] *Id*., 62-65.

[7] Said to be the first multijurisdictional gathering held to discuss transnational services was the 1998 Paris Forum on Transnational Practice for the Legal Profession. A report of this meeting occurs in the following: Laurel Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession***.** 18 DICKINSON JOURNAL OF INTERNATIONAL LAW, 1 (1999-2000). Other influential conferences include: The American Association of Law Schools ("AALS") Symposium on *Emerging Worldwide Strategies in Internationalizing Legal Education* held at the AAL Annual Meeting on January 6, 2000 in Washington, D.C.; the AALS Conference of International Legal Educators held at NYU's campus at Villa La Pietra, (in Florence, Italy in 2000 (involving 50 invited legal educators from about 30 different countries) (the "2000 Conference"); *the Global Legal Practice Symposium Issue*, 22 PENN STATE INTERNATIONAL LAW REVIEW, No. 4 (2003-2004) based on the Global Forum on International Legal Ethics and Rick Management Legal Practice jointly sponsored by the Association of Professional Responsibility Lawyers and the University of Oxford, held in Florence, Italy in October 2002; the American Association of Law Schools Conference on Educating Lawyers for Transnational Challenges held in Hawaii, 26-29 May 2004 (the "2004 Conference"); and the Symposium on *Educating Lawyers for Transnational Challenges* held at the AALS Annual Meeting in San Francisco in 2005. This last conference was reported in 23 PENN STATE INTERNATIONAL LAW REVIEW, No. 4. (2004-2005). The 2000 Conference was believed to be the first worldwide conference held to discuss international cooperation in legal education. See John Sexton and Carl C. Monk, *Papers from the La Pietra Conference of International Legal Educators,* 51 JOURNAL OF LEGAL EDUCATION 313 (2001). This volume also contains conference proceedings.

[8] From the 2000 Conference and the 2004 Conference and the AALS 2005 Annual Meeting evolved the meeting in Istanbul, Turkey, in May 2005 at which the International Association of Law Schools was established and then incorporated in October 2005. Craig Scott was a founding member and director, as well as Chair of the Nominating Committee. See also Carl Monk, *What Kind of Machinery Can Be Set in Place on an International Basis so that the Process Can Continue in a Constructive Manner in Years Ahead*? 23 PENN STATE INTERNATIONAL LAW REVIEW, No.4, 749 (2004-2005).

[9] This raises some conspicuous questions for the program: Is it somehow part of an elite discourse that excludes those marginalized by globalization? Are we seeing not the globalization of legal education, but its global Americanization (Chesterman (note 5) at 65)? These are important questions, which we must, for now, leave aside.

School in Australia. Scott and Parker explored a vision of collaborative legal education at the graduate level that would focus on transnational law and governance.[10] As part of this initiative, Scott and Parker sought to involve further partners—first the Universidad de Deusto in Bilbao, Spain and the Université de Montréal in Canada, later bringing in New York University in the United States and the London School of Economics.[11] Monash dropped out of the consortium in 2007, when Parker left to become Chancellor and President of Canberra University, after which Melbourne joined in its stead.[12] Later, the University of Cape Town in South Africa joined the group. The consortium is growing with two new members this year – Bar-Ilan University, Tel Aviv and Bucerius Law School, Hamburg, Germany. The National University of Singapore will be joining ATLAS next year.

The organizers initially contemplated that ATLAS would run courses which would count toward fulfillment of members' master's-level programs. A model was floated in which between fifty and sixty percent of the requirements for a one-year master's degree would be satisfied by credits from a student's home institution, with the balance coming from ATLAS. ATLAS courses would have been delivered over a concentrated period during which students from all consortium schools attended one location for intensive coursework and/or research and writing.[13]

Thus, the Agora was originally contemplated as a for-credit program involving the preparation of a substantial paper, followed by an active on-site program encompassing five weeks intensive work, preceded by a week of reading and orientation and succeeded by a week of evaluation and wind-down. The format would have incorporated full seminars and courses, research seminars, mini- and micro-courses, one-off workshops and panel discussions, negotiation simulations, film/video sessions, student-organized discussions, student working paper presentations, informal discussion evenings, as well as a culminating plenary session.[14] Presentation of working papers by the students would have been a key component of the program, in order to introduce students to the process of work-shopping their scholarship at a sufficiently early stage to obtain useful feedback.

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[10] Craig Scott, *Transnational Curriculum for Tomorrow's Lawyers - Is There a Curricular Core for the Transnational Lawyer?,* (Paper presented at the AALS Conference on Educating Lawyers for Transnational Challenges, Hawaii, 26-29 May 2004) 157.

[11] Interview with Craig Scott conducted on November 28, 2008. Craig Scott is Professor, Osgoode Hall Law School of York University (Associate Dean, Research and Graduate Studies, 2001-2004), Director of the Nathanson Centre on Transnational Human Rights, Crime and Security, Osgoode Hall Law School, and Academic Director, ATLAS, for 2006-2008. (Scott interview).

[12] *Id.*

[13] *Id.*

[14] Scott, *supra* note 10.

It became apparent as discussions progressed, however, that some participating schools' master's programs did not have enough of a research component for their students to benefit from such an experience. Following a suggestion by Professor Joseph Weiler of NYU at a meeting in 2004, the program's focus shifted to the doctoral level.[15] This shift eased some of the administrative complications that would have beset an integrated master's program. For instance, as some of the partner schools did not require doctoral students to take many courses (or any at all), it was no longer necessary for student participation in the Agora to be undertaken for degree credit purposes, alleviating scheduling difficulties. Among other things, it was less important that the courses offered attain uniform content and faculty complement that would satisfy the graduate faculties of each of the participating law schools. This made it possible to shorten the Agora to three weeks. Also, because the course content and faculty involved could change from year to year, it became unnecessary to hold the Agora each year at the same (somewhat) centrally located site and involving the same faculty, making it possible to alternate the site among the various law school partners in rotation. In turn, this meant that each year the Agora faculty could be primarily sourced from the partner at whose facility the event was taking place, considerably reducing travel and other commitment costs, and encouraging the participation of partner schools whose resources were more modest.

However, the organizers hoped that each Agora would include significant faculty participation from non-host schools. This was in line with an original ambition of the program to bring faculty together for various forms of collaboration including evening symposia, formal or informal discussions of works-in-progress, sitting in on colleagues' seminars and presentations, and possibly for participation in an annual publication on the particular themes of that year's conference principally written by the professorial faculty for that purpose. It was also anticipated that participation in ATLAS and in the annual Agora would provide an easier path to unexpected interaction among faculty, both at the management and at the professorial levels, as has apparently already transpired.[16] For example, in at least one case, when a participating school required temporary faculty for a particular summer program by reason of a change in plans of one committed faculty member, that school was able to source a replacement at a late date from among the faculty of another member school.

The rotation of the Agora's location among partner schools was expected to prevent ossification of the curriculum, outlook, and faculty of the annual Agora. It was anticipated that the particular orientation and strengths of each partner would be reflected in the content and methodology of the Agora in the year in which such partner was the host.[17] At

[15] Scott interview, *supra* note 11.

[16] *Id.*

[17] *Id*.

the same time, the exposition of the host school's particular perspective each year was expected to enhance scholarly discussion of its own and competing perspectives, on a rolling basis as the host school changed from year to year.

Finally, by focusing on doctoral students the program has an opportunity to fill some of their unique needs. By convening for a brief but intense academic program, students would be given a break from the solitude of dissertation writing and research. It was hoped that the Agora might begin to provide students with certain strategic skills, such as networking or positioning their research product in an attractive way in the academic world. It was thought that most students would be at the end of their first year, so that they could present their work to others before their research agenda was set in stone. Also, it was felt that doctoral students would particularly benefit from exposure to different methodologies in workshops given by faculty from other schools. Finally, the hope was that the Agora would encourage students to think about their research in broader terms and not narrow their focus too quickly.

C. Account of the Agora

In what follows we will describe some of the different elements of the program to try to give a sense of the general shape of those elements in a way that is suggestive of their broad strokes and/or outstanding moments. Rather than a mere cataloging of the content of the program, we hope to highlight the content in a way that facilitates an understanding of the argument in the latter part of the paper.

I. The General Courses

1. Introduction

The themes of the two general courses were "Topics in Transnational Law and Globalizations" (GC1) and "Contemporary Challenges for Corporate Regulation" (GC2).[18]

[18] The General Courses divided the cohort of Agora students into two (unevenly sized) groups (with more students in GC1). Students signed up to one or the other course but were free to attend as many sessions of the alternative general course as they desired. (Apart from the Dissertation Research Seminars, which divided the cohort into eight small groups, all other elements of the program were common to all students.) The MOU states that normally one general course will cater to "doctoral students most interested in international law, transnational law and governance, and globalization" while the other will cater to those "most interested in general jurisprudence or common challenges issues faced by domestic legal systems and comparative judicial, legislative and regulatory responses to such issues." ATLAS organizers have described the general intention for this and future Agoras in slightly different terms. In our interview with Craig Scott he suggested the intention was to have one general course deal with issues of a more theoretical nature, and the other of a more practical nature. On the other hand, Professor Damien Chalmers, in our interview with him, suggested the intention was to have one general course deal with transnational issues and the other deal with non-transnational issues. (Interview with Damien Chalmers (LSE), 15 December 2008.)

The focus of GC1 tended towards the changing structures of public international law especially as suggested by the idea of transnationalization. As the world has grown smaller and more interconnected the demands placed on international law, and the claims of state sovereignty and immunity have waned, or, at least, have been challenged as to their legitimacy. This changing reality suggests the need to theorize the global legal terrain differently, understanding the connections between municipal and international law differently, as well as considering the ways in which soft law and non state regulatory forces play a role in the global legal environment.

In GC2, following an introduction that reviewed much of the classic literature on the corporation, the course considered the sundry ways in which corporations, both domestically and on an international scale, (and especially the latter), can be regulated and reigned in from contributing to some of the social ill effects which have historically been attributed to them. Included in this are questions about the propriety, and efficacy of voluntary measures, the means of persuading corporations to take into consideration stakeholders other than shareholders and managers, and possible ways to encourage the democratization of the corporation from within or without.

2. General Course 1: Topics in Transnational Law and Globalizations

The opening session of GC 1[19] might have better been a joint session. Professor Zumbansen (Osgoode) argued that globalization would infuse every aspect of the students' future scholarship and teaching, as much for corporate law as for the law of evidence and international law. A similar theme was sounded in a later Distinguished ATLAS Lecture titled "The End of the Globalization Debate, Revisited" by Professor Robert Howse (NYU).[20]

[19] ATLAS Lecture, Professor Peer Zumbansen (Osgoode), "Varieties of Globalization and Relationships to Law," 7 July 2008. The readings for the lecture/discussion were: Saskia Sassen, *Blind Spots: Towards a Feminist Analytics of Today's Global Economy*, Presentation at the University of Wisconsin System Institute for Global Studies (27 September 1999); JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 3-24 (2006); Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society,* in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997).

[20] ATLAS Lecture, Professor Robert Howse (NYU), "The End of the Globalization Debate," (9 July 2008). Professor Howse in his lecture drew on a recent article of his: Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARVARD LAW REVIEW 1528 (2008). Howse's lecture presented the thesis that the debate over globalization could no longer be framed in terms of pro-globalization and anti-globalization forces. Rather the debate has shifted to one where the stakes are global values and agendas—pertaining to environmental sustainability, human rights, labor standards, and so on—that cannot be advanced by retreating to the nation-state for shelter. The issues being prosecuted are simply beyond the capacity of any country, however powerful, to address by acting alone. Besides, nation-states have themselves been radically transformed by globalization, so it is unclear whether a retreat to the nation-state would in fact be a retreat from globalization. In light of these shifts, Howse in his lecture said he "wanted to tease out for law and legal scholarship what it means to be beyond the globalization debate." That, it seems was the overall aim of the Agora as well. In making this argument Howse drew on the work of Saskia Sassen (SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006)).

The second session[21] focused on ways in which governance and regulation can be asserted through voluntary forms of association. How is authority asserted by non-state actors that propagate regulatory standards in areas like the environment, human rights, and labor relations? A central element of this lecture focused on the work of the International Organization for Standardization (ISO) and its system of voluntary compliance standards. The ISO is an NGO whose members are the national standards institutes of 159 countries. It has a Central Secretariat in Geneva, Switzerland, that coordinates the system. The membership, through the ISO, sets and publishes their various standards. National standardization institutes or other accredited agencies audit companies that subscribe. Compliant companies are certified with respect to the relevant standard and can then use this certification in marketing either to the public or business to business.[22]

Municipal or domestic constitutional law arises through a political process in which the polity strikes an agreement about the legal ground rules. Is there something similar on an international or global scale? Certainly since the time of the formation of the UN, there has arisen an apparently ever-increasing set of legal institutions that function across borders. As international law has evolved and the individual with rights has started to have a place within international law, a question has arisen as to whether the "constitution" of international law is not merely one of international institutions but is grounded in human rights as the bedrock principle in the way many domestic constitutions function. Session three examined these questions.[23]

Sessions four,[24] six,[25] and eight[26] focused on legal-theoretical questions dealing with the conception and understanding of transnational law. Each of these sessions, addressed questions concerning how to conceive of the law, and what theoretical accounts of law could help us make sense of the changing field of transnational law. The last section of this paper will examine these questions more closely, and place them within the context of a

[21] ATLAS Lecture, Professor Stepan Wood (Osgoode), "Political Economy of Transnational Governance" (9 July 2008).

[22] See *International Organization for Standardization,* available at: www.iso.org.

[23] ATLAS Lecture, Professors Robert Howse (NYU) and Craig Scott (Osgoode), "Competing Constitutionalist Claims in the International System" (10 July 2008).

[24] ATLAS Lecture, Professor Ruth Buchanan (Osgoode), "Transnational/International Legal Pluralism" (14 July 2008).

[25] ATLAS Lecture, Professor Michael Giudice (York), "Inter-Field Relationships in Public International Law" (18 July 2008).

[26] ATLAS Lecture, Professor Michael Giudice (York), "Conceptualizing Transnational Law" (24 July 2008).

discussion of how these changes in the law fit within and impact a changing conception of legal education.[27]

In session five, Professor Craig Scott examined how international legal norms are received into national legal systems, and, conversely, how national norms are projected out into the international realm.[28]

3. General Course 2: Contemporary Challenges for Corporate Regulation

The first two modules in GC2 served as an intensive survey (or review) of the highlights of the legal theory of the corporation,[29] as well as related matters.[30] The first class, led by

[27] Session 8 included a reading that did a particularly good job of reviewing the terrain of the issue: Roger Cotterrell, *TRANSNATIONAL COMMUNITIES AND THE CONCEPT OF LAW*, 21 RATIO JURIS 1 (March 2008). In this essay Cotterrell outlines "four realistically possible approaches to the conceptualization of law in legal pluralism (at 8)". The four alternatives are (1) monistic – which searches for a "single criterion of law to be applied to the diversity of legal regimes (at 8)", (2) agnostic, (3) statist (which are self-explanatory), and the final option is pluralism. Cotterrell writes: "A final approach would be to rethink the concept of law to free it from biases built into it by its almost universal modern association with nation-state law. Such a concept would not be one that purports to reduce the plurality of transnational regulation to a single, unified system (a surely pointless task at the present time). Nor would it treat state law as necessarily expressing the essential contemporary characteristics of law. Instead, it would adopt criteria of the legal that are sufficiently flexible to recognise many different forms of law in currently indeterminate but potentially developing relations with each other (at 8)."

[28] ATLAS Lecture, Professor Craig Scott (Osgoode), "Receiving the External: Relationships of Foreign and International Law to 'Domestic' Law" (17 July 2008).

[29] Amongst the theories considered were agency theory and "nexus of contracts" theory, (see, for example, M. Jensen and W. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 JOURNAL OF FINANCIAL ECONOMICS 305 (1976); E.F. Fama and M. Jensen, *Separation of Ownership and Control*, 26 JOURNAL OF LAW AND ECONOMICS, No. 2, 301(1983)), stakeholder theory, (e.g., in EDWARD R. FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1985), at 53; and PRINCIPLES OF STAKEHOLDER MANAGEMENT, THE CLARKSON CENTRE FOR BUSINESS ETHICS AND BOARD EFFECTIVENESS, ROTMAN SCHOOL OF MANAGEMENT, UNIVERSITY OF TORONTO, http://www.rotman.utoronto.ca/ccbe/details.aspx?ContentID=215 (last consulted 5 Jan 2009)), "enlightened" stakeholder theory, (see, for example, M. Jensen, *Value Maximization, Stakeholder Theory and the Corporate Objective Function*, 14 JOURNAL OF APPLIED CORPORATE FINANCE, No. 3, 8 (2001), and team production theory, (see, for example, Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law,* 85 VIRGINIA LAW REVIEW 247 (1999).

[30] These related matters include contracts and markets and the extent to which the corporation straddles both (as developed, for example, in R.H. Coase, *The Nature of the Firm*, 16 ECONOMICA No.4, 386 (1937); and Oliver Hart, *Corporate Governance: Some Theory and Implications*, 105 THE ECONOMIC JOURNAL, 690 (1995), transaction cost economics (see, for example, Oliver Williamson, MARKETS AND HIERARCHIES (1975)); and Oliver Williamson, *Corporate Governance,* 93 YALE LAW JOURNAL NO. 7, 1197 (1984)), value maximization (for example, see Jensen, *(*note 29)), separation of ownership and control (as prominently outlined by A.A. Berle and G.C. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY, (1932); and discussed, for example, in Fama and Jensen, (note 29); credit for this insight is often given to ADAM SMITH, THE WEALTH OF NATIONS (1832)), conflicts of interest and appropriation of managerial "rents" (see, for example, references cited at note 29, among others), risk management (see one discussion of this in MICHAEL POWER, THE RISK MANAGEMENT OF EVERYTHING, (2004) at 7), corporate social disclosure and corporate social responsibility (an early discussion of which appears in Cynthia Williams, *The Securities And Exchange Commission And Corporate Social Transparency,* 112 HARVARD LAW REVIEW

Professor Peer Zumbansen (Osgoode) also moved beyond this review to a close reading of the seminal work "Value Maximization, Stakeholder Theory, and the Corporate Objective Function" by Michael Jensen, and then began to situate these concepts in relation to the concept of "transnational law."[31]

The second session led by Peer Zumbansen and Professor Mary Condon (Osgoode), while still introductory in nature, moved beyond the survey and further developed the connection of corporate law and corporate theory to questions of transnational law and legal pluralism. It also considered the seminal work of Ulrich Beck,[32] (and later Michael Power and others[33]), which began the focus on corporate regulation as a matter of assessing risk. Risk assessment and analysis was first adopted in accounting and finance circles, and only later applied to thinking about the legal regulation of the corporation. The shift to risk assessment thinking devalued the role of political discourse and law, and focused on the internal control mechanisms, such as disclosure and organizational culture.

In the case of European integration,[34] the regulation of any field no longer takes place in a clearly demarcated "public" space as distinct from a "private" one. The development of guidelines, codes of conduct, norms, and certain principles of behavior within and among corporations (rather than publicly) attempts to function in a de-politicized way that tries to abolish the previously dominant left/right characterization of "politics." Integration and harmonization of corporate law between developed countries tends to displace politics in favor of self-regulation, but this "de-politicizing" tendency has also begun to affect the developing world as ideas about harmonization with the corporate law of the developed world spread through the discourse of law and development, and the idea of "best

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1199 (1999); see also Kent Greenfield, *New Principles for Corporate Law,* 1 HASTINGS BUSINESS LAW JOURNAL 87 (2005)), and the divergence/convergence of corporate law and regulation, affected by path dependence and other factors (for example, see Rafael La Porta, Florenzio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, *Legal Determinants of External Finance*, 52 JOURNAL OF FINANCE No. 3, 1131 (1997); and Rafael La Porta, Florenzio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, *Law and Finance*, 106 JOURNAL OF POLITICAL ECONOMY No. 6, 1113 (1998); and other studies by those authors), in jurisdictions embodying different "varieties of capitalism" (see, for example, Ronald Dore, William Lazonick, and Mary O'Sullivan, *Varieties of Capitalism in the Twentieth Century,* 15 OXFORD REVIEW OF ECONOMIC POLICY No. 4, 56, (1999).

[31] This included a discussion of a challenging paper by Peer Zumbansen in which he argues that European corporate law and regulation can be understood as a manifestation of transnational legal pluralism. Peer Zumbansen, *'New Governance' in European Corporate Law Regulation as Transnational Legal Pluralism*, 15 EUROPEAN LAW JOURNAL NO.2, 246 (2009).

[32] ULRICH BECK, RISK SOCIETY: TOWARDS A NEW MODERNITY, (1992), originally published in German in 1986. See also BARBARA ADAM, ULRICH BECK, AND JOOST VAN LOON, THE RISK SOCIETY AND BEYOND: CRITICAL ISSUES FOR SOCIAL THEORY (2000).

[33] See Power, *supra* note 30.

[34] See Zumbansen, *supra* note 31.

practices".[35] One of the ways in which harmonization (particularly if based on "best practices") fosters de-politicization is the need for expert advice to carry out this process. The reality of different political economies existing across borders, nonetheless, continues to arise as a countervailing pressure in the attempts towards harmonization.[36]

In session three,[37] two Osgoode faculty presented their own research work related to securities law in Ontario. Mary Condon argued that there is a greater need to identify and promulgate incentives for compliance rather than *ex post facto* penalties in securities law,[38] while Marilyn Pilkington argued that sanctions and remedies for breach of securities laws in Ontario (and Canada) are in need of reform to strengthen their effectiveness.[39] Both lecturers engaged securities law at the domestic (or municipal) and practical level, while also discussing collaborative initiatives among provincial, and (although the focus of a more limited discussion), national and international bodies, both governmental and non-governmental. Phillip Jessup describes "transnational law" as functioning both within and across borders, so in addressing intra-statal and supra-statal governance, both lecturers were discussing emerging issues of transnational law in corporate regulation.[40]

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[35] At the same time, within developed countries, such as the European Union, harmonization of corporate law has become a key objective, partly against the background idea that economic integration would be conducive to constitutional cohesion. Nonetheless, at the present time corporate and commercial law in Europe is one of the least harmonized areas of European law, partially because of its embeddedness or path dependent nature.

[36] See the "varieties of capitalism" literature, *supra* note 30.

[37] ATLAS Lecture, Professor Mary Condon (Osgoode) and Professor Marilyn Pilkington (Osgoode) "Rethinking Enforcement and Litigation in Securities Regulation" (10 July 2008).

[38] Mary Condon, *Rethinking Enforcement and Litigation in Ontario Securities Regulation*, 32 QUEENS LAW JOURNAL No. 1, 1, 34 (2006). Professor Condon situated her paper in the context of discussions about the proper normative goals of sanctioning by securities regulators, from both a law and economics perspective on the one hand, and a sociological one, on the other. She concluded that there is insufficient evidence to conclude that administrative and criminal sanctions administered ex post facto are effective deterrents to breaches of securities law, and that greater attention must be devoted to reshaping organizational incentives to promote compliance with, rather than breaches of, securities law (at 261). In the short run, however, a mix of private and public enforcement of securities laws, that is, by means of litigation initiated by private parties and by public regulatory authorities, may be appropriate (at 263).

[39] PETER CORY AND MARILYN PILKINGTON, CRITICAL ISSUES IN ENFORCEMENT (2006), (Research Study), CANADA STEPS UP: TASK FORCE TO MODERNIZE SECURITIES LEGISLATION IN CANADA 165 (September 2006). Professor Pilkington commented on weaknesses that are widely perceived to exist in the enforcement of securities laws in Canada, and, in particular, made recommendations to strengthen the investigation, prosecution and adjudication of securities matters, as well as the recovery by investors of compensation for losses incurred as a result of breach of securities law. This reflected the breadth of research into these matters by various other commissions and enquiries initiated by regulatory authorities and legislative bodies, as well as a significant consultation process which the Task Force undertook.

[40] Jessup, *supra* note 1.

Subsequent sessions addressed other transnational implications of corporate law. Session four[41] discussed how disclosure, shareholder proposal and minority proxy solicitation provisions of corporate law can be applied in order to impact human rights issues. Professor Aaron Dhir (Osgoode) demonstrated how careful compliance with the detailed requirements of the statutory and case law applicable to the corporation as a matter of domestic law can assist in achieving corporate social and human rights accountability with respect to operations of the corporation conducted outside the borders of the incorporating jurisdiction.[42] In a similar vein, Professor David Doorey (York) discussed how it is possible to use corporate disclosure obligations and practices, both voluntary and involuntary, applicable to global supply chains to advance workers' rights in foreign jurisdictions in which suppliers conduct business.[43]

In the penultimate session of GC2 University Professor, former York University President and former Osgoode Dean Harry Arthurs gave a wide-ranging talk on the "construction of legal fields" and on the connections between company and labor law.[44] Arthurs' question, in short, is why does the legal academy (and why do practitioners) divide up the conceptual terrain of law in just the ways they do? It is a theoretical question that goes to the core of much of the Agora. The short answer is that it is ideological. In a functional approach to the law there are obviously close connections between company and labor law – labor contracts and labor relations are an aspect of running a company. By separating company law from labor law, legal thinkers tend to maintain a focus on the relationship between board, executive and shareholders. The conception of the corporation as a vehicle for maximizing shareholder value, over other possible social conceptions, including treating employees as legitimate stakeholders tends to be pushed

[41] ATLAS Lecture, Professor Aaron Dhir, (Osgoode) "Perspective on Corporate Social Responsibility, Corporate Law and Human Rights," (14 July 2008). His lecture drew on his recent article *Realigning The Corporate Building Blocks: Shareholder Proposals as a Vehicle For Achieving Corporate Social and Human Rights Accountability,* 43 AMERICAN BUSINESS LAW JOURNAL 365 (2006).

[42] This was also the subject of an early seminal paper by Professor Cynthia Williams (Osgoode) that was included in the materials, see note 30.

[43] ATLAS Lecture Professor David Doorey (Osgoode) "Global Supply Chains as Foci of Regulation and Activism – The Case of Corporate Transparency and the Advancement of Workers' Rights", (16 July 2008). His research indicated that companies disclosing the location of their factories prepare for the event of disclosure by investing in and significantly improving labour practices, monitoring and inspections: *Who Made That?: Influencing Foreign Labour Practices Through Reflexive Disclosure Regulation* 43 OSGOODE HALL LAW JOURNAL. (Osgoode Hall L. J.) 354 *(2005*).

[44] ATLAS Lecture, Professor Harry Arthurs (Osgoode), "The Construction of Legal Fields: (Why) Are Labour Law and Company Law Different Animals?", (July 23, 2008). Professor Arthurs referenced two recent papers which he authored or co-authored: Harry W. Arthurs, *Corporate Self-Regulation: Political Economy, State Regulation And Reflexive Labour Law* (2008) in REGULATING LABOUR IN THE WAKE OF GLOBALISATION: NEW CHALLENGES, NEW INSTITUTIONS (Brian Bercusson and Cynthia Estlund, eds., 2008); and Harry Arthurs and Claire Mumme, *From Governance To Political Economy: Insights From A Study Of Relations Between Corporations And Workers,* 45 OSGOODE HALL. L. J. 439 (2007).

out of mind. Arthurs was concise in his presentation, but a wide-ranging discussion ensued. Though several GC1 members attended this probably should have been a crossover meeting. Arthurs' ideas about how to conceptualize the legal terrain will be examined a little more closely in the final section of this essay.

In the final session of GC2,[45] Professors Allan Hutchinson (Osgoode) and Cynthia Williams (Osgoode) discussed their ideas about the ways in which corporations could become more responsive to the constituents of the polities in which they operate and whose lives they affect in many important ways. Hutchinson discussed ideas about the structural democratization of the corporation. He seemed to suggest a new legislative framework for corporations in which all the "stakeholders," and not just shareholders, would have the possibility of some democratic input into the corporation – though he was less clear about exactly how this would work. Professor Williams, in discussing markets as sites of political activity, described the Equator Principles, which are a voluntary set of environmental and social standards adopted by lenders in respect of financing for development projects. The Equator Principles provide a useful example of how the voluntary adoption of socially beneficial practices can be conducive to collective welfare, both domestically and internationally.[46]

4. The Joint Session

In a presentation to both general courses, Professor Gus van Harten (Osgoode) argued that international investment treaties and arbitrations under such treaties amount to the clearest example of what might be thought of as "global administrative law" presently observed.[47] These treaties permit investor claims against the state concerned without exhausting local remedies, allow claims for damages to be asserted against it, allow the foreign investors to directly seek enforcement of awards against that state before domestic courts, and facilitate forum-shopping. Thus, such treaties are perhaps the closest in conception to "hard law" at the transnational level.

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[45] ATLAS Lecture, Professor Allan Hutchison and Professor Cynthia Williams, "Corporate Governance and Democracy" (24 July 2008). The principal text referenced was Allan C. Hutchinson. *Little Republics*: *From Corpocracy To Democracy* (2005) in THE COMPANIES WE KEEP: CORPORATE GOVERNANCE FOR A DEMOCRATIC SOCIETY (Allan C. Hutchinson, ed., 1997).

[46] The Equator Principles are a set of social and environmental standards created by private sector banks and modeled on standards used by the World Bank. The commitment of some 56 banks and other financial institutions financing infrastructure development requires borrowers to comply with environmental standards has had the result that approximately 85% of new projects of that nature are subject to those principles. www.equator-principles.com

[47] ATLAS Lecture, Profesor Gus Van Harten (Osgoode), "The Transnationalization of Investment Law: Treaty Rights of Corporations and their Implications for Public Law and Public International Law" (22 July 2008). Professor Van Harten's lecture discussed a paper he recently jointly authored: Gus Van Harten and Martin Loughlin, *Investment Treaty Arbitration As A Species Of Global Administrative Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW, NO. 1, 121 (2006).

II. Methodology Workshops

The Agora's six methodology workshops covered fieldwork, historical research, collaborative research methods, interdisciplinarity, and electronic research techniques. In one session,[48] legal historian Douglas Hay (Osgoode) discussed a massive project covering master-and-servant legislation, the precursor of modern labor law, in the British Empire from 1562 to 1955.[49] Such a massive undertaking required teams of researchers to spend years combing the legislative record around the Commonwealth, and to develop new computer applications to analyze their findings. Developing this degree of intimate knowledge of such wide ranging (over time and space), but intimately connected, pieces of legislation, helps to throw light upon the processes of legal transplantation, and demonstrated that the ways in which such transplantation flows do not always follow the simplest and more generally accepted pattern of transmission from motherland to colony. Hay, and the session, challenged students to think big about future projects, and to reconsider the mechanics of gathering, organizing and interpreting historical data for future work.

In another session,[50] Janet Mosher (Osgoode) described how she collaborated on a six-member team of academics and community workers to produce a report on the overwhelmingly negative experience of abused women seeking government social assistance (welfare) in Ontario.[51] The report's findings were based on sixty-four interviews with welfare recipients, as well as on questionnaires circulated to welfare administrators. The authors circulated a draft of their findings among forty interviewees, front-line shelter workers, and social advocates and then held an all-day forum so they could get input.[52] Mosher's work suggested that legal scholarship might sometimes involve the advancement of community-oriented projects with clear programmatic aims.

III. Dissertation Research Seminars

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[48] ATLAS Methodology Workshop, Professor Doug Hay (Osgoode), "Engaging in Field Work: From Planning to Interpreting Results".

[49] Douglas Hay and Paul Craven, *Introduction*, in MASTERS, SERVANTS AND MAGISTRATES IN BRITAIN AND THE EMPIRE: 1652-1955 (Douglas Hay and Paul Craven, eds. 2004).

[50] ATLAS Methodology Workshop, Professor Janet Mosher (Osgoode), "The Politics of Collaborative Research" (15 July 2008). Professor Mosher commented on various types of community-based participatory research (CBPR), and referenced, by way of example, the discussion by Meredith Minkler in *Community-Based Research Partnerships: Challenges And Opportunities,* 82 JOURNAL OF URBAN HEALTH: BULLETIN OF THE NEW YORK ACADEMY OF MEDICINE, NO. 2, SUPPLEMENT 2 (2005).

[51] WOMAN AND ABUSE WELFARE RESEARCH PROJECT, WALKING ON EGGSHELLS: ABUSED WOMEN'S EXPERIENCES OF ONTARIO'S WELFARE SYSTEM (2004).

[52] *Id.* at 11-12.

In one of the most valuable elements of the Agora, participants were required to submit an original piece of research writing, preferably a dissertation chapter, three weeks prior to the commencement of the program to be work shopped in the DRS. The dissertation seminars divided the cohort into groups of about 5 to 8 students each with one or two faculty facilitators. During any given two hour meeting, the group focused on the writing of one student, which all participants had read in advance. The presenting student began with a brief presentation, frequently locating the material presented into the conception of the larger project, i.e., the dissertation. The rest of the time was dedicated to a critical discussion of the sample piece of writing. This could vary from elements of the structure of the argument to questions about aspects of the substance of the argument.

Based on our experience and talks with our classmates, the DRS was one of the most valuable portions of the program – it set a deadline and drove the students to make substantive progress on a portion of the dissertation project. This assessment of the importance of the DRS was generally borne out by the results of an evaluation questionnaire filled out by participants at the end of the program. Students found that not only the feedback on their own work, but also the exposure to the work of others was valuable. Among the other noteworthy elements of the program noted in the questionnaires, students praised the highly interactive, cooperative and collegial nature of the program, providing a genuinely collective learning and intellectual environment. They found the subject-matter, instruction, faculty and their fellow participants to be challenging, diverse, intense, stimulating and multi-national. Many students found the social interaction with faculty and classmates a welcome change that it provided energy, inspiration and criticism of and for their own work, especially at a point in their program and in the year (the summer) at which this was particularly helpful. Not surprisingly, most participants planned academic careers and felt that the Agora contributed to their attainment of that objective.

IV. Film Nights

The Agora included a small film series (four films, and two related seminars) that worked as an extended law and culture essay organized by Craig Scott. The films all address the complicated questions of the rule of law in intercultural conflict or different forms of war.[53] These questions engage the concept of transnational law. Even more significantly, such questions strike at the very nature of law, whether conceived as a transcendent normative order, or as a result of constructing polities. Many consider it to be in the very nature of law that it must actively confront this vivid tension. Its legitimacy must come from group agreement, *and* from some determination of the good for humankind. The films offer a

[53] Among other things, they ask what are the lawful or otherwise appropriate limits of police or other governance powers in asserting control or dominance, such as by way of colonialism? Or, contrariwise, what are the limits of violence in resisting colonial or other oppression?

concrete contextualization through which to puzzle with these otherwise abstract questions.

At the core of the program was the 1966 classic *The Battle of Algiers*[54] by Italian director Gillo Pontecorvo. Made within a few short years of the end of the Algerian War of Independence from France (1954-1962), it tells the story of the seminal events of the first guerrilla organization and battles in the city of Algiers.[55] It starkly depicts the rebel actions of assassinations of police officers and terrorist bombings, and the French colonialist actions of bombing and torture (as an intelligence-generating technique).

Two of the other films in the series were closely related. The first was *Gillo Pontecorvo: The Dictatorship of Truth* (1992),[56] which is a documentary primarily consisting of interviews with key figures of the Algerian war (on both sides) represented in *The Battle of Algiers*. A French official describes how the techniques of counter-insurgency and "advanced interrogation" (otherwise known as torture) practiced in many places in the world today have their roots in methods learned by members of the French resistance during WWII in their struggle against the German occupation. The film illustrates that what the French fighters suffered, as insurgents, at the hands of German interrogators they then turned, as representatives of the occupying authority, against the Algerian "freedom" fighters.

The second film was Marie-Monique Robin's 2003 documentary *Death Squadrons: The French School,*[57] which is an examination of the ongoing influence of the techniques of counter-subversive warfare developed in Algeria and Indochina. It examines how these techniques travelled from French colonies to the United States (focused on the School of the Americas), and thence, directly and indirectly, to Latin America. French training in counterinsurgency tactics began as early as 1958, and the following year France opened a military mission in Buenos Aires staffed with Algerian veterans that trained Americans and others. Later, at Fort Bragg, French instructors taught such techniques to Vietnam bound members of the American Special Forces for the so-called Phoenix Program. The film describes how French operatives were also involved in Operation Condor, the covert intelligence network maintained among the Latin American military regimes with the

[54] Gillo Pontecorvo, (director), *The Battle of Algiers*, [Italian: *La battaglia de Algeri*] (1966), premiere at the Venice Film Festival of 1966, now available on DVD from the Criterion Collection.

[55] Pontecorvo shoots on location in Algiers where the battles took place, and even uses some of the key figures of the war as actors playing themselves, reprising their roles for the camera. The film variously described as Italian neo-realist or French cinéma vérité is shot in black and white and presents itself, stylistically, as documentary, despite its staging. The frequently praised and studied film splits its point of view between the Algerian rebels and French colonialists.

[56] Oliver Curtis, (director), *Gillo Pontecorvo: The Dictatorship of Truth* (1992), Edward Said, narrator. This film is included in the Criterion Collection Box Set under the title "The Battle of Algiers."

[57] Marie-Monique Robin, (director), *Death Squadrons: The French School*, Icarus Films, 2004.

objective of hunting down and murdering "terrorists" and political rivals wherever they were found, including France where the French government provided assistance for these actions.[58]

War functions at the very fringes of law despite law's claim to govern war and its techniques. In tracing the spread of illegal techniques through government exchange programs that are designed to assure the capacity of legitimate governments to defend themselves against insurgents, the films displayed the ragged edge of defending legitimacy through illegitimate means. The theme of legal transplants, or the spread of legal ideas from one jurisdiction to another, was recurrent in the Agora. What is clear, however, is that the mimetic spread of legal ideas must be juxtaposed to the similar spread of counter-legal thinking.

In the discussion following the films, the participants explored what is often considered as one logical conclusion of such thinking: Guantanamo and its secret sister prisons. Following 9/11, the United States deemed itself to be under worldwide attack by terrorists, or "unlawful enemy combatants" who, as non-state actors, it did not consider to enjoy the protections of the Geneva Conventions, specifically Article 3. Some commentators have maintained that the logic of insurrection threatening the existence of law and the polity is ultimately deconstructed by the recent US actions in an argument that we could only call *extensio ad absurdum*: that when spread so widely the internal logic that seemed to hold together the argument of protecting legitimacy through illegitimacy just simply breaks down into a complete absence of legality, or even anarchy.[59]

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[58] Included the film series was an apparent outlier, *One Dead Indian*, Tim Southam (director), about the shooting death of a native Canadian (Indian) protester at Ipperwash, Ontario, Canada. The film is based on the book by PETER EDWARDS, ONE DEAD INDIAN: THE PREMIER, THE POLICE, AND THE IPPERWASH CRISIS, (2003). The film tells the story of resistance to colonialism by native Canadian protesters that results in the tragic death of a protester, Dudley George, apparently at the orders of an impatient head of government. At the outbreak of WWII the government of Canada confiscated land to which natives held title, on an interim basis, to use as a military training camp. Fifty years later the land had been turned into a Provincial Park, but still not returned to its rightful owners. To assert their claim to recover their property natives blockaded the confiscated lands. Although the occupation was peaceful, a riot squad and heavily armed tactical unit dispatched by the Ontario Provincial Police entered the park at night. Apparently misinformed about the threats they faced, and perceiving some apparent violence from the protesters, the police opened fire on protesters whose weapons were later said to consist only of rocks and pieces of wood. In the course of these actions native protester Dudley George was killed. One key concern that arose concerning the incident was the extent to which the police actions were influenced by the head of the Ontario Government (Premier Michael Harris), and whether or not he ordered the police to take action without regard to consequences.

[59] In a recent book, (THE WAY OF THE WORLD: A STORY OF TRUTH AND HOPE IN AN AGE OF EXTREMISM, (2008)), Ron Suskind lays bare this *reductio* or *extensio* argument in stark terms. He describes how Abdul Hamid al-Ghizzawi, an Afghani baker, ends up in the clutches of the US forces and detained in Guantanamo, where he languished in failing health and with inadequate care despite the near complete absence of any incriminating evidence. His capture took place in the early days of the US invasion of Afghanistan following a leafleting program encouraging Afghans to turn in "terrorists" or Taliban in exchange for benefits for their village communities. Al-Ghizzawi, like others, was detained and remained in detention despite what Suskind maintains to be the utter lack of evidence

Political violence, often in the name of safeguarding the possibility of law, spreads and finds its own justifications. "Unlawful rebellions" may invite the dismissal of "the rules of war" by the dominant power in the face of the need to protect citizens. Yet the postwar history of Algeria shows the victorious Algerian leaders quite capable of employing the selfsame tools of torture, violence and murder in an ultimately unsuccessful quest to retain authority and suppress an attempted coup by fellow Algerians.

V. Informal Discussion Evenings

There were other elements of interest, some only briefly alluded to in the description of the Agora so far. Among the most dynamic were the Informal Discussion Evenings (IDE) in which faculty would briefly introduce a topic and readings, after which a free form discussion would ensue. Indeed, while the other elements all involved free discussion and interaction, it was in this forum that faculty and graduate students seemed to most cut loose and explore, and sometimes "thrash out" and even argue ideas together. One IDE session was on the topic of legal transplantation.[60] As noted previously, legal transplantation was an important and recurrent topic throughout the course of the Agora. Particularly interesting in this IDE was the perspective of Professor Neil Brooks (Osgoode) who shared his experiences as a consultant to numerous foreign (i.e., non-Canadian) governments on revising their tax laws. From Brooks' perspective this is a perfectly natural and unproblematic thing to do. Tax law, he suggested, has essentially the same objectives and functions in essentially the same way everywhere. The only issues are about which elements to implement in order to achieve any given set of policy goals. His ideas about unproblematic transferability, which were likely stated so as to be controversial and provoke debate, raised a great deal of concern and dissent amongst the students and a lively discussion ensued.

D. Legal Theory and Pedagogy: The Agora and the Scope of Law

As we noted in the introduction, the Agora both reflects and furthers a trend in legal scholarship and pedagogy related to the scope of both of these. In this last section we will expand on what we mean by this. The pedagogical controversy is rooted in questions about the purpose of legal education, namely, whether it is trade training and should focus on practical legal skills, or whether it should be conceived of as broader than this. This pedagogical controversy is intimately connected with a controversy about the scope of

against him. The story of al-Ghizzawi is also available in audio format in a radio interview Suskind gives on the CBC program "As it Happens," Dec 10, 2008 (part 2), audio available at: http://www.cbc.ca/mrl3/8752/asithappens/20081210-aih-2.wmv.

[60] ATLAS IDE, Neil Brooks (Osgoode), Jinyan Li (Osgoode), Peer Zumbansen (Osgoode), "Exporting Law: The Challenges and Problems of 'Legal Transplants'" (10 July 2008).

legal theory and law. There are different ways of conceiving of law and different accounts of what the object of investigation for a legal scholar is. Does the word "law" designate the organizational instruments of state power, or should we think of "law" as referring to a more diverse set of social-organizational systems that may have greater or less affinity and connection with state law? The distinction can be summed up as the difference between a positivist account of law as a certain set of state institutions, and a more sociological account that finds many different "law-like" institutions overlapping each other whose sources of power or legitimacy and whose boundaries do not correspond neatly with those of the state and its law.

Despite their intimate connection these controversies are not about precisely the same issue. Nor is it the case that choosing sides in either of these controversies settles normative issues about what particular laws or forms of law are desirable for the human good. It is likely the case, however, that choosing the side of a more sociologically oriented jurisprudence in the legal theoretical argument will tend to push one to favor a broader curriculum in legal education. But even this does not follow necessarily. One might think that there is a wide range of law-like phenomena that are neither exactly state nor international law, and which are interesting objects of investigation and important forces in the world, and yet think that a law school curriculum (at least in a professional program) should focus on the institutions, doctrine and practices of state law to the exclusion of those other phenomena. But such a position is clearly not that of the Agora, and seems to be less and less frequently the view taken in law school curricula. This is connected to the changing nature of the institution, the changing nature of the legal world, and some good critical/normative reasons for thinking that the broader view helps produce a better legal world and better legal actors. In the rest of this section we will discuss these three factors (roughly) in turn.

There is a long running controversy about the scope of legal education that one can trace through the history of legal education in the western world. In the US, for instance, the history of professional legal education is one in which at first apprenticeships dominate, but this gradually gives rise to schools run by practitioners,[61] stand alone law schools, and then law schools in universities.[62] This history also describes an arc of increasingly longer

[61] GAIL HUPPER, *THE RISE OF AN ACADEMIC DOCTORATE IN LAW: ORIGINS THROUGH WORLD WAR II*, BOSTON COLLEGE LAW SCHOOL RESEARCH PAPER No. 128. Available at SSRN: http://ssrn.com/abstract=975257 at 7.

[62] See, for instance, Brian Moline, *Early American Legal Education*, 42 WASHBURN LAW JOURNAL, No. 4, 775 (2004). "Although it was a distinct improvement over the apprenticeship and independent law school models, the university law school, pioneered by Story [US Supreme Court Justice and early member of Harvard Law School faculty] and his predecessors, still maintained a basic trade school approach. Blackstone, Jefferson, and Kent had envisioned the study of law as part of a liberal education. But the early law schools maintained no connection between liberal and legal education. Harvard Law School did not require any preliminary education, not even the basic requirements for admission to college. Not until the 1870s did the law schools begin to establish liberal education requirements, and not until after World War II were any serious efforts undertaken to adopt a

and more onerous courses of formal professional education. The scope controversy, in its simplest form, is about the purposes, content, and form of legal education. On one side, legal education is conceived of as training in a trade, the core of which should embrace practical skills and apprenticeship. On the other side is the notion that training lawyers, especially once law schools have become elements of a university, is about much more than trade skills. Adherents of this view hold that legal education should be broad and should include "cultural" elements, which are also necessary for good lawyering, quite beyond the possession of a defined set of "skills".[63] Obviously as programs become longer and settled in university-based institutions the tendency to argue for broader scope as a desideratum increases, but even in that context there are many who argue for depth rather than breadth. In North America where admission to professional legal education requires a first university degree those who would argue for a narrow focus can point to that previous education as what should provide access to "other" kinds of knowledge. In many jurisdictions, including Canada, there is an apprenticeship requirement added on to professional legal education, which should seem to allow for the possibility of greater scope in such professional programs.[64]

The question of scope might seem to be completely different in post-professional graduate education, but the goals and purposes of such degrees are frequently bound up with professional education and the purposes of law schools. The general assumption has frequently been that such degrees are for the purpose of educating law professors. This is the case from what is apparently the first scholarly discussion of graduate legal education[65] by the then Dean of Harvard Law school, Erwin Griswold,[66] and in the work of McDowell and Mewett[67] who made the same assumption, though they found the programs at that

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comprehensive legal education system, integrating theory and practice (at 50)." Citing, ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES: A REPORT PREPARED FOR THE SURVEY OF THE LEGAL PROFESSION, (1953[2004 reprint]).

[63] For a recent discussion of the role of a "liberal education" as a necessary part of the formation of lawyers within law schools see the following interconnected articles: Wesley Pue, *Legal Education's Mission, 42 The Law Teacher*, No. 3, 270 (2008); (also at SSRN: http://ssrn.com/abstract=1282172); (Pue notes, "From the origins of "modern" legal education at Queen's College, Birmingham, in the mid nineteenth century, university legal education has sought to provide a practically useful, pragmatic, trade training, *as part of a liberal education* (at 7, cited to SSRN, italics in original)."; Roger Burridge and Julian Webb, *The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in the Law School, 10 LEGAL ETHICS,* NO. 1, 72 (2008); Fiona Cownie, *Alternative Values in Legal Education*, 6 LEGAL ETHICS No. 2, 159 (2003); W. Wesley Pue, *Educating the Total Jurist*, 8 LEGAL ETHICS No. 2, 208 (2005).

[64] On this point see Pue, 2008, at 13, *supra* note 63.

[65] As indicated in Sanjeev S. Anand, *Canadian Graduate Legal Education: Past, Present and Future*, 27 Dalhousie Law Journal 55 (2004).

[66] Erwin N. Griswold, *Graduate Study In Law*, 28 CANADIAN BAR REVIEW, 267, 272 (1950).

[67] Banks McDowell Jr., and A.W. Mewett, *What Are Teachers Made Of? A Critical Appraisal Of Graduate Study In The United States*, 8 JOURNAL OF LEGAL EDUCATION 79 (1955).

time in the US wanting. Their assessment of both LL.M. (the typical terminal degree at the time) and doctorates then offered by American universities was that they provided insufficient training for law professors, with the LL.M. being primarily coursework degrees. They thought such programs should include the philosophical background of the law teacher's area of interest to help her clarify thinking about doctrine and its basis, to provide a strong understanding of legal analysis and method, and the ability to view the law as a holistic system embracing certain social objectives.[68] Thus, they felt that law teachers should be required to study jurisprudence, the relationships between law and other fields of knowledge, and comparative law.[69]

Tracing the rise of the academic doctorate in law in the US starting in the late nineteenth century, Gail Hupper argues that we can see such programs adopting ideas from continental European models of graduate legal education. There are three key ideas imported from Europe: the idea of law as a "science" involving logically deducible and applicable principles similar to those in other fields of study at universities; the rise of the full-time law professor, rather than part-time instructors who were primarily legal practitioners who taught law as a subordinate activity; and the idea of advanced study for individuals who hoped to become legal scholars, as would be undertaken by those planning to become scholars in other disciplines.[70] She suggests that these developments "meshed well with a fourth phenomenon of the era: a call for lawyers equipped to handle the increasingly complex legal needs of a rapidly industrializing nation."[71] In this context, "research" was increasingly seen as involving something other than the discovery and elucidation of doctrine, but, instead, as making sense, and contributing to the rationalization, of law.[72] Much of this research agenda was functional, in that it aimed to "attempt to understand law in terms of its factual content and economic and social consequences."[73] While different law faculties approached the function of law from "legal realist," "sociological jurisprudence" or "law in action" perspectives, each involved the pursuit of a research agenda. As law schools became more closely integrated with their host universities, which sometimes involved collaboration with scholars in other disciplines, it became apparent that legal scholars, like scholars in other areas, were expected to display some similar values and to undertake somewhat similar activities, including research. Thus, research, whether interdisciplinary or otherwise, became an

[68] *Id*., at 82.

[69] *Id*., at 85-86.

[70] Hupper, *supra* note 61 at 4.

[71] *Id*., at 5.

[72] *Id*., at 24-25.

[73] LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960 (1986), at 3.

activity in which law teachers were expected to be involved.[74] Eventually, by the early 1930s, a number of law schools were offering research-based doctorates.[75] In part, this facilitated the training of lawyers to enter an increasingly complex and professionalized field of practice, but it also facilitated the development of researchers and those adopting more academic approaches to law, and often these scholars were also interested in teaching law.[76] While many professors at American law schools still have only first law degrees (although often from the most prestigious law schools), many have doctoral degrees as well, while an increasing number have at least an LL.M.[77] The number of law faculty members with doctoral degrees in law is increasing, and a doctoral degree in law is thought to provide its holder with additional credibility, in terms of certification of research and academic expertise and capabilities.[78]

Hupper suggests that legal doctoral programs fall into three principal categories, in terms of their concentration: firstly, theoretical or interdisciplinary, secondly, doctrinal, and thirdly, policy pragmatist. The first, which she says appears most often at Columbia, Harvard, Michigan, NYU and Yale, involves "work that inquires into the fundamental nature of legal rules and the social, political, economic and institutional context in which they operate."[79] The second, found most often at George Washington and Wisconsin, according to her, focuses on the rules in themselves, whether in isolation or as applied to a particular problem.[80] The third, which she says can be found at all the schools mentioned, involves a significant level of doctrinal content, but also discusses the political, economic or technical context in which the rules operate, although without engaging the context or the operation of law in that context from a theoretical or systematic perspective.[81],[82]

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[74] Hupper, *supra* note 61, at 26.

[75] *Id*., at 30.

[76] *Id*., at 31.

[77] *Id*., at 17.

[78] *Id*., at 23.

[79] GAIL HUPPER, *The Academic Doctorate in Law: A Vehicle for Legal Transplants*?, BOSTON COLLEGE LAW SCHOOL LEGAL STUDIES RESEARCH PAPER NO. 155. Available at SSRN: http://ssrn.com/abstract=1126358) at 24.

[80] *Id*., at 32.

[81] *Id*., at 35.

[82] Gail Hupper describes the development of post-professional graduate degrees in law in the US as a borrowing or transplant from Europe (Hupper, *supra* note 61). In this article she notes that there arises a "missionary" function in these schools of spreading their own conceptions of legal theory (at 9). In another article (Hupper (note 79)) Hupper attributes such zeal particularly to Roscoe Pound, Dean at Harvard Law, in his efforts to spread legal realism throughout American law schools (at 5). Of course, in turning out graduates who would go on to teach at other schools a graduate program could spread its theoretical perspective. There is, of course, a similar phenomenon in other disciplines. (Citation of Gail Hupper articles with permission of the author. Our thanks to her.)

Several issues drive the theoretical concerns of different schools. However, at the core are persistent issues about differing conceptions of both the law and legal education. Questions about pedagogy can be important drivers of these controversies and the question of the scope of legal education is at the very root of much controversy. As professional training undergoes the shift from apprenticeship (and supplements to apprenticeship) that remain narrowly focused to programs that are university based with the possibility of being much broader, those responsible for these programs begin to ask: What should a lawyer in training learn beyond the basics, i.e. purely doctrinal matters? There are different possible ways to approach this question, and in this way theoretical questions about the law become intimately connected to the professional curriculum. As Kathleen Sullivan notes, "legal rules and opinions are always implicitly theorized."[83] In a similar way legal pedagogy also entails a theory of law, even if in this context too the theory is left implicit.

Some version of positivism has dominated as a theoretical conception of the nature of law in schools of the common law almost since the creation of such entities. It is worth recalling that HLA Hart's seminal and influential *The Concept of Law*[84] was written as a primer for undergraduate/professional students to theoretical thinking about the law. Modern positivism focuses on the idea of law as a product of political convention of states. Law is a social fact. But the analysis offered by Hart and his theoretical successors focuses on understanding law from its own internal logic. In short, assume the reality of the political compromises that create the legal institutions (a neither difficult nor unreasonable proposition) and try to understand how the normative thinking within this enterprise works. This is a valuable, and indeed powerful way of conceiving of the job of legal theory, and especially so in the context of educating professional lawyers. But, despite its power and utility, positivism is also too limited in scope when trying to understand different aspects of the law. This too-limited scope is manifest in two important ways. First is the (geographic) range, and the second is in the epistemic conception.

Built on a foundation of social contractarianism positivism describes law as a product of political compromise that is co-extensive with the state. Such a description works well as a heuristic for lawyers and law students to focus the mind on acceptable sources of law and argumentation in domestic courts. It, however, does not seem to leave much room for analysis of the plural normative order we inhabit. Positivists are not ignorant of the plural normative order, but tend to not think of it as law. Thus H.L.A. Hart thinks of international law as not quite law, though almost. At least international law leans directly upon the forms of law positivists recognize, and includes at least some of the standard hallmarks of law. Other normative law-like forms within and across state boundaries are even further from recognition by positivists, and so they leave them unanalyzed. This is true whether

[83] Kathleen Sullivan, *Foreword: Interdisciplinarity*, 100 MICHIGAN LAW REVIEW, No. 6, 1217, (2002) at 1220.

[84] HERBERT HART, THE CONCEPT OF LAW (1961).

we are speaking of localized customary law inside the bounds of weaker states, or forms of international regulation or non-traditional international law.[85] By one description, then, the positivist takes a limited view of the terrain restricting her view to the law of the bounded state. By another description we might think of the positivist's take on the law not as geographically limited, but as epistemically limited. The positivist may recognize the existence of a plural normative universe, but does not think that the terrain so described is worthy of examination by those concerned with the law. Those other normative orders are not law, says the positivist, and thus not our concern as lawyers or legal theorists.

There are important cross currents to this dominant strain of legal theory in the world of legal pedagogy. Programs like the Agora are an aspect of more recent developments in the area of transnational law. But even without looking to plural normative orders as law (beyond the idea of the state law of the social contract), there are other models offered for understanding the law. In the first half of the 20th century in the US American Legal Realism offers another account of how to think about the law. Realism plays an important role in schools of the common law, especially Yale, in changing thinking about what the jobs of legal theory and pedagogy are. Realism is similar to positivism in its assessment of law as a social fact. It differs considerably, however, in the weight it would give to the political compromise that is the state, and in a normative assessment that functions within state institutions. Realists are skeptical that the law of the state should simply be taken as the model of law. As a social fact, we should understand law to be just whatever happens to function as law. Realists are thus pluralists. An early work of American legal realism describes the system of the law of the Cheyenne tribe – a system of law of a people who live entirely within the confines of the United States and its legal system.[86] Realists are also skeptical of the idea of assuming that an analysis of legal decision making based on the norms that the legal system proclaims is likely to offer the greatest insight into the functioning of the legal system or judicial decisions. Whatever complex elements *cause* the transformation of law, or the rendering of decisions, are just those elements that should be considered and analyzed. The realist joke about judicial decision-making is that it is determined by what the judge had for breakfast. But in fact the realist perspective is both

[85] Localized customary law within internationally recognized states exists frequently and in different forms, e.g., tribal law, religious law or localized law in shantytowns. The classic account of the latter is Boaventura de Sousa Santos*, Law of The Oppressed*: *The Construction And Reproduction Of Legality in Pasargada*, 12 *LAW AND SOCIETY REVIEW* 5 (1977). There are different forms of international regulation that are not part of state law. Lex Mercatoria in which counterparties in international commerce agree on private arbitrators is one example. This is discussed in Gunther Teubner, *Global Bukowina*, (note 19). The International Organization for Standardization (ISO) (see note 22) represents another form of transnational regulation that is voluntarily entered into by private business actors, as discussed by Stepan Wood in his GC1 session entitled, "Political Economy of Transnational Governance" (note 21). And, finally, the extent to which international law deals exclusively with sovereign states as having legal personality is giving way to forms of international law that reach within the domains of sovereign states, as we see especially with respect to international criminal and human rights law, suggesting the possible rise of transnational constitutionalism – a recurrent theme in the Agora.

[86] KARL LLEWELLYN, AND E ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941).

more hard-nosed and more pragmatic in its thinking about law than positivism. If something looks and acts like law, or regulation, then it *is* law, and worthy of our consideration. And, these law-like things effectuate policies. Whatever considerations help us understand how these policies are created and whether or not they work are also worthy of consideration.

One possible interpretation of what the Agora and its ilk represent is that they are a re-emergence of legal realist thinking within the new context of a much more globally integrated system of "legal" activities in response to all the other elements of increasing global integration: financial flows, supply chains, labor markets, environmental impacts, epidemiological concerns, etc. The focus of much earlier American Legal Realism was on the functioning of state law as an instantiation of a particular social contract. As a (social) scientist looking at the legal terrain, a realist perspective is invaluable.[87] It offers a fuller understanding than a positivist conception of law when trying to think of the "legal" terrain of global regulatory activity. So, if we think of the positivist account as offering a useful heuristic within a certain context, rather than defining a limit to what counts as "law," then there need be no conflict between these different ways of trying to understand legal activity. The realist perspective simply offers a broader view. And it is this broader understanding of the legal terrain that this turn (back) to realism by programs such as the Agora represents.[88]

Any legal education that moves toward a focus on more than one jurisdiction begins to encounter the questions of not just geographic but also epistemic limits. When we think of law in a larger context we seem to invariably move towards a different sort of understanding. After a curriculum review, the professional program at McGill Law School began to describe itself as studying law from the perspective of "poly-jurality." In reflecting on this, despite lauding its goals of a wider perspective, Harry Arthurs seemed puzzled by the short shrift given to the problem of epistemic rather than geographic range. The McGill

[87] As we have already noted, the positivist theoretical model of law serves domestic practitioners, and would be practitioners, well, as a heuristic through which to focus the mind on the forms of legal validity recognized by domestic courts.

[88] As we noted above, the Agora is certainly not alone in advancing a model of transnational legal education. There are many programs at the professional and graduate levels that are concerned to move legal education beyond the confines of particular jurisdictions. Trans-jurisdictional education is, of course, nothing new. Legal education in federal states has always involved some element of trans- or poly-jurality. Colonialism has also frequently entailed the creation of new, though not wholly independent, jurisdictions, which has meant that legal education and practice has involved multiple jurisdictions. Contemporary transnational law programs tend to focus on more recent phenomena. The changing nature of the post-WWII international legal institutions towards the turn of the millennium are part of this (the growing importance of the WTO legally and institutionally, for instance, or the European Court of Human Rights). International law and legal institutions are increasingly not limited to inter-state relations, but penetrate into what was previously considered to be areas of state sovereignty. The rise of non-governmental law and regulation are also important in some conceptions of what the transnationalization of law is about.

program has obvious drivers to its innovative approach. "It is a predominantly anglophone institution serving a declining anglophone population in an increasingly assertive francophone province. It has close affinities with legal education in common law North America, but is located in a jurisdiction one of whose defining characteristics is supposedly its civil law system."[89] Along with these exigencies there is also an intellectual culture within the institution, according to Rod MacDonald, that is "characterized by a recurring preoccupation, in differing ways, with poly-jurality and non-state normativity, with transnational legal systems, and with legal theory."[90]

Despite this tradition, Arthurs found the program timid about its commitments.[91] By focusing on "jurality" McGill has failed to give more heed to issues of interdisciplinarity, of the need to have some basic humanities and social science knowledge and their connection to the law as a way to help understand law in its context. "[I]nterdisciplinary perspectives help to rescue legal education and research from the tyranny of conventional assumptions, from the banality of legal-professional discourse, from the embarrassment of solipsistic or circular reasoning."[92] Even if the curriculum review documents failed to highlight these commitments, members of the faculty might appreciate and pursue such goals. As McGill faculty member, and then Dean, Nicholas Kasirer made clear, the importance of the program was not in convincing law firms that recruits could function in different jurisdictions, but because it focuses on questions of "what explains law as a social phenomenon, what is the nature of legal knowledge, what does it mean to think like a lawyer, what it means to think like a citizen alive to law's symbolic and persuasive attributes."[93],[94]

Arthurs suggests that while many at McGill may have shared Kasirer's convictions about how to understand law and the importance of doing so, the failure to be both more explicit

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[89] Harry Arthurs, *Madly off in One Direction*, 50 MCGILL LAW JOURNAL 707 (2005), at 712.

[90] *Id*., at 713, summarizing MacDonald from, Roderick MacDonald, *The National Law Programme at McGill: Origins, Establishment, Prospects*, 13 DALHOUSIE LAW JOURNAL 211 (1990).

[91] *Id*., at 714.

[92] *Id*., at 716-717.

[93] Nicholas Kasirer, *Bijuralism in Law's Empire and in Law's Cosmos,* 52 JOURNAL OF LEGAL EDUCATION 29 (2002); cited in Arthurs at 717, *supra* note 89.

[94] In a similar vein Raymond Friel notes of the concept of educating a transnational lawyer that, "The aim of a transnational legal education is not to create individuals who can practice law in a number of diverse jurisdictions. Although graduates of such a program may well wish to do so, such an ability should not be seen as an objective in itself, but merely as an incidental result. The aim of such a program should be to create lawyers who are comfortable and skilled in dealing with the differing legal systems and cultures that make up our global community." Raymond J. Friel, *Special Methods for Educating the Transnational Lawyer*, 55 J. LEGAL EDUCATION, 507, 507-508, (2005).

and clearer about the need for an interdisciplinary view of the law was a shortcoming of the curriculum review. Arthurs notes that the term ""jural" shares the Latin root *jus* with scores of adjacent entries in the OED online", though strikingly in the middle of the list is the word Jurassic. He goes on to write:

> Most people, many lawyers, even some McGill academics seem to view jurality in rather the same way: law – they imagine – has existed since "time immemorial"; it is the product of ineluctable natural processes; and its manifestations are awe-inspiring. Alas, it is the duty of legal academics, like geologists and archaeologists, to excavate mythologies, correct misconceptions, offer new hypotheses, test them against evidence, and revise them if they do not accurately describe what we understand to be reality.[95]

The problem, then, is trying to do that in a way that remains fundamentally jural, that is, in a way that retains a perspective that is from within the law. The internal point of view that positivism focuses on does not offer sufficient perspective to truly understand law in its fullest sense. Arthurs' rather radical suggestion to this problem is a law curriculum that is deeply and committedly plural.

> Legal pluralism might help to bridge the gap between interdisciplinarity and jurality. For the legal pluralists on the faculty, the "jural" and the "systemic" may refer not simply to common or civil or international law systems established by states, but as well to non-state normative regimes that are indigenous to all sites of social interaction – to workplaces, business networks, neighbourhoods, public bureaucracies, and religious communities. But if this were the case, the curriculum would be organized not around jural concepts – the Procrustean bed into which first year students are still firmly pressed – but rather around the varieties of social relationships that give rise to those concepts. Moreover, if these normative regimes were given curricular weight commensurate with their influence on social and legal behaviour and with the practical, intellectual, and ethical questions they raise, the criminal law syllabus would deal extensively with "the law of the courthouse," labour law with the "law of the shop," family law with "the law of the relationship," and so on.[96]

[95] Arthurs at 718, *supra* note 89.

[96] *Id.*, at 718-719.

Here we begin to see more clearly the idea to which Arthurs was giving voice in his GC2 session on the "construction of legal fields,"[97] and ideas which he has expressed about legal education at length elsewhere.[98] Despite his belief that the dominant view of poly-jurality at McGill was likely of an archipelago of jurisdictions rather than "a way to cultivate an agnostic view of the claims to jurality itself and to explore the parallel normative universe that exists alongside law as it is conventionally understood by lawyers,"[99] he nonetheless lauded McGill's efforts at curriculum reform.

Much of the foregoing is applicable to the Agora and the idea of "transnational law." Arthurs expressed concern about the lack of specific commitment to a deeper critical project about law in the McGill curriculum review documents, but, if founding documents speak directly to the goals and directions of institutional arrangements, there may be hope in the Agora's MOU. While the "overarching theme" of the Agora is said to be the study of "law, change, and regulatory challenges in the contemporary world" the MOU goes on to note that it should be attentive to a short list of "organizing principles."[100] These include:

> b) Attentiveness to the permeability of different fields of law – as well as whole legal systems – to ideas, normative influences and structural forces that may previously have been thought of as marginal or largely external to those fields or systems; and c) The importance of critical inquiry and interdisciplinary perspectives on the nature of law, on law's content, and on law's role in different forms and spheres of regulation.[101]

The Agora in its first instantiation went a considerable way to creating an environment in which faculty and doctoral students could critically examine the assumptions of law, jurality, the internal point of view, what have you, and the accompanying myths of laws uniqueness in creating the normative worlds we inhabit. From our point of view it is certainly to be hoped that just such an impetus will remain a strong and central component of the program.

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[97] See note 44.

[98] CONSULTATIVE GROUP ON RESEARCH AND EDUCATION IN LAW, LAW AND LEARNING (1983) [Arthurs Report], Harry Arthurs lead author.

[99] Arthurs at 719, *supra* note 89.

[100] MOU at 2, *supra* note 2.

[101] *Id*., at 2.

E. Conclusion

The first installment of the annual Agora, this past July 2008, was a strong beginning for this valuable experiment in doctoral legal education.[102] In the coming years the Agora will, no doubt, be subject to further experimentation and change. As we have indicated in the last section, we believe that there is a valuable theoretical and critical impetus to the program that we hope will continue to inform the Agora, and indeed, perhaps come in to even clearer focus. Ultimately, there is no tension between doctrinal work from the internal point of view, and a wider reaching critical legal pluralism, as long as their relationship to each other is understood. Indeed, appreciating the mythos of law, standing at the margin of law to better critically engage with law's claims, is best done via a thorough knowledge of law's claimed terrain. But as Arthurs notes about the McGill program, there is a risk that mapping that terrain may be mistaken for the job in full, if not by all participants in the process, then perhaps by some significant number. Such a result seems unlikely to transpire in the case of the Agora, though it bears saying that even understood in such a guise there would no doubt remain much of value in the Agora. The mere act of bringing together an international group of talented faculty and doctoral students of law for an intensive session of discussion around their areas of research and interest creates opportunities for enlightenment and edification. The efficacy of the Agora in this regard remains to be examined and re-examined with each of its instantiations and the testaments of their participants. We can look forward with great interest to the program and to reports of the next ATLAS Agora.

[102] The success of the initial installment came about only after many years of organizational efforts for which all those involved, too numerous to mention, should be congratulated.

SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

Teaching "Human Rights in Africa" Transnationally: Reflections on the Jos-Osgoode Virtual Classroom Experience

By Obiora Chinedu Okafor[*] and Dakas C.J. Dakas[**]

A. Project Description

During the Fall of 2007, as part of a much broader York-Nigerian Universities linkage project that he had been working on for some time, Professor Okafor taught an internationalized version of a pre-existing existing course entitled "Human Rights in Africa." At the same time, Professor Dakas of the Faculty of Law, University of Jos, Nigeria (assisted by Mr. J.D. Gamaliel) taught a similarly modified version of an existing course at their own institution. Professor Dakas, a former Hauser Global Scholar at New York University and most recently the attorney-general of the Plateau State of Nigeria) was the lead faculty at that partner law school in Nigeria.

Both courses were linked and connected to each other *over the internet*, almost always in real time. This pedagogic linkage was achieved through collaborative development with the partner faculty of a *virtual* transnational classroom (created via the use of cutting edge

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We wish to express our immense gratitude to the following York University faculty: Vice President (Academic) Sheila Embleton, Associate Vice President (International) Adrian Schubert, Associate Vice President (Research – Social Sciences) David Dewitt, Osgoode Dean Patrick Monahan, Associate Dean Robert Wai, and Associate Dean Peer Zumbansen (for generous internationalization, incentive, CLPE, and other grants/funding that enabled us to construct and use this virtual transnational classroom). We also wish to express our immense gratitude to the following University of Jos faculty: Vice Chancellor Sonni Gwanle Tyoden, Deputy Vice-Chancellor (Academic) Bethrand Nwufo, Faculty of Law Dean, Professor Jamila M. Nasir and Mr. J.D. Gamaliel (for their financial, pedagogic and other support without which the project would not have been possible). Kurt Binnie, Osgoode's Director of IT services, deserves special thanks for his extraordinary creativity, industry, support, and good cheer; and so does Mrs Abiola Omo-Tom-Fregene, the Director of the Computing Centre of the University of Jos. The IT staff at the University of Jos (especially Tizhe Zira and Emmanuel George), and at Osgoode Hall Law School (especially Gautam Janardhanan and Nyree Mahadeo) also deserve our immense gratitude for their tireless efforts which ensured the success of the project. Opeoluwa Ogundokun's excellent research and pedagogic assistance is gratefully acknowledged.

information technology (IT) solutions) which served as a key mode of interfacing and delivering the two separate but closely connected partner courses. In order to fully form this transnational classroom, class instruction and discussion were supplemented and complemented by web-based real-time video-conferencing (and to a lesser extent, in practice, by a discussion board). As a result, students both at Osgoode/York and the University of Jos (hereafter Jos), for the most part, had access to and learned within one integrated, if virtual, space.

In one sense, three separate pedagogic spaces were created and interfaced: the regular classroom in Jos (which sometimes met outside the joint Jos-Osgoode sessions), the regular Osgoode course (which also had some separate meeting time of its own), and the joint Jos-Osgoode virtual classroom. The adoption of this "tri-space" format (this maintenance of two separate regular courses at Jos and Osgoode) was necessitated by the need to avoid "the significant difficulties that would have been encountered in shepherding a single course through bureaucracies of [two] universities" in two distant and different countries.[1]

During September to October 2007, the two regular classes came together and integrated in real time most Fridays. On account of time differences, these joint sessions were held during the late mornings in Toronto and late afternoons in Jos). These web-based video conference sessions lasted between one-and-a-half and two hours (depending on how quickly internet connections could be established by the IT people at both ends, and how late it was at the Jos end.

At other times, students at both law schools were encouraged to utilize a discussion board (located within the human rights in Africa course's website) in order to continue conversations that arose from class discussions. As we shall soon see, the discussion board worked very well for the Osgoode students, but was, for time and access reasons, rarely accessed by the Jos students.

For most of the web-based video conference sessions, students at both the Jos and Osgoode ends were provided at least one joint reading that framed the issues for discussion in that session. These joint readings were selected by both of us from a much larger set of materials prepared for the human rights in Africa course by Professor Okafor and his research assistant over the preceding summer.

[1] See D. Harris, J. McLaren, W.W. Pue, S. Bronitt, and I. Holloway, "'Community without Propinquity' – Teaching Legal History Intercontinentally" (1999) 10 Legal Education Review 1, at 7.

Discussions were invariably led off by either of us, who raised one main question after the other and encouraged active participation. Students and faculty participated enthusiastically at both ends, some more than others. The allotted time was usually insufficient to exhaust the high energy that such discussions always generated. We had to take care to ensure an equitable allocation of the available time between the Jos and Osgoode "teams" of students, and within each "team" as well. There were many more students at the Jos end (usually over 20) than at the Osgoode end (9 registered LLB and graduate students and 1 student observer from the University of Toronto).

The web-based conferencing sessions were almost always monitored by at least one IT person in each of the two physical classroom locations at Jos and Osgoode in order to ensure that the equipment functioned well and the internet video link was not disconnected. Additionally, the Osgoode IT person had the ability to monitor the conference from a remote connection, and even send messages to the Osgoode faculty and students via the video screen regarding any technical hitches. On a number of occasions, despite several successful tests in between sessions, the conference was in fact disconnected mid-stream and the IT teams at both ends had to work together to re-connect it.

The actual delivery of the transnational classroom course at the Osgoode end was not without its challenges, but was on the whole successful.

B. The Project Conception/Design Process

I. Broad Objective

The broad objective and ambition of the project was and continues to be to internationalize in-class discussions, enrich pedagogic experiences, encourage active and therefore more effective learning, challenge myths and mythologies, encourage critical reflection, and broaden the intellectual horizons, of students at both Osgoode and Jos.

II. How the Idea Formed

While the original project conception was basically Professor Okafor's idea,[2] the actual development of the full and mature idea and the actual project design occurred collaboratively between us (the partner faculty members at Osgoode and Jos) and with the IT staff at both ends. It was important to us that both the South partner (Jos) and the North

[2] In turn, Okafor was inspired by the earlier efforts of Wes Pue of the University of British Columbia (and his collaborators in Canada and Australia), and Craig Scott of Osgoode (and before that UBC) to teach intercontinentally or transnationally. Pue and co had taught a text-based internet course in 1997, and Scott had taught a video-conference based course in the late 1990s and early 2000s, using regular phone lines.

partner (Osgoode) participate actively and fully in the development of the idea from project design to completion, and thus have "ownership" of the project.

We wanted to do something that added real value to our respective courses at Jos and Osgoode (not simply something that added "bells and whistles"[3] to them). In and of itself, the use of IT is not education![4] After much consultation, pondering of the advice of our IT collaborators, reflection, and trial and error, we settled on the use of internet-based video-conferencing that would avoid long distance phone charges; an internet-based discussion board; and a chat-room solution that could enable some research collaboration among our respective students outside the classroom. For technical reasons, we did not end up pursuing the third option during this first iteration of the virtual transnational classroom.

III. Funding

The project was co-funded by York University and the University of Jos. Seperate York Incentive and York Internationalization Grants were awarded to Professor Okafor, while a Visiting Professorship and a Comparative Research in Law and Political Economy (CLPE) Fellowship were awarded to Professor Dakas at Osgoode. Some financial assistance was provided by the Dean of Law at the University of Jos. Human resources and equipment were also provided by the University of Jos and Osgoode. Less conventionally, some funds were sourced from our own research and even personal budgets.

IV. Needs Assessment Mission

In accordance with the underlying "active participation and ownership" model adopted by us for both this project and the broader program of which it is a part, Professor Okafor and his research assistant conducted a broader needs assessment mission to the Jos and other Nigerian universities in the summer of 2004. We were received well almost everywhere and the mood of the potential partners in Nigeria was largely enthusiastic. While we already knew a lot about these institutions and Nigeria, we still learnt a lot from this trip. One important such fact was that while all the universities we visited had made impressive strides in the development of their IT capacities, Jos was the clear leader in this regard. This and other factors led us (at the Osgoode end) to approach Jos to become our partners in this initial phase of this virtual transnational classroom project.

V. Collaborative Construction of the IT Infrastructure

Obiora Okafor was on site at the University of Jos to participate in the actual construction of the IT infrastructure that would make the virtual transnational classroom possible. We

[3] See D. Harris, *et al*, *supra* note 1 at 4.

[4] *Ibid*, at 4.

both worked with the IT staff at Jos to ensure the success of the effort. Even after he departed from Jos, Okafor continued to be involved in the testing of the equipment. Dakas C.J. Dakas was actively involved via email and phone links in the discussions around the work on similar infrastructure at Osgoode.

C. Why Teach in a Virtual Transnational Classroom, and Why this "Human Rights in Africa" Course in Particular?

As we have already noted, in deciding to teach our respective courses transnationally and in choosing to do so via a virtual classroom, we were motivated by the desire to add real value to those courses, and not by any kind of desire to add "bells and whistles" or the so-called "wow factor". In our minds, a number of good reasons justify the deployment of this "transnational classroom" mode of learning within both partner courses. These are as follows:

The courses themselves were especially suited to Transnational teaching

Because of the well-known universalist vs. particularist tensions inherent in human rights thought and practice, and the socio-cultural and historical experiences and outlooks that significantly differentiate Canada from Nigeria, the two courses (on human rights in Africa and international human rights) were particularly well-suited to being offered in a transnational classroom setting.

Such a mode of delivery allowed IT resources to be creatively leveraged to bridge vast distances (physical and social) and thus broker cross-cultural communication, greater inter-cultural understanding, and a much deepened appreciation of the subject-matter of the course. As such, Osgoode students benefited as much as their counterparts in Jos from this richer, much broader, and much more challenging training in the human rights and African studies areas.

Fostering a Level of Cross-Cultural Community

This flows from the last point.[5]

Active Learning

The virtual transnational classroom mode allowed students at both schools to experience real life interchange and engagement with those who have historically been constructed as their "others", and to learn from each other in an active way. Rather than just telling them

[5] See D. Harris, *et al*, *supra* note 1 at 3.

about each other's often different experiences, views, and approaches regarding human rights, the collaborating instructors led them to a place where they could discover this for themselves by, well, hearing it from the "horses mouth"! This active learning mode led to super-engaged classrooms at both ends.

Debunking the myths about a uniformly simple and needy "Africa" and a monolithic "West"

The real life interchange allowed students to begin to form a more nuanced, less uni-linear and complex view of the state of things (society, human rights talk and so on) in both "Africa" and "the West". For one, given the tendency to talk about the African continent almost exclusively in terms of its "lack" of this or that, the mere fact that the virtual transnational classroom could be done at all, was a bit of a lesson to many Osgoode students and other observers, and was a tiny reversal of a one-sided but dominant narrative. This then supported our pedagogic attempts to introduce a greater sense of nuance and complexity about the question of human rights in Africa. On the other hand, the tendency among some Nigerians to think of the Western approaches to human rights as relatively settled and uncontested was disturbed significantly by, among other things, the palpable differences in views among the Osgoode students. The debunking of this myth about the monolithic "West" served a similar pedagogic end as the discrediting of the myths about "Africa".

Interactive Refinement and Reformulation of Previously Held Human Rights Ideas

The interactive debunking of these various myths about each other's country or continent led in turn to the refinement and development of some student understandings of both "Africa" and "the West", and ultimately of various debates about the concept and practice of human rights.

Much Lower Cost of Virtual Transnational Teaching

Imagine what it would cost to fly all 60 or so Jos students to Osgoode and house them here in Toronto for three months, or vice versa? It cost a tiny fraction of this estimated amount to construct and operate the additional IT platform needed to teach the exact same group of students in a virtual classroom. So leveraging IT in this case provided substantial cost reduction advantages.

Education-Equity Benefit

As predicted by Wes Pue and his collaborators as far back as 1997,[6] the much lower cost of building community via a virtual transnational classroom provided a significant education

[6] *Ibid*, at 3.

equity benefit in this case. The reduced cost leveled the playing field for all qualified students at Jos and Osgoode (instead of the few who could afford part of the costs of having to travel to Nigeria or Canada) to have the same opportunity to enjoy the benefits of being taught in this way.

D. Challenges

Notwithstanding the many advantages of teaching in the virtual transnational classroom mode and our strong commitment to the project, we confronted, and in almost all cases, overcame many challenges that militated against its technical and pedagogic success. These challenges are as follows:

The constant threat of strikes at the Nigerian end

Due to decades of an IMF/World Bank inspired massive funding cuts of higher education in Nigeria, Nigerian universities have taken a beating over the last 2 decades. As a result the academic and other staff unions in the universities are prone to launching strikes to try to force much needed improvements in that country's university sector. This has led to a degree of instability in the university system in Nigeria, and has led to many disruptions in the academic calendar; to the extent that it was often hard to estimate in advance when the school year would begin and end. The unpredictable danger was that the University of Jos could be on holidays at the time we planned to mount the joint course. We had to take this into consideration as we planned. To reduce this uncertainty, we decided that the partner course at the Jos end would be a Masters, rather than an undergraduate, course. Graduate courses are more flexibly scheduled in Nigeria.

South-North resource asymmetries

Although Jos was able to contribute significant financial and human resources to the project, much more of the funding was contributed by the York/Osgoode side of the partnership. The danger we tried to guard against was that s/he who paid the piper often dictates the tune. Our participatory model of engagement mitigated this danger to an extent.

Scheduling differences

We had to work hard with the Dean's offices at both ends to align semesters, timing (a substantial time zone mismatch exists), and timetabling (in terms of the days on which the partner courses were taught).

Technical challenges

As might be expected, the project was heavily IT reliant and dependent. We had the good fortune of having access to what are perhaps the best IT resources in a law school in each of our separate countries. Yet, a number of technical issues still presented problems that required much thought and work on the part of our IT teams to resolve. For example, "mic-*ing*" (i.e. ensuring sufficient and efficient audio coverage of) the considerably more populous Jos class presented a challenge. Similarly, ensuring adequate video coverage of the entire Jos contingent with a stationary webcam mounted on a computer presented problems. We did not have the resources to deploy a more sophisticated system that would require the purchase and set up in Jos of an expensive Polycom video-conferencing system. As importantly, on one occasion the internet video-link to Jos went down and interrupted the joint session of the two classes. Most of these problems were quickly resolved, but we are in the process of seeking more funding to improve the equipment we use, and enhance the quality of the virtual classroom experience. Another problem was power outage at the Jos end. They solved this by deploying their standby generator each time we had a joint session.

Constructing and using the virtual classroom is labor intensive

The teaching and IT staff at both ends spent hundreds of hours well above and beyond what one would normally expect to put in if one were to plan for and teach a regular course.[7] Other than for our personal satisfaction as teachers, there is as yet little incentive (e.g. real course release time or added pay), other then perhaps at promotion time, for faculty to undertake this kind of venture and to do the heavy extra work required. Even then, one can easily get promoted without teaching in this mode.

The difficulty experienced by Jos students regarding their usage of the discussion board

Jos students tended not to use the web-based discussion board perhaps because far fewer of them had access to internet connections at home, and most did not have the time to do so after class hours (most had families and worked full-time on the side while pursuing a full time degree program).

Classroom culture issues

Although known to be very outspoken people, the Nigerian students tended to defer just a little bit more to their instructors in terms of jumping into the conversation. As a result, the contributions of the instructors at the Jos end took up a bit more of class time than we had

[7] *Ibid*, at 29.

wanted. While the instructor at the Osgoode end did lead most of the conversations, Osgoode students spoke a bit more frequently than the Jos students.

E. The Factors that Contributed to the Success of the Project

Deep local knowledge of Nigeria and connections

Concerning the Jos end Okafor's extensive and intensive "local knowledge" of the Nigerian and Jos local environments helped a great deal. He was from there, had lived most of his life there, had taught in a university there before coming to Canada, understood the "culture", knew much about what had to be done to succeed and had many strong human resource connections there. This made it easier for him to work successfully there *and to actually get things done*. Regarding the Osgoode end Dakas had studied in part in North America (at NYU), understood the culture well, and had many strong connections here. This had a similarly good effect.

Needs assessment mission sharpened and deepened knowledge of and connections to Nigerian society and the University of Jos

This is self-explanatory.

Our previous experience using IT in the classroom

Both of us have had years of experience in the leveraging of IT as a way of adding value to student learning experience. This helped a lot in the planning and execution of the project.

Impressive pre-existing IT infrastructure and human resources at both partner institutions

Now renowned as a leader in the application of IT to teaching and research in Canada, Osgoode is home to a remarkably strong IT unit that provided the electronic backbone of the project. Jos is, in our view, now widely regarded as the top such institution in Nigeria.

We remembered "the human"[8]

Our insistence on the use of internet-based video-conferencing in addition to the text-based internet solutions was important to the success of the project. As Wes Pue and co have put it:

[8] *Ibid*, at 5.

"The intense, face-to-face, intellectual exchange possible in real as opposed to virtual communities has a quality about it which is impossible to replicate, even in endless hours spent pecking at a keyboard, firing meaning-packed electrons into the void. DCT [i.e. distance communication technology] is not human communication."[9]

Pue *et. al* would agree with us that text-based internet communication suffers far more from this deficiency than the kind of real-time internet-based video-conferences that we utilized in this project.

Cooperation and dedication of the Osgoode/York and Jos senior administration and the IT staff

This is self-explanatory.

Collaborative development of the project

This helped us anticipate and avoid/ameliorate bottlenecks and serious problems that would have frustrated our efforts in the end. For example, we avoided the use of analog phone lines in Jos – something that had looked like a great idea from the Osgoode end. We also avoided the use of an undergraduate course that would have been less flexible in terms of scheduling and semester alignment.

Funding

This is self-explanatory.

Student Receptiveness

Students were quite engaged and participated very actively on the whole.

F. Next Steps

Over the next few months and years, it is proposed to deepen and expand the project to include a student collaborative research component, an internship program, more faculty exchanges, and more universities in Nigeria (and possibly Canada). As the relative paucity of funding has been a major constraint to the enhancement of the project, effort is being made to reach out to possible major funders both in Canada and Nigeria.

[9] *Ibid*.

'Hanse Law School' - A Promising Example of Transnational Legal Education? An Alumna's Perspective

By Franziska Weber[*]

A. Introduction

Starting with the European Coal and Steel Community in 1951[1] and the establishment of the European Economic Community by the Treaty of Rome in 1957[2] with only 6 member states,[3] Europe has since become a political and economic union of 27 Member States that has wide law-making competences and thus considerably affects daily life in Europe.[4] With the overall aim of creating a common market for economic activities, borders are largely disappearing and people are free to travel to other Member States and stay, study or work.

The European Union (EU) also has its own court – the European Court of Justice (ECJ) – that watches over the uniform and effective application of European Law across the Member States.[5] The body of European Law, which is an own legal order besides the national laws, is increasing. Its source of inspiration lies in comparative studies of the laws of the Member States. Therefore, not only European, but also Comparative Law should be a crucial part of the curricula of national law programs. Transnational legal education is indispensable for the attainment of the skills to engage in successful legal comparisons, and in the making and application of European Law.

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[1] See, "Declaration of 9 May 1950" EUROPEAN COMMISSION, available at: http://europa.eu/abc/symbols/9-may/decl_en.htm, last accessed, 20 May 2009.

[2] The Treaties of Rome, 25 March 1957, are two of the treaties of the European Union: the first established the European Economic Community (EEC) and the second established the European Atomic Energy Community (EAEC or EURATOM). Later on these treaties have been amended and renamed several times.

[3] Belgium, France, Italy, Luxembourg, the Netherlands and West Germany.

[4] The EU is unique in being a 'supranational' entity that is characterized by the fact that Member States have voluntarily agreed to transfer originally national legislative competences to the higher entity, see the ground-breaking Case 26/62, *Van Gend and Loos*, 1963 E.C.R. 1, para. 12 where the Court held that 'the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields…'

[5] See, CURIA – Court of Justice of the European Communities, available at: http://curia.europa.eu/jcms/jcms/Jo1_6308/ecran-d-accueil, last accessed, 20 May 2009.

In the ambit of facilitating student mobility – we have recently celebrated 20 years of Erasmus[6] - 29[7] European Ministers of Education in 1999 jointly declared to construct a European area of higher education by 2010 with the Bologna Declaration,[8] foremost characterized by easily readable and comparable degrees, and a uniform grading system. Many years after the Bologna declaration, large parts of the German university landscape have been changed to the Bachelors and Masters structure[9] - as in the majority of signatory states - but a reform of the German legal system is still hotly debated.[10] Transnationalising legal education is particularly crucial due to the essential part that law obviously plays in shaping the EU and its activities.

In anticipation of Bologna-type reforms, the Universities of Bremen and Oldenburg in Germany and Groningen in the North of the Netherlands introduced, in 2002, a joint Bachelors/Masters program in European and Comparative Law that is known as the Hanse Law School.[11] This article considers the extent to which this effort meets the demands of

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[6] See, 20 Years Erasmus Programme – Erasmus Days Around Europe, available at: http://www.20erasmus.eu/erasmusdays/view, last accessed, 20 May 2009. 'Erasmus' is a program that facilitates students' mobility by enabling them to spend a semester at another European university without having to pay tuition fees, with a guaranteed recognition of the courses taken at the foreign university and other advantages.

[7] These countries were Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

[8] Please access the text of the declaration available at: http://www.bologna-berlin2003.de/pdf/bologna_declaration.pdf, last accessed, 20 May 2009. The declaration is not a product of the EU or European Community (EC) and therefore limited in its binding legal character. The number of signatures has in the meantime increased: Croatia, Cyprus, Liechtenstein, Turkey (2001); Albania, Andorra, Bosnia and Herzegovina, the Holy See, Russia, Serbia, "the former Yugoslav Republic of Macedonia" (2003); Armenia, Azerbaijan, Georgia, Moldova and Ukraine (2005); and Montenegro (2007) joined which adds up to 46. See also, Hildegard Schneider & Sjoerd Claessens, *The Recognition of Diplomas and the Free Movement of Professionals in the European Union: Fifty Years of Experience* (2007), available at http://www.ialsnet.org/meetings/assembly/HildegardSchneider.pdf, last accessed, 20 May 2009.

[9] For the regulation of the German universities see, *'Hochschulrahmengesetz'*, http://bundesrecht.juris.de/bundesrecht/hrg/gesamt.pdf (in German), last accessed, 21 May 2009.

[10] See the official website of the Bologna process, available at: http://www.ond.vlaanderen.be/hogeronderwijs/bologna/, last accessed, 20 May 2009; alternatively information provided by the German Federal Ministry of Education and Research, available at: http://www.bmbf.de/de/3336.php, last accessed, 21 May 2009.

[11] For more information, see, Hanse Law School, available at: http://www.hanse-law-school.de/, last accessed, 21 May 2009. HLS was not even the first Bachelor – in Greifswald in 2000 an LL.B. was introduced, see, '*Wieder einmal die Nase vorn: erster deutscher Jura-Bachelor – (LL.B.) – Studiengang in Greifswald*,' available at: http://www.uni-protokolle.de/nachrichten/id/62664/, last accessed, 20 May 2009; another LL.B. study is offered at the Bucerius Law School in Hamburg, see, *Jurastudium*: Bucerius Law School, available at: http://www.law-school.de/jurastudium.html?&L=0, last accessed, 20 May 2009. The Bachelors program there is, however, merely a first step on the way to completing the *Staatsexam*. Another Bachelors program integrated in the *Staatsexam* was recently set up in Mannheim: see, Carsten Schäfer, *'Bologna' in der Juristenausbildung? - Das Mannheimer Modell eines LL.B.-Studiengangs'* in NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 2487-2490 (2008). Conferring with a list

the internationalising labour market, and does so particularly in the context of the Europeanisation of law in the European space. The content and aim of these programs are contrasted with the traditional German legal education as graduates are asked for their experiences in the labour market following graduation.[12] How can universities best prepare their student for contemporary legal challenges and does the Hanse Law School succeed in equipping students for the careers that they seek? As the program is still very new this article only describes some initial reflections.

B. The Traditional German Legal Education

A *Staatsexam* (state examination) program in Germany prepares students primarily for entrance to service on the Bench. It follows the system of the *Einheitsjurist* (uniform jurist).[13] There is no difference in formal qualifications in being admitted to the Bar or to the Bench. This is generally structured as follows[14]: on average students apply to be admitted to the final examination after around ten semesters.[15] Prior to taking the exam, there is the *Repetitorium* (revision course) (at least 1 year) that repeats all of what the students had learnt thus far and prepares them for the First State Exam – an exam, first written and then oral – that tests knowledge in the traditional three fields of law (civil, public and criminal law). Passing this exam allows for the admission to the *Rechtsreferendariat* (court traineeship) in which in ca. 2 years the *Rechtsreferendar* (law clerk) are trained in different legal areas in various posts (*e.g.* at the court). At the end of this period there will be another exam: the Second State Exam. During the study time an internship of 3 months is obligatory. Only recently legal terminology courses were made compulsory as were courses on key skills, *e.g.* mediation or negotiation. An increasing

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of other possible LL.B.'s and their curricula it becomes obvious that the focus of the HLS is unique, Bachelor of Laws – Wikipedia, available at: http://de.wikipedia.org/wiki/Bachelor_of_Laws, last accessed, 20 May 2009.

[12] Please consider that the program started in 2002/03 and that three classes had already obtained their LL.M. and thus four classes had achieved their LL.B. Throughout the paper, I will refer to a survey 'Facts & Figures' that was carried out in 2007. The judgments that I will make are my personal opinion. They were, however, enriched by discussions with and emails to former fellow students from 2002 to 2004.

[13] See, Annette Keilmann, *The Einheitsjurist – A German Phenomenon*, 7 GERMAN LAW JOURNAL (GLJ), No. 3, 293 – 312 (2006), available at: http://www.germanlawjournal.com/article.php?id=712, last accessed, 20 May 2009. The concept entails that every law student has to follow the same legal education independent of the legal professions he/she aims at.

[14] I shall not go into details about the structure of the *Staatsexam* as it depends to a certain extent on the *Bundesland (*state*)* what the details look like. See homepage of the Federal Ministry of Justice, available at: http://www.bmj.bund.de/enid/1ae551402344f8412736d5f791bce952,0/Rechtspflege/Juristische_Aus-_und_Fortbildung_16i.html (Federal Ministry of Justice), last accessed, 21 May 2009. However there are general principles in the form of federal legislation.

[15] See statistics by the German Federal Ministry of Justice with most recent data from 2006, available at: http://www.bmj.bund.de/files/-/2457/Ausbildungsstatistik_2006.pdf, last accessed, 21 May 2009.

number of students opt for the *Freiversuch* (free trial) - an examination after eight semesters that will only be counted if the student passes it and which decreases the overall study period.

C. Description of the Hanse Law School Program

The Hanse Law School (HLS) was created by the cooperation of the Carl von Ossietzky University Oldenburg (D), the University of Bremen (D) and the Rijksuniversiteit Groningen (NL). The founders of the programs[16] wished to create a genuinely European (and therefore multilingual) law study, one that went beyond the ordinary *Staatsexam* and that made use of the method of legal comparison.[17] Their approach was, amongst others, inspired by the law program at McGill University, where a lot of weight is given to the positive effects of comparative law studies.[18] Despite a considerable amount of resistance from the conservative German legal world (including from within the University of Bremen), the '*Zentrale Evaluations- und Akkreditierungsagentur*' (Central Evaluations and Accreditations Office), Hanover – the central accreditation agency for Lower Saxony – accepted their proposals and fully accredited the programs as 'veritable models of European legal studies.'[19]

The study consists of a Bachelors and a Masters phase.[20] While the Bachelors program (European and Comparative Law) takes four years, the Masters is a one-year-program.[21] Participation in the program is restricted to 25 students.[22] Half of these students are

[16] In particular, Prof. Dr. Lorenz Böllinger, Prof. Dr. Gert Brüggemeier, Prof. Dr. Hagen Lichtenberg, Prof. Dr. Erich Roeper and Prof. Dr. Dian Schefold (University of Bremen), Prof. Dr. Dagmar Schiek and Prof. Dr. Dr. h.c. Götz Frank (University of Oldenburg) and Prof. Dr. Damiaan Meuwissen, Prof. Dr. Dick Lubach and Berend Vis (University of Groningen).

[17] Peter Rott, *Die Hanse Law School - Vorreiter mit Zukunft?*, in: René de Groot/André Janssen (Hrsg.), *Festschrift zum 60-jährigen Bestehen der Deutsch-Niederländischen Juristenkonferenz*, forthcoming 2009, 1. See, as to the reasons for the establishment of the HLS, also 'HLS Cahiers', Nr. 2 Methodology and its applications/*La méthodologie et son application* published by *Rijksuniversiteit Groningen* (2001).

[18] Information provided by Tim Thorsten Schwithal, coordinator HLS (University of Oldenburg).

[19] See, ZeVA, Hannover, *Akkreditierungsbericht*, 2006.

[20] See, *infra*, note 46.

[21] Please note: The structure of the program has been exposed to changes over the last years in terms of study time and content. The most radical change has been the expansion of the Bachelor phase from 3 to 4 years in 2006. For the purpose of this paper the current study guidelines shall be described.

[22] See, *Ordnung über besondere Zugangsvoraussetzungen für den internationalen Bachelorstudiengang 'Comparative and European Law' der Hanse Law School an der Carl von Ossietzky Universität Oldenburg und der Universität Bremen* (Guidelines on the admission criteria). In 2008, for the first time, 35 students were accepted

selected on the basis of high school grades, with the average admission grade after 3 cycles being 1.6 (an –A grade).[23] The rest of the places are allocated on the basis of a personal 30-minute interview. All students are tested on their English language skills prior to admission.[24] The small enrolment leads to a very interactive atmosphere in the lectures, and low drop-out rates.[25] Furthermore, every student is allocated an individual mentor from the university staff to guide the student's studies.

The program is primarily located in Oldenburg and in Bremen, however two semesters in the Bachelors and one semester in the Masters phase needs to be spent abroad, preferably at the partner University in Groningen. Students are prepared for their stay in the Netherlands from the first semester, with language courses, references to Dutch law in the lectures and the establishment of contact with Professors from the University of Groningen in team teachings with German professors.[26] In addition to a focus on Dutch law, in keeping with the comparative approach of the program, core aspects of English Common Law are also taught. The language of instruction is approximately half in English, half in German, with an additional course in English legal terminology integrated into the program.

The curriculum is strongly focused on comparative law. The skills for approaching this discipline are taught in the first year and the theme continues throughout all further courses. This emphasis on comparative law is reflected in the opportunities for every student to study abroad, and these possibilities are not restricted to the Netherlands, but also include a range of other European universities, such as Sheffield, Madrid, Geneva, Lund *etc.*[27] A deeper understanding of the comparative process emerges during the exchange semesters, and students are also expected to select a comparative law topic for their Bachelors and Masters theses. The second focus of the curriculum is European Law, which forms a substantial part of the curriculum, including an obligatory moot on European Law in the second year of the Bachelors program. However, despite the alternative *foci* of the program, German law is not neglected; the program covers the same

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with a view to increasing the number of students that take up Masters study at the HLS. So far, only in-house students could fulfil the admission criteria for the Masters program.

[23] See, *supra*, note 12.

[24] The requirement can be fulfilled by a TOEFL (Test of English as a Foreign Language) test with a minimum of 79 points (Internet-based Test) or an equivalent test, *e.g.* IELTS. (Requirement: Band 6).

[25] The reverse side of the coin is that this mentoring requires a lot of resources. However, exams *etc.* that have to be passed in different modules could be combined and merged and the workload for the university staff could be reduced.

[26] Team teaching means that a German and a Dutch Professor lecture together about the same legal topic and illustrate the differences and similarities in approaches in the two legal traditions.

[27] Lately also non-European universities, such as Melbourne and Calcutta.

topics as the traditional *Staatsexamen* (state examination), with the exception of family and inheritance law, but simply from a comparative perspective.

Further, the Hanse Law School programs are not only concerned with traditional law subjects. Students are additionally obliged to follow three modules of economics and, since 2008, three political science modules which can be selected from a wide range of topics offered by the curricula of other faculties at the university.[28] The program also caters to the practical side of law by requiring students to undergo an internship of 14 weeks as part of the Masters program.[29] These internships can be done in Germany or abroad and are intended to give students the opportunity to apply the knowledge gained in their studies thus far and to prepare the student for entry in the workforce. They also aim to enhance soft skills, such as communication, assertiveness or teamwork. Internships in law firms in border regions where different national laws are applied are encouraged. HLS also leaves room for innovation and puts emphasis on extra-curricular activities: in 2005 students of the HLS, for example, founded the Hanse Law Review – an e-journal on European, International and Comparative Law, with two yearly publications.[30]

Examinations take place over the course of the semester, with each exam constituting an increasing percentage of the final grade. This places a distinctly less heavy burden on students than the final examination in traditional law programs.

The qualifications students gain from this program depends to a certain extent on their choices during the program. Completion of the program will not qualify students for the German *Rechtsreferendariat* and provide access to the traditional legal professions (*e.g.* judge, public prosecutor or barrister/solicitor[31]) as do the traditional legal education and *Staatsexamen*. However, where students opt to spend all their semesters abroad in the Netherlands, they can, in addition to the normal course load, take *effectus civilis* courses. Should they pass the full *effectus civilis* course complement in Dutch, they will be awarded a Masters degree that grants access to the professional Bar in the Netherlands.[32] Students with *effectus civilis* can be admitted to the 3-year professional practical training that precedes admission to the Dutch bar. By qualifying as a lawyer in another EU Member State, it is possible to return to Germany (or move to any other Member State) to practice

[28] See, section 4 (2) Examination Regulations, available at: http://www.hanse-law-school.de/, last accessed, 21 May 2009.

[29] See, section 4 (6) Examination Regulations and generally: Internship Regulations. Aims of the internship are listed in para. 2 of this regulation.

[30] See, HANSE LAW REVIEW, available at: http://www.hanselawreview.org, last accessed, 20 May 2009.

[31] In Germany there is only one profession: *Rechtsanwalt*.

[32] Those students that spend one semester of their Masters degree, but not necessarily their Bachelor degree, in Groningen receive a German-Dutch double Masters degree.

within the ambit of the European right of establishment.[33] The right of establishment is one of the so-called 'fundamental freedoms' that form part of the substantive law of the European Union.[34] With the ongoing integration process of the EU the fundamental freedoms are crucial in that they not only regulate the flow of goods, capital, but also the movement of workers, students, service providers, and they create the possibility to establish a business in another Member State. Also, national laws that prevented the carrying out of these activities by lawyers have been gradually abolished.[35] While a graduate who has successfully qualified as an '*advocaat*'[36] in the Netherlands[37] can immediately work under this title everywhere in the EU, he or she will have to undergo another 3 years of practical time in the new Member State working in the domestic legal system in order to be able to practice under a country's local title.[38] This rule acknowledges that the differences between national legal orders requires a lawyer to have some experience in the applicable domestic legal system before, for example, a lawyer trained in Spanish law can give reliable advice on Greek law.

A number of HLS graduates have taken advantage of the free movement possibilities and that are currently *advocaat stagiair* – thus in the practical training – in the Netherlands. Once they have completed their training, it will be possible for them to be admitted to the *Referendardienst* without completion of the First State Exam. Instead, they will need to pass an equality exam (*Gleichwertigkeitsprüfung*).[39] A number of Bachelors graduates have gone to the UK and have undertaken a Conversion Course (GDL), and then a Legal Practice Course (LPC) - each lasting 1 year - to qualify there as a solicitor.[40]

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[33] For Germany, see, sections 2, 11 EuRAG - *Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland* (*Law* regulating the activity of *European lawyers in Germany)*, available at: http://www.brak.de/seiten/pdf/EuRAG.pdf, last accessed, 21 May, 2009.

[34] The four fundamental freedoms are the free movement of goods; the free movement of persons (and citizenship), including free movement of workers, and freedom of establishment; the free movement of services; and the free movement of capital.

[35] For the evolution of the free movement of professionals in particular see *supra*, note 8.

[36] The Dutch term for lawyer.

[37] The same is true for a full legal qualification in any other European Member State.

[38] See, *supra*, note 34, *Art*. 11

[39] This is set out in 112 a DRiG (*Deutsches Richtergesetz* – The German Judiciary Act) and to a certain extent divergent in the different *Länder*. The first graduate will undertake this exam in July 2009. It follows particularly from the ECJ case, C-313/01, *Christine Morgenbesser v. Consiglio dell' Ordine degli avvocati di Genova*, 2003 E.C.R. I-13467 and *Lubina v. Land Nordrhein-Westfalen* AZ 10 K 7279/04 before the National German Administrative court in Düsseldorf,. See, for an overview, *supra*, note 8.

[40] As these courses are very expensive it is advisable to organize a training contract with a law firm and have them pay the expenses. Alternative ways via other European Member States can be explored. The Civil Effect will, however, always be advantageous.

This is followed by a 2-year practical training similar to the *Referendariat*. In line with the right of establishment, this can also lead the HLS graduates back to Germany should they so choose.

D. Where Are We Now?

The Hanse Law School has identified the main contemporary challenges facing law students as being the Europeanisation of law and the greater mobility of lawyers and trains students to meet these challenges. But, does the HLS program actually give students the skills and knowledge that employers are looking for?

Among Bachelors graduates,[41] 90% have opted for further study in a Masters program. Most have done so immediately following their undergraduate degree, while approximately half choose to continue their education with the HLS. The rest study at universities across a range of European countries.[42] Some graduates successfully sought paid employment following their Bachelors degree.[43] However, there was a strong feeling among students that finding a job on the basis of a Bachelors qualification was easier outside Germany, although (at least) one student has found permanent employment in a German law firm on the basis of the Bachelors.[44]

LL.M. graduates, however, have streamed into the labour market. About a third of graduates work in the private sector, mainly in consultancies (29%), while more than a quarter opting to work for international organisations and associations (26%). Another quarter (25%), have taken up Ph.D. research. In-house consulting in large law firms, such as Lovells, Sherman & Sterling, Linklaters, Latham & Watkins, Lampe & Schwartze, *Duijnstee van der Wilk Advocaten*, *KienhuisHoving Advocaten en Notarissen*, accounted for 16 % of graduates;[45] an increase from the first to the second year. Only in a handful of individual cases did searching for a job take longer than half a year. In the case of the students that

[41] The drop-out rate in the HLS study is less than 10%.

[42] See, *supra*, note 12.

[43] See *e.g.* Franz Christian Ebert, available at: http://www.spiegel.de/unispiegel/studium/0,1518,549857,00.html, last accessed, 20 May 2009. Other examples include: EDCTP (European & Developing Countries Clinical Trials Partnership), The Hague or the European Design and Trademark Office, Alicante.

[44] See, for some examples of experiences of students and alumni brochure, 'Hanse Law School', by Hanse Law School, Oldenburg, forthcoming 2009, 17.

[45] See, University Calendar 2008/9, available at: http://www.hanse-law-school.de/, last accessed, 21 May 2009, p. 5.

graduated in 2006 (LL.B.), of which approximately 50% also completed the HLS LL.M. in 2007, 7 out of 20 of these graduates found work in Germany.[46]

It would thus appear from these figures that HLS prepares its students very well for research, particularly if country comparisons form part of it. Several graduates have gained PhD positions and do research with a view to improving policy-making in Brussels for European directives and regulations, practically applying the techniques of legal comparisons that they have learned. HLS students found it striking that when studying Masters program elsewhere, they found it much easier to write papers in a foreign language than it was for *Staatsexam* students, particularly with English legal terminology.

The *Staatsexam*, whose structure was sketched above, is the subject of a lot of general criticism, ranging from the long study time –partly mitigated by the *Freiversuch* – to the concept of the *Einheitsjurist* that puts too high a burden on students whose aim it is not to become a judge. Common problems of the university system, such as crowded lectures and anonymity, also detract from the quality of study.[47] The First State Exam and the preparation period are regarded as very tough, especially psychologically, and only about half of students beginning university studies in law successfully take the First State Exam.[48] The most frequent grade received is 'sufficient' (*ausreichend* - 4 points).[49] The grading system is another point of criticism.[50] Only with a 'fully satisfactory' (*vollbefriedigend* - 9 points) is the job market, *e.g.* the possibility to become judge, really open.[51] The need for reform is undisputed.

[46] Four former HLS students of that year have not yet entered the labour market because they merged the *Staatsexam* study.

[47] See, *supra*, note 13, Keilmann at 297: "First and second year courses with 400 or 500 students are not at all rare."

[48] See, statistics by the Federal Ministry of Justice, available at: http://www.bmbf.de/pub/studien abbruchstudie_2002.pdf, last accessed, 21 May 2009.

[49] See, *supra,* note 15.

[50] Even though the range of grades that can be achieved goes from 1 to 18, the slogans are '4 wins' and '9 is magic'.

[51] See, *supra*, note 15, in 2006 this grade was reached by 12.2 % in the First State Exam and 14.2 % in the Second State Exam. Depending on where you want to apply the grade of the first or the second state exam or even single grades from civil, public or criminal law will be decisive. It is, furthermore, interesting that despite alleging that the exam is organized at the federal level, the exams of students in one State are downgraded when applying for posts in another.

Recently it was decided that students can be examined during their studies for the equivalent of 30% of the final mark. The resistance towards reforms – generally and in the ambit of the Bologna process – is, however, very high and not without reason; the *Staatsexam* was recently called a 'dinosaur' by a well-known German magazine.[52]

Despite mitigating some of the criticised aspects of the *Staatsexam* for the students of the HLS there is a clear downside to participation in such an innovative program, particularly within Germany. Obviously HLS[53] graduates are not fully qualified German lawyers and therefore they are restricted in their post-study choice of work. This restriction is made clear to prospective applicants and that training for the *Staatsexam* is clearly not the objective of the studies is reflected in the curriculum - considerably less importance is given to procedural law. Should a student's aim be to work in a traditional law firm, graduates with a HLS degree working in such an environment would currently advise them to undertake an ordinary law degree. Otherwise, due to the unresolved status of HLS graduates, he or she is likely to be paid considerably less than *Staatsexamen* graduates.[54] HLS graduates, however, also report that after proving themselves to the law firm, wages regularly increase and the tasks become more challenging. It is typical of Germany's academic legal world to be very suspicious of experiences acquired abroad. For example, fully qualified German lawyers with a PhD from another country also report discrimination in the German job market. The value of an additional LL.M. from an English speaking country, that many German lawyers opt for, is often seen by a German law firm as providing additional language skills, but it is hardly valued for the comparative legal insights that might be gained.[55]

E. Conclusion

Contrary to all affirmative announcements made in the context of the Bologna declaration, faculties of law, of medicine and of engineering in Germany are highly resistant to reforms of their studies.[56] A recent announcement in late 2008 smoothed ruffled feathers and

[52] See, Von Jochen Schönmann, *Angriff auf den Dinosaurier*, SPIEGEL (20 March 2008), available at: http://www.spiegel.de/unispiegel/studium/0,1518,542687,00.html, last accessed 20 May 2009.

[53] It is here referred to the normal way and not to special qualifications like the *effectus civilis*.

[54] Some students, who during their studies felt that they want to become lawyers often used the chance to merge the *Staatsexam* after 3 years of HLS . Nearly all their courses were recognised, and they were able to continue with their studies having an LL.B. up their sleeve already.

[55] This became clear in exchange with colleagues during internships.

[56] *'Medizin ‚light': der Bachelor kommt'*, DER WESTEN (15 October 2008), available at: http://www.derwesten.de/nachrichten/nachrichten/campus-und-karriere/campus/2008/10/15/news-83460406/detail.html [this link does not work –TW], last accessed, 11 May 2009, or 'Professoren-Lobby springt auf die Bremse', SPIEGEL (5 September

declared that no reforms can be expected in legal training for the next 3 years.[57] This is frustrating for all those brave students that opted for a Bachelors or Masters study in law as the lack of reform leaves them in a vacuum.[58] However, HLS graduates have adapted to this resistance in Germany and have, nonetheless, successfully conquered the labour market – even if often from outside of Germany. Furthermore, students achieve this in a much shorter period of study.

The aim of this paper, in contrasting the two systems, was not necessarily to suggest that the HLS study can substitute the *Staatsexam* (currently the way to become a lawyer in Germany is more burdensome via the HLS than the ordinary program). Rather, this paper demonstrated that a truly transnational program that does not neglect German Law can deliver graduates that are sought after in the job market, and more than this, perhaps suggest a possible avenue for how current German legal education could be reformed in the context of internationalisation. HLS is a very successful niche product and as such unique in Germany's academic world.

The advantages of a HLS graduate are clear: knowledge of various legal systems and traditions, familiarity with the techniques of legal comparison, language skills, intercultural experience and, derived from broad cultural experience, the ability to think outside the box. The fact that the students study different legal orders and the multilevel system of EC and national law at the same time and in several languages speaks for itself. Last, but not least, graduates are clearly not risk-averse as they have dared to study something with a rather unclear future and under a weight of criticism from traditional legal scholars and employers.

We, however, see quite clearly that, in contrast to many other European countries, Germany is not able to recognise the true value of these graduates; as a consequence, young graduates with a demonstrated potential who are trained for participation in an internationalising legal world feel forced to leave the country. Many will not return and in an Europeanising legal market, it therefore seems reasonable to suggest that Germany will need to work harder to retain its homegrown talent.

2008), available at: http://www.spiegel.de/unispiegel/studium/0,1518,576339,00.html, last accessed, 21 May 2009.

[57] '*Drei Jahre Pause: Bachelor und Master fuer Juristen'*, AZUR (25 November 2009), available at: http://www.azur-online.de/azhtml/stud_intro.html, last accessed, 21 May 2009.

[58] See, *supra*, note 40. It is in particular referred to students that do not acquire special qualifications like the *effectus civilis* in the Netherlands. A possible solution lies in the ECJ case; see also, *supra*, note 8.

'In the Public Interest': The Responsibilities and Rights of Government Lawyers

*By Allan C. Hutchinson**

While considerable thought and effort has been put into exploring and fixing the ethical rights and professional responsibilities of private lawyers, little energy has been directed towards defining and defending the role and duties of government lawyers. As a result, the traditional understanding seems to be that government lawyers are to consider themselves as being under the same regimen and restrictions as their private counterparts. After criticizing this default approach, the article offers a fresh evaluation of what is different about the role of government lawyers and develops a more appropriate model for thinking about their professional responsibilities and ethical privileges. The central thrust of the article is the effort to appreciate legal ethics and professional responsibility as part of a larger democratic understanding of law and justice.

A. Introduction

Government lawyers are the orphans of legal ethics. While considerable thought and effort has been put into exploring and fixing the ethical rights and professional responsibilities of private lawyers, little energy has been directed towards defining and defending the role and duties of government lawyers. Not only do the various official codes of professional conduct remain almost silent in their applicability to government lawyers, there is also a paucity of academic literature and professional commentary about how these lawyers are supposed to approach their working obligations and institutional imperatives. As a result, the traditional understanding seems to be that government lawyers are to consider themselves subject to the same regimen and restrictions as their private counterparts. Yet this default approach is obviously wanting in many regards. In particular, it fails to appreciate the important differences between the functions of government lawyers and private lawyers and, therefore, fails to recognize that the ethical duties and professional

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obligations imposed on private lawyers do not transfer easily or usefully to the different context of government lawyers. Consequently, as the number and importance of government lawyers continue to grow, it is more than timely to offer a fresh evaluation of what is different about the role of government lawyers and to develop a more appropriate model for thinking about their professional responsibilities and ethical privileges. This short article is an attempt to begin that important theoretical task.

The central thrust of this article sees legal ethics and professional responsibility as part of a larger democratic understanding of law and justice. While a democratic focus has commanded the attention of most commentators when it comes to assessing the appropriate role of judges in fulfilling their common law and constitutional duties, there has been almost no corresponding democratic concern with the professional role of lawyers.[1] The relationship between democracy and legal ethics tends to be stated implicitly and viewed as secondary, even though many similar dilemmas and challenges arise in both the lawyering context and the adjudication realm. Accordingly, I make an initial foray into this neglected field and put a democratic sensibility at the heart of my approach to reframing the responsibilities of government. After exploring the democratic basis for the traditional private model of ethical lawyering, I look to how the concept of the "public interest" might be relied on to illuminate the context in which government lawyers work and the implications this has for their ethical obligations. Of course, democracy is one of the most contested terms in the legal and political lexicon, having almost as many meanings as there are democrats. While it is important to be sensitive to such divisions of opinion, this ought not to present an insuperable obstacle to grounding some general and broad observations about the role and responsibilities of government lawyers in a democratic society. Moreover, the application of such an approach to legal ethics recommends that some traditional understandings of government lawyers' ethical duties and professional constraints (*e.g.*, zealous advocacy and confidentiality) may need to be reformulated and reworked.

B. Democracy and Legal Ethics

Although there is much debate and disagreement over democracy's precise meaning and requirements, its core commitment is to the understanding that people should rule over themselves. Treated as having procedural (*i.e.*, participation, voting, etc.) and substantive (*i.e.*, security, welfare, etc.) dimensions, albeit both heavily contested, strong democracy is committed to the idea and practice that governance is to be *for* the people and, as importantly, *by* the people. However, the realities of modern states and large-scale

[1] Of course, the democratic focus on adjudication has not led to any agreement on what adjudication is and ought to be about. Nevertheless, there is almost universal agreement that the effort to understand adjudication in democratic terms is one of the compelling mandates of judicial scholarship. See e.g. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

governance mean that democratic proponents must be prepared to compromise on some of democracy's more idealistic aspirations if it is to be implemented in an efficient and efficacious manner. Like most political theories, therefore, democracy focuses on the distribution and exercise of power. Democrats are concerned less with power in itself and more with the basis on which it is allocated, with how it is exercised, and with the use to which it is put. At bottom, democracy seems to involve a recognition that power should be devolved and shared, and when that is not practicable, that power be exercised by those democratically authorized to do so with responsibility and accountability. Consequently, modern democratic governance effects a practical compromise by establishing a system of governance that is at least for the people if it is not always by the people. It does this by ensuring a division of powers and responsibilities among institutions and actors so that the allocation and exercise of power is diffuse, disciplined, conditional, temporary, and accountable. The basic gamble is that although a gap between the rulers and the ruled and between the powerful and the powerless will persist, the smaller the gap and the better its means of scrutiny, the more democratic the society will be.[2]

However, if democracy is to make good on its emancipatory promise, it must be willing to confront and eradicate abuses of power from whatever source they arise. From a citizen's perspective, it surely makes little difference whether the concentration of power and its exercise is technically public or private in origin. In particular, sustained efforts must be made to ensure that power is not held by a small group of elites and exercised with little regard to the interests of others. In an important sense, the key contemporary challenge remains as much about whether the majority will ride roughshod over the minority as whether a privileged minority—be it the monied few, the judicial aristocracy, the political elite, the bureaucratic oligarchy, the corporate nabobs or, of course, the legal profession—will ride roughshod over the majority. Democracy is devoted to exerting a centrifugal rather than centripetal influence on power. Too often, democracy and its institutions have been hijacked by the elite, even if claiming to speak and act for the interests of all Canadians. This is more a form of benevolent despotism which, no matter how benevolent, remains despotic and cannot be democratic in operation or effect. Accordingly, democracy demands that neither the majority oppress the minority nor that a minority rule over the majority. Both are anathema to the democrat.

It is against this backdrop that the present models of legal ethics and professional responsibility have developed. As part of a larger democratic compact, the existence of a large and powerful legal profession presents both a boost and a threat to the proper establishment and maintenance of democratic governance. On the one hand, a strong and forceful legal profession is a vital resource in holding governments to democratic account and guaranteeing that all citizens are empowered by vigorous representation in their

[2] For my own general stance on democracy, see Allan C. Hutchinson, *The Companies We Keep: Corporate Governance in a Democratic Society* (Toronto: Irwin Law, 2005) at 59-83.

dealings with governing bodies and other powerful elites. This task pushes towards a variety of rules and regulations which protect the legal profession's independence and entitle it to act as a bulwark between state oppression and citizens' freedom. On the other hand, in fulfilling that essential democratic task, there is a real danger that the legal profession will itself become an elite centre of power which will put its own interests ahead of those of its clients and that will fail to serve the broader public interest. This possibility suggests that a range of mechanisms will need to be put in place to ensure that the legal profession is held accountable to the public at large, and that its resources and prestige are not hijacked by any one segment of society. The challenge is to craft a set of regulatory, legal, and ethical arrangements that allow and require members of the profession to act in a way that satisfies the demands of democracy and the public interest by contributing to and facilitating the devolution and accountability of power.[3]

The underlying and animating model of the ethical lawyer is as a "special purpose friend" to his or her clients.[4] As super-technocrats, lawyers are considered to possess a cultivated set of talents and techniques which they are supposed to deploy for the sole advantage of the people and private institutions who hire them. Positioned between the state and its citizenry, the legal profession is there to ensure that people are aware of their rights and are able to rely on them in dealing with the state or other private actors. As such, lawyers are to regard themselves as being neutral on the substance and form of the law as well as on their clients' agendas and interests. Not only is there no need for lawyers to act in solidarity with their clients' stance, but there are important political and moral reasons why lawyers should be consciously indifferent to their clients' causes and goals. This is because the relationship between lawyers and clients is built upon trust and respect: clients are to trust lawyers to act in the clients' best interests and, in return, lawyers will respect the clients' autonomy and interests. Within a largely adversarial system, lawyers' primary obligations are to their clients. While it is now excessive to suggest that they are "required to treat outsiders as if they were barbarians and enemies,"[5] lawyers are expected to be single-minded in their devotion to their clients' cause and to use whatever legitimate means are at their disposal to advance it.

The most obvious example of this uncompromising effort to act as a special friend in an adversarial setting is the traditionally conceived role and responsibilities of the criminal defence counsel. As accused individuals, citizens are pitted against the state, with all its

[3] I offer a very stylized and schematic account of the standard model of ethical lawyering. The fact that this model has severe limitations (*e.g.*, insensitivity to the different needs of wealthier and poorer people) and is open to strong criticisms (*e.g.*, differential access to legal services) is beyond the immediate scope of this paper. For a fuller discussion and a critical account, see Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed. (Toronto: Irwin Law, 2006) at 19-59.

[4] Charles Fried, "Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1976) 85 Yale L.J. 1060.

[5] Charles P. Curtis, "The Ethics of Advocacy" (1951) 4 Stan. L. Rev. 3 at 5.

resources and power, and are in urgent need of a friend who is always and unconditionally on their side. Charged with the task of raising a reasonable doubt, criminal lawyers are expected to commit themselves to doing all they can to ensure that their client is acquitted and that the state does not exercise its powers of punishment without respecting the rights of those it proceeds against, whether they are guilty or innocent. Of course, not all or even most lawyering is concerned with the criminal justice system. However, the criminal defence model holds great (and perhaps too much) theoretical sway in defining the basis and limits of lawyers' ethical role generally. The strict adversarial ethic has been largely transposed to the non-criminal law setting so that private lawyers are expected to adhere to a similar partisan role in representing their clients. Within such an account of lawyers in a democratic society, it will be apparent that lawyers are thought to advance the public interest by standing squarely in the citizens' corner and promoting or protecting their private interests against the government or against other citizens, in accordance with existing law and policy. As such, although this professional role is decidedly amoral, in that lawyers are not expected or required to take up their clients' interests and causes as their own or to defend them morally, it does have a strong moral and democratic underpinning.

Under this traditional model of lawyering, the basic contours of the lawyer-client relationship take on a fairly obvious shape and substance. Apart from any general contractual obligations or tortious duties owed to the client, the lawyer is considered to be in a fiduciary relationship with the client. Consequently, lawyers are obligated to ensure that they act as zealous partisans on behalf of their clients, demonstrate undivided loyalty to and are entirely candid with their clients, avoid conflicts of interest, and give the highest confidentiality to their clients' communications. Moreover, it is generally accepted that one lawyer's client is considered to be the client of all the members in the retained lawyer's firm and, therefore, will be entitled to the same duties and obligations from all those lawyers as the circumstances allow: "it is the firm, not just the individual lawyer, that owes a fiduciary duty to its clients."[6] Each of these obligations flows from the basic democratic account of professional roles and responsibilities. However, as part of the general compromise implicit in the democratic account, there are occasions on which lawyers must temper their zealous advocacy and loyalty in the public interest. Lawyers' adversarial zeal on behalf of clients is mitigated not only by competing duties to the courts (*e.g.*, not to mislead) and the public (*e.g.*, disclosure of future serious crimes), but also by the basic duty to one's self to be honest and honourable. Nevertheless, lawyers do owe special duties to their clients and are not only entitled, but are obliged to give those interests priority in any clash with the interests of others. While those other interests might still count, they count for much less and, except in extraordinary circumstances, only when they are not in direct conflict with the interests of the lawyer's clients.[7]

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[6] *R. v. Neil*, [2002] 3 S.C.R. 631 at para. 29. See also Allan C. Hutchinson, "Who are 'Clients'? (And Why it Matters)" (2005) 84 Can. Bar Rev. 411.

[7] There is, of course, a less strict and softer interpretation of this traditional model which, although still retaining the primary duties of loyalty, zealous advocacy, and confidentiality, contends that unconditional loyalty to clients'

C. Government Lawyers

Of course, not all lawyers practice in the same circumstances. Indeed, it can be persuasively argued that it is no longer accurate or useful to talk about a Canadian legal profession or a typical Canadian lawyer.[8] Instead, there is now a multiplicity of roles and positions, ranging from the solo practice to the large corporate bureaucracy to the small partnership to government. The days of the fungible lawyer or legal practice are long gone. A diverse group of lawyers is engaged in a wide variety of practices. Who practises law (men and women, young and old, black and white, domestic and foreign, etc.), where they do it (office towers, shopping malls, clinics, home basements, government offices, mobile vans, etc.), how they do it (with entrepreneurial flair, part-time, on a shoestring, as big business, etc.), who they do it for (Aboriginal people, rich individuals, international conglomerates, homeless persons, small businesses, etc.), and what they do it for (subsistence income, personal satisfaction, enormous income, social prestige, political influence, etc.) have all gone through a transformation. It might be thought, therefore, that this changing landscape of professional practice would have significant implications for how the rules and models of ethical lawyering apply: different kinds of lawyers might be treated differently in terms of the ethical obligations placed upon them and the professional expectations demanded of them. Whether and how this will be done has not yet become clear.

Government lawyers—those who are employed by or sub-contracted to work for federal, provincial, or local governments and related agencies and public bodies—are largely held to the same ethical standards and requirements as private lawyers. The almost complete silence of the various regulatory codes on the role and responsibilities of government lawyers can be reasonably assumed to recommend that there are no substantially different expectations of government lawyers. In a rare explicit acknowledgement of a possible distinction between the roles of private lawyers and government lawyers, the *Code of Professional Conduct* states that lawyers in public office must continue to maintain the same high standards expected of lawyers in private practice because their position "is in the public eye" and, therefore, "the legal profession can more readily be brought into disrepute" by misconduct.[9] Although American courts have occasionally placed a higher standard on government lawyers, Canadian courts have refused to hold government

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interests will result in lawyers facilitating substantive social injustice. Instead, it places more emphasis on the broader secondary duties of the lawyer to the court and to third parties. See David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988). See also William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard University Press, 1998).

[8] Harry W. Arthurs, "Lawyering in Canada in the 21st Century" (1996) 15 Windsor Y.B. Access Just. 202.

[9] Canadian Bar Association, *Code of Professional Conduct* (2006) c. 10, commentary, s. 1 [CBA, *Code of Professional Conduct*]. This more likely applies only to lawyers in elected office, but it can reasonably extend to government lawyers generally, even though it says and demands very little of them.

lawyers to a higher standard than lawyers in private practice. Indeed, one court has gone so far to say that "all lawyers ... are subject to the same single high standard of professional conduct" and that "it is not flattering to [other] lawyers ... to say that most of them are held to a lower standard of professional conduct than government lawyers."[10] The most that seems to be conceded is that even though the general rules of professional conduct apply equally to government lawyers, there needs to be some adjustment and modest refinement in their application to those different situations which confront government lawyers.

Much of the day-to-day work done by government lawyers can be reasonably compared to that of private lawyers: they advise persons and institutions on existing laws and regulations, develop effective legal strategies, and then implement and vary those strategies as circumstances demand. However, this comparison only holds at a very superficial level. There is little similarity between the work and situation of a solo practitioner or small partnership lawyer in a small town and that of a federal Department of Justice litigator. The overall context in which government lawyers operate is markedly different from that of private practice. Government lawyers are charged with the task of acting on behalf of government and placing the public interest ahead of the interests of any particular individual; there are many statutory, constitutional, and regulatory initiatives that impinge upon government lawyers. Private lawyers do not need to be directly, but only tangentially, concerned with the public interest (or, more accurately, attention to the clients' private needs is largely considered to be advancing the public interest). They also have a greater range of discretion in both whether they accept certain files or clients and under what circumstances they are prepared to withdraw from cases or discontinue their clients' representation. Because government lawyers are both legal practitioners and employees, they are more restricted in their options. However, in this one regard at least, government lawyers are in not so different a position from junior associates in large metropolitan law firms: they have little choice about who they represent, what files they take, and how they mange those files. Both the large firm lawyer and the government lawyer must follow instructions in all ethical and professional matters unless they are prepared to take an employment-threatening stance.[11]

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[10] *Everingham v. Ontario* (1992), 88 D.L.R. (4th) 755 at para. 18 (Div. Ct.). The CBA also states that "the lawyer who holds public office should, in the discharge of official duties, adhere to standards as high as those that these rules require of a lawyer in the practice of law." See CBA, *Code of Professional Conduct*, *ibid.*, r. 10. See also Law Society of Upper Canada, *Rules of Professional Conduct*, r. 6. However, I will not deal with the particular responsibilities and duties of elected officials, like the Attorney General or Minister of Justice. See Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31 Queen's L.J. 598.

[11] I will pursue this important point in Part E below.

The significant difference between private lawyers and government lawyers is that the latter have a much greater obligation to consider the public interest in their decisions and dealings with others than the former. This is particularly so in the case of the criminal prosecutor. Because prosecutors fulfill a "public function," it must be carried out "fairly and dispassionately."[12] Consequently, the duty of prosecutors is not to seek convictions, but to adopt an almost quasi-judicial obligation which excludes any notion of winning or losing. The prosecutor's duty "is not to seek a conviction," but to present all "credible" and "relevant" evidence to the court so "that justice may be done through a fair trial."[13] As such, prosecutors operate in a dual capacity: as a partisan advocate (*i.e.*, they must seek convictions for the guilty) and as a court administrator (*i.e.*, guard against the wrongful convictions of the innocent). These different roles and responsibilities were made clear by Justice Rand in *Boucher*:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor ... is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[14]

It might also be contended that in the same way that criminal lawyers can be considered to be in a different position from private lawyers, government lawyers might also be viewed generally as operating in a significantly different context than their prosecutorial colleagues. Yet this contention seems less convincing—the differences between criminal lawyers and private lawyers are much more significant than those between government lawyers generally and prosecution lawyers specifically: prosecution lawyers are a species of government lawyers, not an entirely different genus. While they do not fulfill exactly the same roles or assume exactly the same obligations, government lawyers and prosecution lawyers both share a common duty to advance the public interest as a direct and explicit undertaking. Indeed, it can be argued that all government lawyers, including prosecution lawyers, are government bureaucrats first and lawyers only second. Each of them is involved in the important task of formulating and implementing government policy within a specified and sophisticated structure of constitutional, legislative, administrative, and judicial requirements. This difference in roles and responsibilities can be analogized to the

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[12] CBA, *Code of Professional Conduct*, *supra* note 9, c. 9, commentary, s. 9.

[13] *Ibid*.

[14] *R. v. Boucher*, [1955] S.C.R. 16 at para. 26. See also *R. v. Trochym*, [2007] 1 S.C.R. 239.

division between the laws and regulations which govern the operation and orientation of private and public bodies generally. The development of constitutional and administrative law has been marked by the approved imperative to hold public actors to different standards of conduct and accountability than their private counterparts.[15] Informed by a distinctly democratic sensibility and commitment to the public interest, courts have required public bodies to look to a broader set of interests than their own parochial and partisan concerns in determining the most appropriate and reasonable course of action to be followed. In short, like the bodies that they serve and represent, government lawyers are different in that they are expected to have a more expansive and more public appreciation of their roles and responsibilities than their private counterparts.

D. In the Public Interest

It can be insisted, therefore, without too much serious resistance, that government lawyers are differently situated than private lawyers in that their work takes place more directly in the immediate field of the public interest. However, because there are so many competing notions of what comprises the public interest and how it should apply in particular situations, it is a notoriously difficult and contested task to designate what ends are in the public interest and what means—which must also be consistent with the public interest—are best pursued to realize those ends. There is no certainty as to what those values are and even less on what they demand in particular situations: democracy is premised on the belief that such determinations are inherently political and are best made by the people themselves. However, in seeking to fix and frame the ethical obligations and professional responsibilities of government lawyers, there is no compelling need to enter into that sprawling debate in any definitive or exhaustive way. The more modest and pertinent question concerns the role and responsibilities that government lawyers do and should have in explicating or contributing to the government's duty to act in the public interest. Fortunately, reference back to a democratic appreciation of the public interest can point to possible answers to that central quandary.

In any populous and contemporary society, there will have to be certain trade-offs in how the government works and how power is allocated and exercised. Democracy is no exception. While it will be important to maximize the circumstances and settings in which popular participation occurs, there will be limits on how this can be done. Problems of scale and efficacy suggest that compromises will need to be made. For instance, it must be determined how many people will be involved in the general governance and decision-

[15] See *e.g.* Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough: Thomson Canada, 2006). See also David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law*, 4th ed. (Scarborough: Thomson Canada, 2004).

making process of society, for how long they will be involved, and by what method they will be selected and/or removed. However, in settling on the kind and manner of such compromises, it will be important to make such trade-offs *within* a democratic account of governance and not *with* a democratic account of governance. This means that while it will be necessary to confer public power on some persons over others at times, the role of those people presently out of power will not be exhausted by occasional electoral involvement; democracy is a mode of government by the people as well as for them. Even citizens who are not involved in government and decision-making as to the public interest have a responsibility to keep a watchful eye on those in power and to hold them accountable. As such, both those in power and those out of power have mutually-reinforcing duties and obligations to advance and maintain the democratic project. Accordingly, a democratic approach to the problems of the allocation and exercise of power will likely work along two axes: participation and accountability.

The participatory imperative is intended to maximize the opportunities not only for popular involvement in decision making and policy implementation, but also for ultimate responsibility for those tasks. Democracy is not intended to be a supplement to or cover for rule by an expert elite. While elected officials would do well to seek the advice of experts, it is entirely their choice as to whether they follow that advice. Of course, because these political delegates are given such extensive power and responsibility, an accountability check becomes essential; democracy must guard against the power-hogging tendencies of elected officials as much as any other group. This gives rise to the accountability imperative: elected officials must be answerable to the other citizens they represent and on whose behalf they act. Along with the usual electoral processes and more discipline-oriented measures, it will be important to ensure that the practice of democratic governance is as open and transparent as possible. Without the necessary information about what government decisions are made and how they are made, the citizenry will be unable to exercise its own democratic responsibilities and rights in overseeing public officials and in deciding whether to re-elect them. Consequently, the role of public officials involves a democratic *quid quo pro*. While those in power by virtue of the extant democratic processes might obtain certain temporary privileges and priorities, they can also expect to be placed under much greater scrutiny and appraisal than other persons in exercising that power. Quite simply, the accrual of public power carries with it the moral and institutional obligation to exercise it in the public interest and to be seen to do so. By relying on both participation and accountability, the necessary trade-offs in establishing genuine democratic governance in large societies can be made *within* rather than *with* democracy.

This democratic understanding of the allocation and exercise of public power recommends some particular responses to the challenge of determining the role and responsibilities of government lawyers. As regards zealous advocacy and confidentiality, such a democratic sensibility seems to pull in two different ethical directions: it favours close adherence to the traditional model of private lawyering in some instances and deviations from it in

others. For instance, as regards zealous advocacy, it seems to suggest that insofar as government lawyers are expected or directed to act in the public interest, they will take their lead from their political superiors and defer to such officials on what the public interest demands in deciding on policy and implementing it. However, as regards confidentiality, although they will not be permitted to act wantonly or capriciously, they will be under a less onerous obligation to keep work-related communications and information confidential. Indeed, when assessed from the public interest, government lawyers might well have a professional duty in some circumstances to disclose publicly certain communications and information. Government lawyers will determine their moral compass by the requirements of maintaining a loyal and keen friendship not with their political superiors or government as such, but with the public interest more generally. Public officials are entitled to loyalty from government lawyers not directly, but by virtue of their roles as the democratic guardians of the public interest. Both of these positions on zealous advocacy and confidentiality need further elaboration and justification.

E. Zealous Advocacy

At the heart of private lawyers' duty of loyalty to their clients is the obligation to act as their zealous advocate. This demands a single-minded focus on clients' interests. As Lord Brougham declaimed in defending the English queen against treason charges, the lawyer's duty is "to save that client by all means and expedients, and at all hazards and costs to other persons, and ... in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others."[16] Although that degree of passionate commitment might not be required today, it is only in exceptional and relatively extreme circumstances that lawyers are expected to curb their unconditional enthusiasm for their clients' interests in the name of the public interest. Moreover, even if this standard were to be applied to government lawyers, it would demand certain concessions. Lord Brougham's exhortation that lawyers must be prepared to separate "the duties of a patriot from those of an advocate, and casting them, if need be, to the wind" and to "go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion"[17] hardly fits easily with the role of the modern government lawyer. Presumably in acting in the public interest, government lawyers are to advocate on behalf of the government, not against it, and will be sensitive to the country's fate.

Whether by design or default, government lawyers will have an important role to play in thinking through and answering contentious and crucial matters about what ends and means are in the public interest. It is difficult to take seriously any suggestion that government lawyers should have no legitimate or effective role at all in such policy

[16] J. Nightingale, ed., *Trial of Queen Caroline*, vol. 2 (London: J. Robins & Co., 1820-21) at 8.

[17] *Ibid.*

formation and implementation. Government lawyers can and should make a valuable contribution in shaping discussion about what represents the public interest in any particular instance. However, the crucial issue is who gets to determine what is in the public interest when governments lawyers disagree or, more pertinently, when government lawyers and their political and/or elected superiors disagree. It is difficult to make a strong claim that government lawyers should have the final and determinative call on what is in the public interest under a strictly democratic model of good governance and ethical lawyering. It would be undemocratic and perhaps even anti-democratic for government lawyers to be authorized by the legal profession as a matter of ethical discretion or professional responsibility to put their own views on the public interest ahead of the views of public officials. As an elite group of expert professionals, lawyers have no better and perhaps worse claims to determine what is in the public interest than elected officials, or even citizens generally. As John Hart Ely might have said, "we may grant until we're blue in the face that [elected officials] aren't wholly democratic, but that isn't going to make [lawyers] more democratic than [elected officials]."[18] As such, a commitment to democracy strongly recommends that aside from proposed courses of criminal or illegal conduct, government lawyers should not have any kind of veto over such determinations of the public interest by elected officials or political superiors. Indeed, after exhausting all opportunities for persuasion and discussion, government lawyers must advance the determined goals or strategies with customary enthusiasm or give up their position. Under any account of legal ethics or public interest, there is simply no role for half-hearted professional advocacy.

In developing and defending this general stance, there are two related aspects of the current understanding about lawyers' professional responsibilities that can be profitably examined: client identity generally and corporate representation specifically. First, it might be useful to come at this problem as if government lawyers are part of a traditional lawyer-client relationship. This would initially demand some appreciation of the identity of the client that they are intended to serve. This is by no means obvious. There are a number of candidates: the government as a whole; the branch of government in which the lawyer is employed (*i.e.*, executive, legislative, or judicial); the particular agency or department in which the lawyer works; the responsible officers who make decisions for the agency; and the public interest itself.[19] Because the professional codes seem to assume that

[18] Although this is a bastardized version of Ely's original quote that "we may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures," it is intended to be in the spirit of Ely's original quote. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 67. For views along a similar line, see Geoffrey Miller, "Government Lawyers' Ethics in a System of Checks and Balances" (1987) 54 U. Chi. L. Rev. 1293 at 1294. See also Peter L. Strauss, "The Internal Relations of Government: Cautionary Tales From Inside the Black Box" (1998) 61 Law & Contemp. Probs. 155 at 156-57.

[19] Roger C. Cramton, "The Lawyer as Whistleblower: Confidentiality and Government Lawyer" (1991) 5 Geo. J. Legal Ethics 291 at 296.

government lawyers will be bound by similar ethical duties as their private counterparts, they have little if anything to say on this important choice between the likely alternatives. However, the Alberta Code does state that "the client of a lawyer employed by the government is the government itself and not a board, agency, minister or Crown corporation."[20] Accordingly, even if the government, broadly understood, is the client or even if it is something as abstract as the public interest itself, the more pertinent question is not "who is the client?" but "who gets to speak on the client's behalf?" In either case, it seems unlikely that government lawyers have any prior or privileged claim to make that call on behalf of the citizenry at large as compared to other government officials. After all, that would in effect make government lawyers their own clients and they would have no greater responsibility than to take *bona fide* instructions from themselves.

Accordingly, from a democratic perspective, it can be argued that whether it is the government generally or the public interest at large that is to be served by government lawyers, there is no compelling reason why the government lawyer's view as to what to do should take precedence over the view of elected officials and/or political superiors.[21] Of course, government lawyers have a significant contribution to make in debates within government about how to determine what the public interest demands; they often have the training, experience, and knowledge to help develop a nuanced and sophisticated approach to identifying the public interest and crafting a range of practical strategies for its realization in difficult circumstances. Indeed, being relatively independent of political pressures and partisan agendas, government lawyers are well placed to act as trusted advisors to their political superiors. They can adopt a broader and deeper perspective on how the public interest can be advanced, anticipate the response of courts to particular arguments and directives, and caution their political superiors on legal and policy tactics that might backfire. Nevertheless, it is incumbent on government lawyers to leave the final decision on what government policy and legal strategy should be adopted and implemented to elected officials. As such, I can do no better than echo approvingly the wise words of Henry Hart and Albert Sacks:

> Government lawyers, of course, have a wide variety of responsibilities as advisers to other officials. ... These responsibilities are akin to those of a private lawyer when he [or she] advises a private client, and they include the same inescapable residuum of personal responsibility which is inherent in the exercise of any profession. Indeed, in the case of a government lawyer this personal responsibility not merely to give accurate advice but to try to

[20] The Law Society of Alberta, *Code of Professional Conduct* (2007) c. 12, commentary, C.1.

[21] For a defence of the position that a lower standard of loyalty is owed by government lawyers as a result of the public interest or the common good, see Steven K. Berenson, "Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?" (2000) 41 B.C. L. Rev. 789 and "Rethinking the Professional Responsibilities of Federal Agency Lawyers," Note, (2002) 115 Harv. L. Rev. 1170.

> guide decision so as to keep it within proper bounds has a special urgency, for a lawyer's client is not merely the official whose action is immediately in question but the government of which the official is a part and in some sense the whole society for which the government speaks. Nevertheless, the power and the ultimate responsibility of decision in these situations belong to the official whom the lawyer advises. The lawyer acts essentially in a staff capacity, and has always to remember this.[22]

Although government lawyers are in a different position than private lawyers, a useful analogy can be drawn to the context and challenges faced by those lawyers who represent corporations or other similar organizations. While it is clear and undisputed that the corporation itself is the client for the purposes of the lawyer's ethical obligations, it remains less settled as to how this relationship is to be operationalized in light of the fact that a corporation only exists as an abstract entity. As a general matter, it can be stated that the lawyer's ultimate obligation of allegiance is to the corporation itself and not to any of its officers, shareholders, employees, or other persons who might control the corporation.[23] However, it is plain that corporate lawyers are not entitled to determine for themselves what is in the best interests of the corporation and how best to protect or promote those interests. In any dispute or disagreement about how the corporation should be represented, the individual person designated to speak on behalf of the corporation by its board of directors has the first and last call. Corporate lawyers can and should contribute to that debate, but they are not at liberty simply to prefer their own sense of what is in the corporation's best interests.[24] Consequently, like corporate lawyers, government lawyers would be well advised, on assuming their position as a government lawyer or accepting any file, to obtain express clarification as to which individuals have authority to instruct them on behalf of the government or public interest.

If there are good democratic reasons why private lawyers should be required to defer to their clients' own assessments of their best interests, there are even stronger reasons why government lawyers should defer to the assessments of democratically elected and popularly accountable officials as to what constitutes the public interest. It seems almost axiomatic that if the public is in the best position to assess the public interest, then its representatives are in a better position than lawyers to do so. There is a temptation to suggest that citizens do not always know what is best for them, but this is exactly the kind of elitist thinking that democracy rejects and seeks to overcome. Like judges, lawyers can

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[22] Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* by William N. Eskridge, Jr. & Philip P. Frickey (Cambridge: Cambridge University Press, 1994) at 1047.

[23] CBA, *Code of Professional Conduct*, *supra* note 9, c. 5, commentary, C.16.

[24] Nevertheless, as I discuss below, there might well be some extreme circumstances in which corporate lawyers could be required to question and occasionally ignore the instructions of the person who has been designated to speak on behalf of the corporation.

claim no special insight or privilege in evaluating what is in the public interest. Indeed, also like judges, they might confuse established or special interests with what is in the public interest, more generally construed. The legal profession as a whole can hardly be portrayed as a bastion of popular or progressive thinking or as unerring calculators of the public good. Historically, they have a mixed record in their efforts to give substance to the public interest over the years and in particular instances.[25] Moreover, apart from their dubious judgment on such matters, any plea by or on behalf of government lawyers to be allowed to pursue their own rendition of the public interest over that of their political superiors will also have the effect of holding the public interest hostage to one more elite group. No matter how well intentioned that group of government lawyers might be, such a state of affairs will be almost anathema to the committed democrat.

This stance may well mean that government lawyers will be asked to take positions or pursue tactics with which they strongly disagree or which they might think to be against the public interest. This is an institutional price that will have to be paid, because democracy is not so much about getting the right answers, insofar as they can ever be said to exist, but about who gets to make difficult decisions. However, in being required to accede to the lawful instructions of their political superiors, government lawyers are in no worse position than private lawyers. Government lawyers' deference regarding the determination of the public interest to officials with a better democratic mandate than their own is not as significant a problem as some protest, as there are often lawyers on the other side or judges who are able to declare such views of the public interest to be wrong-headed or even illegitimate. Moreover, if government lawyers find themselves in situations in which they no longer feel able to represent a certain objectionable position, make a certain objectionable argument, or pursue a particular legal strategy, they will have to consider whether they can or should remain in their present employment. Further, there is no expectation that they breach legal rules or statutory regulations as a matter of professional responsibility; no professional code allows lawyers to act illegally under the supposed ethical cover of zealous advocacy.

As with private lawyers, there are no easy answers or solutions to ethical dilemmas involving government lawyers. It is simply naive or self-deluding to pretend that legal professionals, be they private lawyers or government lawyers, can expect to arrange their lives so that they not only always get to do what they want, but also have such a course of action approved as being ethically virtuous or even merely acceptable. Being ethical and being a lawyer can be exacting, inconvenient, and even harmful to the lawyer's own interests. This ought to come as no surprise because it is what makes law a profession as much as a business and emphasizes the onerous side of the power-responsibility equation.

[25] This is not the place to offer chapter-and-verse support for such a relatively moderate assessment. Suffice it to say that there are as many specific instances of lawyers and judges getting it wrong as opposed to right in advancing the public interest. See *e.g.* J.A.G. Griffith, *The Politics of the Judiciary*, 5th ed. (London: Fontana Press, 1997) and A. Hutchinson, *Evolution and the Common Law* (Cambridge: Cambridge University Press, 2005).

While government lawyers may occasionally have to forego their employment (or at least threaten such a move), they should expect no special dispensation in fulfilling the ethical duties and professional responsibilities of their chosen profession.

F. Confidentiality

Up to now, it might be reasonably thought that, although I have argued that government lawyers are in a different position than private lawyers and that their ethical obligations may be correspondingly different, the role and expectations of government lawyers is no different than those of their private counterparts—while acting in the public interest, they must ultimately defer to the views of their superiors as to what ends and means are in the public interest. However, though government lawyers must act as zealous advocates of the government's view of the public interest, this does not mean that their other ethical duties and professional responsibilities will fall entirely into line with those of private lawyers. If government lawyers are to advance the public interest (as determined by their political superiors), this will pull in different directions in crafting the precise impact upon their professional responsibilities when measured against the private benchmark. In particular, government lawyers are in a different position when it comes to the demands of confidentiality. In short, the same democratic-based arguments that recommend that government lawyers should be the government's zealous advocates also support the proposal that they should *not* be under the same regime of ethical expectations in regard to maintaining confidentiality.

The traditional model of ethical lawyering places a strict duty on private lawyers to keep their clients' communications on legal matters entirely to themselves. It inures to the benefit of clients, not lawyers, and can only be waived with the client's clear approval. Although confidentiality cannot be used as a cover for criminal communications, the duty prevents lawyers from utilizing or publicizing information received for their own or anyone else's benefit. The demands of this duty are relatively uncompromising and can only be breached by lawyers in exceptional circumstances—to defend themselves against allegations of criminal conduct, civil liability, or professional misconduct; to establish or collect their fees; and to avert an imminent risk to an identifiable person or group of death or serious bodily harm.[26] Even when they are permitted to reveal privileged communications, they may only do so in the most restricted way that least adversely affects their clients' interests. Moreover, the duty of confidentiality does not expire when the lawyer no longer represents the client. However, when the rationales offered for enforcing such a strict duty among private lawyers are examined in the setting of government lawyers, their application in terms of their force and reach is by no means readily apparent. Indeed, the reasons for insisting upon such a duty of confidentiality have far less cogency in regard to government lawyers.

[26] *Smith v. Jones*, [1999] 1 S.C.R. 455 at para. 77.

The established basis for the duty is that clients must be able to confer with their lawyers so as to ascertain and protect their legal rights. In order to obtain full and frank legal advice, it is considered appropriate that clients should have no fear that those communications will become public and possibly be used against them. It is considered that the public interest is best served by placing such communications outside public scrutiny, even if that might seriously impair the search for truth: the sanctity of certain relationships (*e.g.*, the lawyer-client relationship) are deemed to have sufficient social significance to outweigh the priority given to the ascertainment of truth in the legal process. In the leading contemporary Canadian case, the Supreme Court offered a convenient summary of the lawyer-client privilege:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.[27]

Although this privilege has considerable, if not irresistible, appeal in the context of private individuals and their lawyers, especially in the criminal law context, it loses much of its credibility and gravitas when transferred to the situation of government lawyers. Insofar as the rule of confidentiality is meant to protect the relatively powerless citizen against the state by ensuring effective legal representation through open communication, it does not seem either necessary or useful when the government is the putative client being protected.[28] While government business is important, it has no need of such privileges and protections. The dignity and vulnerability of individuals is not at stake in the same way. Indeed, the basic democratic commitment to openness and transparency as a vital prerequisite for accountability suggests that there is very little role for confidentiality in the affairs of government: confidentiality and open government do not sit at all well together.

In *Pritchard*, a disgruntled complainant sought production of an opinion from the Ontario Human Rights Commission's in-house lawyer. The Court held that solicitor-client privilege applies "with equal force in the context of advice given to an administrative board by in-

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[27] *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at para. 17 [*Pritchard*]. The classic statement of this justification is offered by Lord Brougham in *Greenough v. Gaskell*, (1833), 39 E.R. 618 at 620-21.

[28] See Lory A. Barsdate, "Attorney-client Privilege for the Government Entity" (1988) 97 Yale L.J. 1725 and James E. Moliterno, "The Federal Government Lawyer's Duty to Breach Confidentiality" (2005) 14 Temp. Pol. & Civ. Rts. L. Rev. 633.

house counsel as it does to advice given in the realm of private law."[29] The Court refused to make any distinction at all between the role of government lawyers and private lawyers. This is surely a short-sighted decision. Government lawyers clearly have an obligation to pursue the public interest, not simply the private interests of their government client. Although the precise scope of that obligation might well be contentious, its existence and good sense is surely not. On its facts, it is difficult to appreciate why the Commission should be able to hide behind lawyer-client privilege as a way of frustrating the complainant's efforts to learn why her complaint was rejected. The opinion pertained to a public body's fulfillment of its explicit public interest mandate; there was no pending litigation where the recognition might be more compelling. As such, the court's failure in *Pritchard* to recognize *any* distinction between private lawyers and government lawyers is regrettable and flies in the face of basic democratic and institutional realities.

After all, the absolute duty of confidentiality is already under steady criticism in the corporate context, where the broad interpretation of privileged communications has begun to persuade some commentators and regulators that it might be desirable to place certain limitations and restrictions on the duty.[30] The need to facilitate the flow of information between the corporate organization, its employees, and its lawyers seems much less compelling than in the case of the isolated citizen who must deal with the state and its government departments. Out of concern that the duty is being utilized too easily to hide corporate mischief and even criminality from appropriate public scrutiny, there are efforts to restore a greater sense of balance between the need for confidentiality and the need for publicity so that greater weight is given to the public interest in determining appropriate occasions of required disclosure or perhaps noisy withdrawal.[31] Consequently, the reasons for maintaining strict confidentiality in such circumstances are less persuasive.

Similarly, even if there is to be a general duty on government lawyers to keep confidential communications between themselves and their political superiors and colleagues, it should be severely curtailed. If there are strong arguments against protecting the internal workings of corporations from public scrutiny, there are fewer reasons to do so in the case of governments. In a recent case, the Ontario Court of Appeal held that, based on broad *Charter*[32] considerations, government can be obliged to disclose information which falls

[29] *Pritchard*, *supra* note 27 at para. 21.

[30] See William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, Mass.: Harvard University Press, 1998) at 55 and Daniel R. Fischel, "Lawyers and Confidentiality" (1998), 65 U. Chi. L. Rev. 1.

[31] See *e.g.* "After Sarbanes-Oxley: A Panel Discussion on Law and Legal Ethics in the Era of Corporate Scandal" (2003) 17 Geo. J. Legal Ethics 67. For a general defence of the rationale for easing the confidentiality burden on government lawyers, see Christine Harrington, "Reevaluating the Duty of Confidentiality," Note, (2003) 47 N.Y. L. Sch. L. Rev. 423 and Daniel R. Fischel, "Lawyers and Confidentiality" (1998) 65 U. Chi. L. Rev. 1.

[32] *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

within the traditional lawyer-client privilege if there is a strong public interest in so doing; this was notwithstanding exemptions in pertinent access to information legislation.[33] While this decision speaks to the circumstances in which the government "client" is obliged to reveal what is otherwise privileged information (as opposed to the government lawyer), it points in the right democratic direction. As such, it is preferable to the dubious thrust of the *Pritchard* decision.

While it would be inappropriate to move to a situation in which government lawyers have no responsibility at all to preserve some degree of confidentiality in their professional activities, the public interest rationale supports the conclusion that any such duty should certainly cease to apply where the lawyer is no longer in the employment of the government and, more contentiously, even when still in government employ. Moreover, it would be advisable if former or present government lawyers did not breach confidences unless they had made a good faith decision that the public disclosure of such communications was strongly in the public interest. Although this would put lawyers in the position of determining the public interest (which I frowned upon and resisted in the context of zealous advocacy), it would only occur where lawyers were so concerned about public officials' mistaken or perverse reliance on the public interest that they were prepared to run the risk of relinquishing their positions as government lawyers. This is a heavy burden and might convince some that government lawyers should benefit from a lower threshold at which they would become empowered to blow the whistle on government misfeasance in regard to the public interest. Nevertheless, the major thrust of a democratic approach to the duty of confidentiality is that it is at best a rebuttable presumption.[34] Government lawyers might well better serve the public interest by breaking confidentiality than preserving it.

Another beneficial consequence of a looser obligation on government lawyers to keep confidences is its effect on the relationship between government lawyers and their political superiors. While government lawyers must be subservient to elected leaders and political officials in regards to what counts as the public interest in determining policy ends and legal means, those officials might begin to feel a little more pressure to ensure that they are acting in good faith in settling upon the demands of the public interest. Mindful that the bounds and demands of confidentiality were looser and that government lawyers might at some point in the future reveal their superiors' inappropriate motives, those superiors might be inhibited from using the public interest as a cover for crass or improper purposes. Elected officials would still have at their disposal the necessary statutory protection of state secrets to ensure that information held by government lawyers or

[33] *Criminal Lawyers Association. v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (C.A.).

[34] For a defence of the position that government lawyers are duty-bound to keep in strict confidence all communications and information, see Catherine J. Lanctot, "The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions" (1991) 64 S. Cal. L. Rev. 951 at 1012-13.

communications with them that legitimately jeopardized national security would remain out of the public domain. However, outside of this special kind of information and communication, it is entirely in accord with democracy and more attuned to the public interest to cultivate a government culture in which openness and transparency, not secrecy and obfuscation, are the order of the day. In this way, government lawyers will help citizens to better fulfill their continuing democratic responsibility to monitor and oversee the operation of government.

G. Conclusion

If this brief democratic inquiry into the theoretical role and responsibilities of government lawyers suggests anything, it is that the role and responsibilities of private lawyers are in need of more serious evaluation and revision. The democratic arguments as to why lawyers should act as the zealous and loyal advocates of private interests are not easy to reconcile with the public interest dimensions of democratic governance. Although it is undoubtedly in the public interest that people be free to promote and protect their own private interests, there is no reason why the vast resources and talents of the legal profession should be so unconditionally organized and deployed in line with those private interests. Insofar as there is a mandate for the traditional model of special friends at all, it would seem that it must be more evenly balanced and calibrated in favour of a more ample understanding of the public interest. Because the exclusive advancement of private interests will not always inure to the benefit of the larger society (except perhaps in the austere imagination of the unreconstructed free-market theorist), it behooves a democratic society to realign its stance on legal ethics so that it better incorporates a more public vision of lawyers' professional role and responsibilities. However, there is no reason to throw good money after bad by making the ethical obligations of government lawyers hostage to the traditional model of professional duty, or even to utilize that model as the only baseline against which to determine and measure the different role and responsibilities of government lawyers. As their importance to policy making and policy implementation becomes more apparent, government lawyers should have their professional responsibilities and ethical expectations regulated and disciplined with the special circumstances and conditions of their professional lives clearly in mind.

Sustainable Professionalism

By Trevor C.W. Farrow[*]

> *Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly found, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living. And just when they seem engaged in revolutionizing themselves and things, in creating something entirely new, precisely in such epochs of revolutionary crisis they anxiously conjure up the spirits of the past to their service and borrow from them names, battle slogans and costumes in order to present the new scene of world history in this time-honoured disguise and this borrowed language.*[1]
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> *[I]f lawyers cannot look at the society as a whole and say that certain aspects of their work … represent a plus for this society and for the world of our children, then they had better look to last-ditch defenses. Better yet, lawyers*

[*] Associate Professor, Osgoode Hall Law School, York University. Email: tfarrow@osgoode.yorku.ca. The Osgoode Hall Law Journal has granted the German Law Journal permission to reprint this paper. "Sustainable Professionalism" was originally published in a special issue of the Osgoode Hall Law Journal devoted to Legal Ethics & Professional Responsibility: (2009) 46:1 Osgoode Hall Law Journal 51. Parts of this article were first presented at two University of Toronto, Faculty of Law "Bridge Week" panels on legal ethics and professionalism entitled "Conceptual Frameworks for Legal Ethics" (8 November 2006 and 7 November 2007), one chaired by the Honourable Mr. Justice Stephen Goudge and the other by Lorne Sossin. I am grateful to my co-panelists—Randal Graham and Paul Paton—together with Stephen Goudge, Lorne Sossin, and Michael Code for helpful comments at those panels. This article has also benefited from numerous discussions with Adam Dodek, Janet Mosher, Robert Wai, Rusby Chaparro, Graham Hudson, Stuart O'Connell, and Mary Stokes in the context of creating Osgoode Hall Law School's new "Ethical Lawyering in a Global Community" course, for which I am the course director. I am grateful to Allan Hutchinson, Jamie Cameron, Peer Zumbansen, Adam Dodek, Alice Woolley, Annalise Acorn, the Osgoode Hall Law Journal and members of the German Law Journal student editorial board, and an anonymous reviewer for very helpful comments and suggestions on an early draft of this article, and to the German Law Journal for republishing this article (which is a slightly revised version of the original). Finally, I am also grateful to Alan Melamud for excellent research assistance.

[1] Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte" (1852) in Robert C. Tucker, ed., *The Marx-Engels Reader*, 2d ed. (New York: W.W. Norton, 1978) 594 at 595 [Marx, "Eighteenth Brumaire"]. I realize I am not the only one to see the instructive connections between Marx's "Eighteenth Brumaire" and professionalism (see *e.g.* Anthony T. Kronman, "Professionalism" (1999) 2 J.I.S.L.E. 89). I became aware of Kronman's use of Marx after making my own connections on the issue.

> *should try to find a way to salvage what is worth doing out of their work and be influential in the production of what is going to happen next.*[2]

The traditional narrative of the legal profession has run its course. Lawyers are looking for ethically sensitive ways to practice law that "assume greater responsibility for the welfare of parties other than clients"[3] and that increasingly amount "to a plus for this society and for the world of our children."[4] Lawyers are also seeking ways to practice law that allow them to get home at night and on weekends, see their families, work full or part-time, practice in diverse and "alternative" settings, and generally pursue a meaningful *career* in the law rather than necessarily a total *life* in the law.[5] Similarly, law students are hoping not to be asked to make a "pact with the Devil"[6] as the cost of becoming a lawyer, and are instead looking to find areas in the law that fit with their personal, political, and economic preferences.[7] An increasing number of legal academics are teaching, researching, and writing about progressive changes to the way we view the role and purpose of lawyering.[8] Law faculties are actively reforming their programs and creating centres and initiatives designed to make space for innovative ethics offerings and public interest programs.[9] Law

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[2] Martin Mayer, "The Trial Lawyers" in Grace W. Holmes, ed., *Excellence in Advocacy* (Michigan: Ann Arbor, The Institute of Continuing Legal Education, 1971) 51 at 60.

[3] Deborah L. Rhode, "Legal Ethics in an Adversary System: The Persistent Questions" (2005-2006) 34 Hofstra L. Rev. 641 at 649 [footnotes omitted] [Rhode, "Persistent Questions"]. See also David B. Wilkins, "Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics," Book Review of *The Lost Lawyer: Failing Ideals of the Legal Profession* by Anthony T. Kronman (1994) 108 Harv. L. Rev. 458 at 472.

[4] Mayer, *supra* note 2.

[5] Trevor C.W. Farrow, "Law: A Profession, Not a Life" (2002) 26 Advocates' Q. 217 [Farrow, "A Profession, Not a Life"].

[6] Duncan Kennedy, "Rebels from Principle: Changing the Corporate Law Firm from Within" (1981) Harv. L. Sch. Bull. 36 in Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method*, 2d ed. (New York: Aspen, 1998) 86 at 87 [Kennedy, "Rebels from Principle"].

[7] Much of my sense of law student preferences comes from countless direct discussions with my students over the years. See also Sophie Bryan, "Personally Professional: A Law Student in Search of an Advocacy Model" (2000) 35 Harv. C.R.-C.L.L. Rev. 277; Marilyn Poitras, "Through My Eyes: Lessons on Life in Law School" (2005) 17 C.J.W.L. 41; and James R. Elkins, "Thinking Like a Lawyer: Second Thoughts" (1996) 47 Mercer L. Rev. 511.

[8] See *e.g.* Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed. (Toronto: Irwin, 2006) [Hutchinson, *Legal Ethics*]; Rhode, "Persistent Questions," *supra* note 3 at 643. For a very useful discussion on trends in Canadian academic scholarship in the area of legal ethics and professionalism, see Adam M. Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 46 Osgoode Hall L.J. 1 [Dodek, "Canadian Legal Ethics"]. Further, there is a newly formed Canadian network of ethics scholars (of which I am a member) that is supported by the law school deans and that is currently seeking to create a Canadian Virtual Center for Legal Ethics and Professional Responsibility. See also Part C.II.

[9] See *e.g.* Osgoode Hall Law School, "Ethical Lawyering in a Global Community" course, online: <http://osgoode.yorku.ca/QuickPlace/trevorfarrow/PageLibrary852573410062FAF0.nsf/h_Toc/92be13faec1b583 90525670800167238/!OpenDocument> ["Ethical Lawyering"]; Osgoode Public Interest Requirement Program,

societies and other regulatory bodies are slowly chipping away at some of the time-honoured shields of ethically suspect client behaviour,[10] while at the same time facing demands for increased accountability.[11] The bench and the bar are taking an active interest in addressing a perceived growing lack of professionalism within the practice.[12] The public is increasingly skeptical of the distinction that continues to be drawn between legal ethics and "ordinary standards of moral conduct."[13] Finally, clients are not only expecting lawyers to actively canvass methods of alternative dispute resolution—the alternative to the adversarial and costly litigation process—but they are also demanding evidence of general sustainable professional practices from their legal counsel.[14]

These current, contextual, and contested realities have become badges of modern progressive lives in the practice of law, as well as its visions. Taken together, they are forming a new discourse for lawyers and the legal profession that is seeking to become personally, politically, ethically, economically, and professionally sustainable. It is a discourse that makes meaningful space for a lawyer's own principles, interests, and life preferences by balancing them with other important interests—including, but not dominated by, those of the client—in the context of the overall calculus of what counts as the "right" course of conduct both in a given retainer as well as, more generally, in a given career.[15] It is a discourse that seeks to make good on what has largely only amounted to

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"First Year Degree Requirements," online: <http://www.osgoode. yorku.ca/llb/first_year_requirements.html>. See also Harvard Law School, "Program on the Legal Profession," online: <http://www.law.harvard.edu/ rograms/plp/>; University of Toronto, Faculty of Law, "Centre for the Legal Profession, " online:<http://www.clp.utoronto.ca/site3.aspx>.

[10] In the US, see *e.g. Sarbanes-Oxley Act of 2002*, 15 U.S.C. § 307, § 7245 (2003); 17 C.F.R. § 205.3 (2005), which is discussed further in Rhode, "Persistent Questions," *supra* note 3 at 647-48. See also Deborah L. Rhode & Paul D. Paton, "Lawyers, Ethics and Enron" (2002) 8 Stan. J.L. Bus. & Fin. 9. In Canada, see *e.g.* Law Society of Upper Canada, *Rules of Professional Conduct* (adopted 1 November 2000, as amended), r. 2.02 (1.1), (5)-(5.2) [LSUC, *Rules*]. See also Paul D. Paton, "Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era" (2006) 84 Can. Bar Rev. 533; Paul D. Paton, "The Independence of the Bar and the Public Interest Imperative: Lawyers as Gatekeepers, Whistleblowers, or Instruments of State Enforcement?" in LSUC, *In the Public Interest* (Toronto: Irwin Law, 2007) 175.

[11] See *e.g.* Rhode, "Persistent Questions," *supra* note 3 at 657-58.

[12] See *e.g.* Chief Justice of Ontario's Advisory Committee on Professionalism, online: <http://www.lsuc.on.ca/ atest-news/a/hottopics/committee-on-professionalism/>.

[13] Samuel Dash, "Legal Ethics and Morality: Can a Legally Ethical Lawyer Be a Moral Person?" (1993) 1 Frank G. Raichle Lecture Series on Law in American Society 209 at 212; also at 214.

[14] See *e.g.* Pamela McClintock, "Big Corporate Clients Demand Diversity" (1999) 221:99 N.Y.L.J. 5.

[15] I have elsewhere commented on the relevance of some of these competing interests, particularly in the context of negotiation and in advocacy. See *e.g.* Trevor C.W. Farrow, "The Negotiator-as-Professional: Understanding the Competing Interests of a Representative Negotiator" (2007) 7 Pepp. Disp. Resol. L.J. 373 [Farrow, "The Negotiator-as-Professional"]; Trevor C.W. Farrow, "Representative Negotiation" in Colleen M. Hanycz, Trevor C.W. Farrow & Frederick H. Zemans, eds., *The Theory and Practice of Representative Negotiation*

aspirational promises of equality, access to justice, and the protection of the public interest. And it is a discourse that seeks both to benefit from and take seriously its obligations to address the culturally complicated makeup of the bar and our general pluralistic and globalized civil societies. This modern discourse of an ethically sustainable profession challenges the "time-honoured"[16] centrality of client autonomy and a lawyer's unqualified loyalty to the client's interests. Specifically, it rejects stories of lawyers, collectively, as members of a relatively homogenized profession and who, individually, are single-tasked "hired guns" focused on only one interest "in all the world."[17] According to this new model, those stories are no longer—if they ever were—sustainable.

Thinking about the profession in terms of a discourse of "professional sustainability" that takes seriously a broad range of voices and interests is surprisingly new. The label "sustainable" has not, to date, been generally applied to discussions of ethics and professionalism in the legal context.[18] And because as a profession, lawyers are still "anxiously" fearful of replacing the "spirits" of "dead generations," which continue to weigh on us "like a nightmare"[19] (lawyers grow up and depend on stories of zeal, vigour, and role-differentiated behaviour[20] that allow them to act for all kinds of clients, including those who they think are "reprehensible,"[21] while still being able to sleep soundly at night), a discourse of sustainable professionalism is threatening. Proponents of the dominant model borrow "names, battle slogans, and costumes":[22] names such as "zealous advocates,"[23] "shock troops,"[24] "hired gun[s],"[25] and "soldiers of the law";[26] battle

(Toronto: Emond Montgomery, 2008) c. 2; and Trevor C.W. Farrow, "Ethics in Advocacy" in Alice Woolley *et al*., eds., *Lawyers' Ethics and Professional Regulation* (Canada: LexisNexis, 2008) c. 5 [Farrow, "Ethics in Advocacy"].

[16] See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

[17] See *Trial of Queen Caroline*, *infra* note 68. See generally, below, Part B.

[18] See further note 196 and surrounding text.

[19] See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

[20] For a discussion of role-differentiated behaviour (a behavioural approach that "often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive"), see Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues" (1975) 5 Hum. Rts. 1 at 3 [Wasserstrom, "Lawyers as Professionals"].

[21] From Gary Mason, "'A rigorous defence … is the key to our system'" *The Globe and Mail* (11 December 2007) A15 [Mason].

[22] See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

[23] Richard A. Matasar, "The Pain of Moral Lawyering" (1990) 75 Iowa L. Rev. 975 at 975. See also *R. v. Felderhof* (2003), 68 O.R. (3d) 481 at para. 84 (C.A.), Rosenberg J.A. Compare American Bar Association, *Model Rules of Professional Conduct* (adopted 1983, as amended) at Preamble and Scope, para. 2 [ABA, *Model Rules*].

slogans such as "fierce," "fearless," "resolute," and "partisan";[27] and costumes such as barristers' gowns, tabs, and waistcoats. They doggedly and dogmatically[28] re-make a history under this "time-honoured disguise and this borrowed language"[29] in a continued effort to "create[] a world after [their] image."[30]

The resulting paradox created by the dominant narrative is that, although the stories that continue to be told are becoming less attractive to more people,[31] the stories continue to be told. To my mind, given the complex realities of the current professional trajectory,[32] lawyers need another story—a sustainable story—that captures those complex realities and provides for a meaningful prospect of broad-based buy-in. Alternative models that critique the dominant model provide another story.[33] Those critiques, which are becoming increasingly attractive, are often framed in terms of the "moral perspective,"[34] "moral lawyering,"[35] "the moral lawyer,"[36] or "the good

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[24] Matasar, *ibid.* at 975.

[25] See *e.g.* Rob Atkinson, "A Dissenter's Commentary on the Professionalism Crusade" (1995) 74 Tex. L. Rev. 259 at 304; David M. Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 Dal. L.J. 267 at 271.

[26] Matasar, *supra* note 23 at 985.

[27] See *e.g. R. v. Felderhof*, *supra* note 23 at para. 85; LSUC, *Rules*, *supra* note 10 at r. 4.01(1) and commentary; and Canadian Bar Association, *Code of Professional Conduct* (adopted August 2004 and February 2006), c. IX [CBA, *Code*].

[28] For a useful treatment of the deployment of dogmatic language in the service of sustaining legal traditions—specifically in the context of solicitor-client privilege—see Adam M. Dodek, "Theoretical Foundations of Solicitor-Client Privilege" [unpublished].

[29] See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

[30] Karl Marx & Friedrich Engels, "Manifesto of the Communist Party" (1848) [Marx & Engels, "Communist Manifesto"] in Tucker, *supra* note 1 at 477.

[31] I realize that, although correct in my view, this statement is not uncontroversial. For example, many clients (and indeed many lawyers) are quite happy with the current model. See Part B.III, below, for more on this topic.

[32] See *e.g. supra* notes 3-14.

[33] See Part C, below, for further discussion of these alternatives. See also Jerome E. Bickenbach, "The Redemption of the Moral Mandate of the Profession of Law" (1996) 9 Can. J.L. & Jur. 51.

[34] See *e.g.* Robert K. Vischer, "Legal Advice as Moral Perspective" (2006) 19 Geo. J. Legal Ethics 225.

[35] See *e.g.* Matasar, *supra* note 23.

[36] See *e.g.* Hon. Frank Iacobucci, "The Practice of Law: Business and Professionalism" (1991) 49 Advocate 859 at 863.

lawyer."[37] These labels appear to connote some shared or required understanding of what counts as "moral" or "good," whereas the safe harbours of zealous advocacy and neutral partisanship[38] provide sheltered, role-differentiated moral refuge, and continue to be preferred over alternative accounts. Further, these alternative models are typically criticized for underplaying the institutional value of the lawyer in the adversarial system, while at the same time overplaying the relevance or supremacy of the lawyer's individual moral choices or preferences that risk usurping the ethical autonomy of the lawyer's client.[39]

In my experience, while some students and practitioners[40] are in optimistic agreement with modern critiques, most are, at worst, put off by them and are, at best, intrigued but ultimately not persuaded by their apparent moral superiority, relativity, and sermon-like[41] nature. For example, I recently taught a series of mandatory first year legal ethics seminars.[42] One of the early classes took up the relevance of a lawyer's sense of self—moral values; social and political views; sense of societal duty, justice, and world outlook; space for personal obligations to family, friends, and other commitments; obligations to work colleagues, institutional preferences, and duties; expectations of equality and progressive workplace experiences; et cetera—in the context of a life in the law, and more specifically, in the context of the lawyer-client advocacy model. I asked the twenty-five students in the seminar to put their hands up if, ideally, they would like to maintain a meaningful sense and space for "self" after becoming lawyers (*i.e.*, whether the profession should be able to accommodate and *sustain* that sense of self). Approximately twenty-five hands went up. I then asked the same students to put their hands up if they thought creating that space could actually occur "in the real world" of practising lawyers. No hands went up. Of course this informal in-class exercise was neither scientific nor comprehensive. The reaction was, however, consistent with numerous other legal ethics classes in which I have asked the same and similar questions, and with accounts of other student

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[37] See *e.g.* David Luban, ed., *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Totowa, N.J.: Rowman & Allanheld, 1983); Richard Wasserstrom, "Legal Education and the Good Lawyer" (1984) 34 J. Legal Educ. 155 [Wasserstrom, "Legal Education"].

[38] See *e.g. infra* note 66 and surrounding text.

[39] See Part B.I-II, below, for more on this topic.

[40] My comments here are animated by several experiences: approximately five years as a litigation lawyer at a large firm in Toronto, almost ten years of teaching ethics and professionalism to LL.B. students in several different institutions in several different jurisdictions, and more recently, teaching also in a part-time graduate program in which most students typically continue to carry on an active law practice.

[41] Rob Atkinson, "How the Butler Was Made to Do It: The Perverted Professionalism of the Remains of the Day" (1995) 105 Yale L.J. 177 at 177 [Atkinson, "Perverted Professionalism"].

[42] See "Ethical Lawyering," *supra* note 9.

experiences as well.[43] The reaction tells me that, even at the outset of law school, at least some students—and my intuition is that in fact most students—already have a strongly developed sense of allegiance to the institutional history and hegemonic ideology of the practice of law. As such, they are already starting to "think like a lawyer."[44] Clearly the "spirits of the past" have a firm hold on the "brain[s] of the living."[45]

This article seeks to demystify the power of those spirits by providing a new way to think about professionalism.[46] Specifically, by tapping into and building upon the ideas and energy of many current alternative models of professionalism, I seek to assist with the project of re-conceiving our modern understanding of professionalism. It is a professionalism that, unlike traditional (dominant) accounts, makes descriptive and normative sense of the complex modern practice of law. In so doing, I do not claim to be making a radical departure from other alternative model thinkers. In fact, what this article does is simply to recalibrate many of the current (primarily alternative) models and discussions through a slightly different lens: that of sustainability.

To frame the overall discussion, Part A provides a brief discussion of the meaning and import of legal ethics and professionalism. Part B reviews some of the relevant history of the traditional model of lawyering that continues to dominate the modern discourse of legal professionalism. Part C canvasses several alternative visions of the profession that critique the dominant model. Part D, collectively building on a number of those alternative visions, seeks to assist with the development of a sustainable discourse of professionalism.

A. Legal Ethics and Professionalism

This article does not purport to provide a full treatment of the study of ethics generally, or even of legal ethics in particular. A brief understanding of what I mean by ethics and professionalism provides a context for my underlying arguments. As a starting point, the concept of ethics invites notions of good and bad as values in themselves, from either the

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[43] See *e.g.* Kennedy, "Rebels from Principle," *supra* note 6 at 87 ("I think we should ask of our students that in practice they try to figure out whether there are intelligent, more or less controlled risks they can take to put their careers behind their opinions. According to my students, they 'impliedly agreed' not to do any such thing, and if they tried, they'd be fired, or never make partner").

[44] See *e.g.* Elkins, *supra* note 7.

[45] See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

[46] With apologies to Marx and Engels, it could be said that what I am recognizing is the "spectre" that is currently "haunting" the legal profession: the spectre of sustainable professionalism. See Marx & Engels, "Communist Manifesto," *supra* note 30 at 473.

perspective of semantics or of justification.[47] These perspectives of ethical theory are *not* immediately interested in the application of ethical thinking to specific contexts of human action.[48] G.E. Moore, for example, explained that his approach to the topic of ethics recognizes the distinction between an underlying value itself—namely "the general enquiry into what is good"—and an evaluation of the human action that is derivative from that underlying value.[49]

For the purposes of this article, my interest in ethics (and in particular legal ethics)—animated in part by Plato's dialogue on just conduct in the *Republic*[50]—is at the level of human action in context. Because this article is concerned with the derivative discussion of ethics as applied to the legal profession, my approach here adopts this derivative standpoint.[51] What is "at stake" in this discussion—as Socrates contemplated in his musings with Thrasymachus about the lives of the just and unjust—is "no light matter."[52]

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[47] Although ethicists often think of these perspectives as the subjects more specifically of either *meta-ethics* or *normative ethics*, this distinction does not matter for the purposes of this article (a distinction that, in any event, is at least for some "no longer found so convincing or important" (Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana Paperbacks, 1985) 73)). However, for a useful discussion on the basic differences between these sub-streams of ethics, see *ibid*. at c. 5. See also Rhode, *Ethics by the Pervasive Method*, *supra* note 6 at 12.

[48] That perspective is often thought of as the purview of *applied* ethics. See *e.g.* Rhode, *ibid.* at 12.

[49] G.E. Moore, *Principia Ethica* (Cambridge: Cambridge University Press, 1903) at 2.

[50] Plato, "The Republic," Bk. I, 352d in *The Dialogues of Plato*, 3d ed., trans. by B. Jowett (London: Oxford University Press, 1931) vol. 1 at 33 [*Plato*, trans. by Jowett]. My thinking on the use of Plato's *Republic* in this part of the article has been influenced by Bernard Williams. See Williams, *supra* note 47 at c. 1.

[51] Although choosing Plato's more metaphysical treatment of justice as a convenient underlying conceptual starting point, a different lens through which to think about legal ethics could be the lens of pragmatism, developed by thinkers such as William James, John Dewey, and more recently Richard Rorty (see *e.g.* Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979)). For example, rather than trying to philosophize about legal ethics and professional responsibility in the context of abstract notions of "the good," pragmatists would be much more likely to consider the discussion's practical applications for lawyers and clients (and other interested stakeholders) in the specific context of their everyday roles and experiences. This viewpoint might be helpful when trying to develop an understanding of professionalism—particularly from the contextual perspective of sustainability—that is contemplated in this article. However, because nothing in this article turns on my choice of conceptual lenses, I leave this as a point of departure for future fruitful thinking on ethics and professionalism. For a useful discussion of the distinction between Plato's general philosophical approach and pragmatism, see *e.g.* Richard Rorty, *Consequences of Pragmatism* (Minneapolis: University of Minnesota Press, 1982) at xiii ff. ("Introduction: Pragmatism and Philosophy"). See generally Williams, *supra* note 47 at 137-38; Charles Taylor, *Philosophical Arguments* (Cambridge: Harvard University Press, 1995) at 2 ff. I am grateful to Allan Hutchinson for comments on the application of pragmatism to this project.

[52] *Plato*, trans. by Jowett, *supra* note 50.

Ethics, from this perspective, involves an inquiry into "how one should live one's life"[53] or "the rule of human life."[54]

When thinking about the subset of ethics that we call *legal ethics*, the starting point for the inquiry is to think about how one should live in the context of law, or more specifically, how lawyers ought to act in the context of the profession. To push this discussion further, I turn to Aristotle, who in his discussion on community—and in particular the *telos* (end) of the community of the *polis* (city)—argued that the city exists not only "for the sake of living, it exists for the sake of living well."[55] If we then think of the legal profession as the (self-regulated) community in which we are ultimately contemplating (and judging) the ethics of a lawyer's action, the legal profession must exist not only for the sake of practising law, but for the sake of practising it *well*. Any notion of legal ethics must therefore contemplate an understanding of lawyering that is fully engaged with a vision of what amounts to practising well.

We need to find a way of deciding what amounts to "practising well." Religion, custom, power, and happiness have all been used over the centuries by ethicists to assess the general morality of a given course of action.[56] In the specific context of law we might consider the "legality" of a given course of conduct—the client's conduct—and ask Rob Atkinson's "fundamental question of professional ethics": "Should a professional always do all that the law allows, or should the professional recognize other constraints, particularly concerns for the welfare of third parties?"[57] According to Atkinson, this question "divides scholars of legal ethics … into two schools: those who recognize constraints other than law's outer limit, and those who do not."[58] The next two parts of this article look at the

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[53] Plato, *The Republic*, Bk. I, 352d, trans. by Robin Waterfield (Oxford: Oxford University Press, 1993) at 40.

[54] *Plato*, trans. by Jowett, *supra* note 50.

[55] Aristotle, *The Politics*, Bk. 1, c. 2, 1252b, trans. by Carnes Lord (Chicago: University of Chicago Press, 1984) at 37.

[56] For useful background sources, see *e.g.* Donald Nicholson & Julian Webb, *Professional Legal Ethics* (Oxford: Oxford University Press, 1999) c. 2; J.B. Schneewind, "Modern Moral Philosophy" in Peter Singer, ed., *A Companion to Ethics* (Oxford: Basil Blackwell Ltd., 1991) 147; and R.M. Hare, *The Language of Morals* (London: Oxford University Press, 1972). See further Will Kymlicka, *Contemporary Political Philosophy: An Introduction*, 2d ed. (Oxford: Oxford University Press, 2002); George H. Sabine, *A History of Political Theory* (London: George G. Harrap & Co. Ltd., 1948); Philippa Foot, ed., *Theories of Ethics* (London: Oxford University Press, 1967); J.L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth, UK: Penguin Books Ltd., 1977); and W.D. Hudson, *Modern Moral Philosophy*, 2d ed. (London: MacMillan, 1983).

[57] Atkinson, "Perverted Professionalism," *supra* note 41 at 184 [footnotes omitted].

[58] *Ibid*. For a similar analysis, see Vischer, *supra* note 34 at 227. Compare William H. Simon, "Visions of Practice in Legal Thought" (1984) 36 Stan. L. Rev. 469 at 469.

leading (and competing) approaches to thinking about Atkinson's "fundamental question."[59]

Finally, the term "legal ethics" is typically used interchangeably with the term "professionalism" or "professional responsibility."[60] The sources for what counts as right or wrong for the purposes of these interchangeable approaches to ethics and/or professionalism are found in codes of professional conduct and other legal texts.[61] This interchangeable approach does not typically pose a problem. Often ethics and professionalism map nicely onto one another. For example, it is generally agreed that stealing from a client or acting in a direct financial conflict with a client are bad things, both from the perspective of professional codes and from the perspective of personal morality. However, because codes of conduct are often open textured in approach and indefinite in content, what any given individual considers to be "professional" can depend on personal moral deliberation as to what counts as "ethical." As will be seen,[62] it is therefore important to maintain the conceptual distinction between what is professional, under codes of conduct, and what is ethical, as ultimately guided by personal moral deliberation.[63]

B. Dominant Model of Professionalism

One approach to Atkinson's "fundamental question" is provided by the traditional and still dominant view of the lawyer's role. Familiar labels such as "zealous advocate,"[64] "amoral

[59] A potential objection to using Atkinson's "fundamental question" to frame this part of the discussion is that often what counts as "legal" is not necessarily something that is neatly separate and apart from lawyers and their ethical deliberation and professional involvement. In fact, lawyers are typically very much bound up in the production of law and its procedural instruments. However, because this is more of an objection to the premise of Atkinson's question than an objection to my use of his question (which, ultimately—as is developed further in this article in Part D.I-IV—is sympathetic to this objection), I do not need to respond to it further here. For a discussion of the concerns that underline this potential objection, see *e.g.* Hutchinson, *Legal Ethics*, *supra* note 8 at 26.

[60] See *e.g.* Nathan M. Crystal, *Professional Responsibility: Problems of Practice and the Profession*, 2d ed. (New York: Aspen, 2000) at 9 ("Professional responsibility or legal ethics, like other fields of law, is a latticework of court rules, judicial decisions, statutes, and other authorities"). See also Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics*, 5th ed. (New York: Aspen, 1998) at 10-13.

[61] See *e.g.* Crystal, *ibid.* at 9.

[62] See Part D.III, below.

[63] For useful background discussion on professional regulation and legal ethics, see *e.g.* Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* (New Haven: Yale University Press, 1978) cc. 1-2; Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 4th ed. (Toronto: Carswell, 2006) at 2-3.

[64] See *e.g.* Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs-Merrill, 1975) at 9-24.

technician,"[65] and "neutral partisan"[66] are used to describe this hegemonic model of lawyering. In a nutshell, the basic defining elements of this narrative are that the lawyer's job is to advance zealously the client's cause with all legal means; to be personally neutral vis-à-vis the result of the client's cause; and to leave the ultimate ethical, personal, economic, and social bases for the decision to proceed in the hands of the client. According to this view, lawyers should reject non-legal factors such as morality, popularity, religion, power, custom, et cetera and be guided only by what the law allows, thereby viewing themselves purely as legal agents for their clients.

Perhaps the "spirit[] of the past" that is most often "conjure[d] up"[67] in defence of this dominant model is that of Henry Brougham who, in defence of Queen Caroline against adultery charges brought by her husband King George IV, famously argued that a lawyer "knows but one person in all the world, and that person is his client."[68] However, lest we think that this is a vision and language of old, the same words continue to be used by modern legal ethics scholars.[69] As David Layton has commented, the "dominant view is everywhere in Canadian law."[70] This dominant vision of the lawyer's role is premised on well-established arguments sounding in principle, policy, and practice. The model is also well represented in visions of lawyers as portrayed in literature, popular culture, and the media.

I. Principle

The animating principle behind the dominant position—consistent with enlightenment notions of individual autonomy and freedom—is one that champions a client's freedom to arrange her affairs within the bounds of the law.[71] According to Atkinson, "[s]ociety

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[65] See *e.g.* Wasserstrom, "Lawyers as Professionals," *supra* note 20 at 6.

[66] See *e.g.* Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford: Oxford University Press, 2000) at 53 [Rhode, *Interests of Justice*]; Atkinson, "Perverted Professionalism," *supra* note 41 at 185 [footnotes omitted].

[67] See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

[68] Lord Brougham further commented, regarding the advocate's role, that "[t]o save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others." J. Nightingale, ed., *Trial of Queen Caroline*, vol. 2 (London: J. Robins & Co., 1821) at 8 [*Trial of Queen Caroline*]. See also Farrow, "Ethics in Advocacy," *supra* note 15.

[69] See *e.g.* Dash, *supra* note 13 ("A lawyer knows but one person, his client" at 217). See generally Freedman, *supra* note 64 at 9.

[70] David Layton, "The Criminal Defence Lawyer's Role" (2004) 27 Dal. L.J. 379 at 381.

[71] See *e.g.* Stephen L. Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities" (1986) Am. Bar Found. Res. J. 613 at 616-18, 626-27; Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1976) 85 Yale L.J. 1060 at 1073-74, 1077.

recognizes individual autonomy as a good in the highest order … and carves out a sphere in which individuals can exercise that autonomy without interference. By helping lay folk … the lawyer is accomplishing a moral and social, not just professional, good."[72] The lawyer's job, therefore, is to facilitate "the client's exercise of moral autonomy as authorized by the law."[73] Lawyers as champions of client freedom militate against a tyranny of the majority or of the executive (in line with de Tocqueville's observations about lawyers[74]), which is particularly important in the context of a legal profession that essentially has a monopoly over the provision of increasingly complicated and necessary legal services.[75] Any other role for the lawyer would "usurp the role not just of judge and jury, but of the legislature as well."[76]

Justifications for the dominant narrative also come from the fact that, particularly—although not exclusively—in the criminal law context, clients deserve the best defence and representation possible, especially when they are up against the power of the state and individual liberty is involved.[77] Further, according to Lon Fuller, the purpose of a rule of professional conduct that makes it proper to defend a criminal, including one whom the lawyer knows to be guilty, "is to preserve the integrity of society itself. It aims at keeping sound and wholesome the procedures by which society visits its condemnation on an erring member."[78] The criminal law context therefore provides the strongest justification

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[72] Atkinson, "Perverted Professionalism," *supra* note 41 at 187-88. As such, when "proponents of neutral partisanship describe their model as amoral, they are not referring to its ultimate grounding, which is emphatically moral. They are referring, rather, to the lawyer's immunity from the task of scrutinizing the morality of particular client acts. Theirs is the morality at the wholesale but not the retail level; a morality of the long run, not the particular case; a morality of fidelity to role obligations, not attention to particular acts" (at 188) [footnotes omitted].

[73] *Ibid.* at 187 [footnotes omitted].

[74] See *e.g.* Alexis de Tocqueville, *Democracy in America*, J.P. Mayer, ed., trans. by George Lawrence (New York: Harper & Row, 1969) c. 8 at 263-70.

[75] See Stephen L. Pepper, "A Rejoinder to Professors Kaufman and Luban" (1986) Am. Bar Found. Res. J. 657.

[76] Atkinson, "Perverted Professionalism," *supra* note 41 at 189. See also Wasserstrom, "Lawyers as Professionals," *supra* note 20 at 10. For useful background discussions of the dominant model, see *e.g.* William H. Simon, "Ethical Discretion in Lawyering" (1988) 101 Harv. L. Rev. 1083 at 1084-90 [Simon, "Ethical Discretion"]; Sharon Dolovich, "Ethical Lawyering and the Possibility of Integrity" (2002) 70 Fordham L. Rev. 1629 at 1632-39; Geoffrey C. Hazard, Jr. & Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation*, 3d ed. (Westbury: Foundation Press, 1994) at 135-213; and Vischer, *supra* note 34 at 226-27. Compare also Leonard Riskin's critique of the traditional lawyer's "standard philosophical map." Leonard Riskin, "Mediation and Lawyers" (1982) 43 Ohio St. L.J. 29 at 44.

[77] See *e.g.* Wasserstrom, "Lawyers as Professionals," *supra* note 20 at 7-8.

[78] Lon L. Fuller, "The Adversary System" in Harold J. Berman, ed., *Talks on American Law* (New York: Vintage Books, 1961) at 32-37.

for the dominant model,[79] even though a minority of lawyers practise criminal law.[80] Finally, the institutional setting of the adversary system requires that all participants—specifically including lawyers—"adhere to their institutional roles."[81] The dependability and predictability of the adversary system relies on the amorality of the participating advocates.[82]

II. Policy

These animating principles and justifications for the dominant narrative have been embodied in numerous sources of policy, most notably including various codes of professional conduct. Perhaps one of the strongest modern policy statements is found in the ABA's *Model Rules*, which provide that when acting as an advocate, "a lawyer zealously asserts the client's position under the rules of the adversary system."[83] Similarly in Canada, the CBA's *Code* provides that when acting as an advocate, "the lawyer must … represent the client resolutely, honourably and within the limits of the law."[84]

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[79] For this reason, the dominant model's treatment of the criminal defence lawyer is also the most difficult aspect of the dominant model to critique. In fact, there is a debate in the alternative literature about whether the alternative models, discussed further in Part C, apply equally to criminal defence work as they do to civil side work. For example, Wasserstrom argues that "the amoral behaviour of the *criminal* defense lawyer is justifiable," and is of the view that "[o]nce we leave the peculiar situation of the criminal defense lawyer ... it is quite likely that the role-differentiated amorality of the lawyer is almost certainly excessive and at times inappropriate." Wasserstrom, "Lawyers as Professionals," *supra* note 20 at 12 [emphasis in original]. See similarly Rhode, *Interests of Justice*, *supra* note 66 at 72 (arguing that the criminal context often requires role differentiated behaviour); David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988) at 148 (arguing that, in the criminal defence context, "the appeal to the adversary system by-and-large vindicates the kind of partisan zeal characterized in the standard conception") [Luban, *Lawyers and Justice*]. See further Atkinson, "Perverted Professionalism," *supra* note 41 at 191. In contrast, William Simon rejects the distinction between civil and criminal contexts as a reason to move away from the notion of justice-seeking as the basis for ethical deliberation. See William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard University Press, 1998) at 170-94, discussed in Dolovich, *supra* note 76 at 1647-48.

[80] See *e.g.* ABA Young Lawyers Division, Survey, "Career Satisfaction Among Young Lawyers" (2000) at 13 (table 11), online: ABA <http://www.abanet.org/yld/satisfaction_800.doc>.

[81] Wasserstrom, "Lawyers as Professionals," *supra* note 20 at 9-10.

[82] *Ibid*. at 10. See also Wasserstrom, "Legal Education," *supra* note 37 at 157-58; Abe Krash, "Professional Responsibility to Clients and the Public Interest: Is There a Conflict?" (1974) 55 Chicago Bar Record 31. For an early and colourful account of this role-based institutional argument, see James Boswell, *Boswell's Journal of A Tour to the Hebrides with Samuel Johnson, LL.D.* (London: William Heinemann, 1936) at 14-15 (15 August 1773 journal entry).

[83] ABA, *Model Rules*, *supra* note 23. For commentary, see *e.g.* Alice Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer" (1996) 9 Can. J.L. & Jur. 61 [Woolley, "Integrity in Zealousness"].

[84] CBA, *Code*, *supra* note 27.

In the spirit of the dominant model's commitment to amorality, these policy provisions recognize the importance of the lawyer's ability to raise arguments that, while legal, may not be popular (or moral[85]). For example, the LSUC's *Rules* provide that the lawyer "has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, *however distasteful*, that the lawyer thinks will help the client's case, and endeavour to obtain for the client the benefit of every remedy and defence authorized by law."[86]

Further, in line with the principles of the dominant model, even if the lawyer has personal difficulties with the position of the client, the dominant model requires the lawyer to suppress his or her own views in favour of those of the client and to "refrain from expressing the lawyer's personal opinions on the merits of a client's case."[87] Alberta makes the same point even more bluntly: "What the lawyer believes about the merits of the case is essentially irrelevant."[88]

III. Practice

Not only do the principles of the dominant model play out in the guiding policy statements in the area, they also resonate with the routine practice of most lawyers' daily work. One only needs briefly to visit the local civil or criminal courts to see the model in action.[89] The model is equally present in the context of everyday solicitor work, including real estate deals, estate matters, corporate and securities work, tax planning, et cetera.[90] In sum, the dominant model is not only the dominant model in theory, it also continues to be the dominant model in practice.

IV. Literature, Popular Culture, and Media

We also see the realities of legal practice playing themselves out in the ways that lawyers are portrayed in literature, film, popular culture, and the media. From before Shakespeare

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[85] For example, according to Wasserstrom, the dominant model has been described as rendering lawyers "at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind." Wasserstrom, "Lawyers as Professionals," *supra* note 20 at 1.

[86] LSUC, *Rules*, *supra* note 10, r. 4.01(1), commentary [emphasis added].

[87] *Ibid*.

[88] The Law Society of Alberta, *Code of Professional Conduct*, c. 10, r. 11, commentary [LSA, *Code*].

[89] See *e.g.* Mason, *supra* note 21.

[90] Discussed in Wasserstrom, "Lawyers as Professionals," *supra* note 20 at 8. In the specific context of representative negotiation, see *e.g.* Robert F. Cochran, Jr., "Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation" (1990) 47 Wash. & Lee L. Rev. 819.

to after Shaw, lawyers continue to be viewed in literature primarily through the lens of amorality and by the choices and actions that result from that amoral viewpoint.[91] For example, as Jean-Baptiste Clamence, the narrator and former successful Parisian lawyer in Camus' *La Chute* (*The Fall*) mused: "Now and then I still argued a case. At times even, forgetting that I no longer believed in what I was saying, *I was a good advocate*."[92] Representations of lawyers in movies and other popular culture venues continue with this tendency.[93] For example, for fans of *Law & Order*, there is no doubt that Jack McCoy's views that "justice is a by-product of winning" and that "sometimes you have to make deals with the devil" separate the attorney's personal morals from the client's causes.[94] The media also regularly highlight the ethical challenges of lawyers[95] as well as normalize or romanticize the role of the zealous advocate.[96] Either way, the dominant message is delivered and perpetuated both inside and outside of the profession.

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[91] For general treatments of law and literature, see *e.g.* Richard A. Posner, *Law and Literature*, rev. ed. (Cambridge, MA: Harvard University Press, 1998); and Irving Browne, *Law and Lawyers in Literature* (Littleton, CO: Fred B. Rothman, 1982); John Marshall Gest, *The Lawyer in Literature* (Boston: Boston Book Company, 1913). For a useful Canadian collection of papers and discussions on the topic of law and literature, see The Honourable Mr. Justice James M. Farley, "Law, Lawyers and Judges in Literature" (The Chief Justice of Ontario's Advisory Committee on Professionalism, Sixth Colloquium on the Legal Profession: Law and Lawyers in Literature and Film, 10 March 2006), online: http://www.lsuc.on.ca/latest-news/a/hottopics/committee-on-professionalism/papers-from-past-colloquia/.

[92] Albert Camus, *The Fall*, trans. by Justin O'Brien (London: Penguin, 2000) at 79 [emphasis added]. See also Boswell's recounting of Johnson's views on the role of the lawyer, *supra* note 82.

[93] For a recent and compelling film that looks at various competing visions of lawyers' professional and ethical roles and obligations, see *Michael Clayton* (Warner Bros. Pictures, 2007), online: Warner Bros. <http://michaelclayton.warnerbros.com/#>. See further Paul Bergman, "The Movie Lawyers' Guide to Redemptive Legal Practice" in Susan D. Carle, ed., *Lawyers' Ethics and the Pursuit of Social Justice* (New York: New York University Press, 2005) at 309.

[94] The Internet Movie Database ("IMDb"), "Memorable Quotes from 'Law & Order' (1990)," online: <http://www.imdb.com/title/tt0098844/quotes>.

[95] See *e.g.* Kate Fillion, "'One prominent lawyer told me, "Every lawyer is going to go into the office today and commit fraud." Then he laughed.' Ex-Bay Street lawyer Philip Slayton talks to Kate Fillion about how lawyers became greedy, unprincipled enablers of the rich," *Maclean's* 120:30 (6 August 2007) 18 (the "Lawyers are Rats" issue). This was an interview with Philip Slayton, based on his recent book: Philip Slayton, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession* (Toronto: Viking Canada, 2007). See similarly James L. Kelley, *Lawyers Crossing Lines: Nine Stories* (Durham, NC: Carolina Academic Press, 2001). For a brief discussion of the *Maclean's* issue and Philip Slayton's book, see Dodek, "Canadian Legal Ethics," *supra* note 8 at 7, 16, 38. For a review of Slayton's book, see Lorraine Lafferty, (2008) 46 Osgoode Hall L.J. 197; Tim Wilbur, "The trouble with law is lawyers" *The Globe and Mail* (4 August 2007) D3. For a recent example of media attention on a particularly ethically contentious legal issue, see Adam Liptak, "Lawyer Reveals Secret, Toppling Death Sentence" *The New York Times* (19 January 2008), online: <http://www.nytimes.com/2008/01/19/us/19death.html?pagewanted=1>.

[96] See *e.g.* Mason, *supra* note 21 (discussing the role of Peter Ritchie and other members of the defence team in the Robert Pickton murder trial); Liptak, *ibid*.; and Wilbur, *ibid*. (stating that the "accepted view in the profession" is that "a lawyer should be a zealous advocate…").

V. Hegemony Light

If the client's interests were truly all that was at stake for an advocate, as the purest of zealous advocacy models proposes, his or her job would be relatively straightforward: there would only be, in line with Lord Brougham's articulation, "one person in all the world."[97] Most versions of the dominant model, however, do not focus solely on the zealous representation of the client. First, lawyers—no matter how zealous—cannot engage in illegal activity by, for example, concealing evidence or obstructing justice.[98] This view is consistent with typical code of conduct provisions requiring lawyers to act "within the limits of the law."[99]

Second, although slightly more controversial, most dominant trend theorists typically recognize and make space for a lawyer's obligations to the court.[100] For example, according to Florida State Judge David A. Demers of the Sixth Judicial Circuit for St. Petersburg, the "best definition" of professionalism balances "two primary duties: (1) zealous representation … and (2) service as an officer of the court."[101] What counts as service "to the court" is a contested discussion. One less controversial version of this service would be the relatively narrow and negative obligations not to, for example, "deceive a tribunal," "misstate the contents of a document [or] the testimony of a witness," or "dissuade a witness from giving evidence."[102] However, given that the privilege of self-regulation has come with the responsibility of acting in the public interest,[103] acting as an officer of the court has been seen by some to include more expansive notions of lawyering responsibilities that potentially are required by the public interest.[104] These more

[97] *Trial of Queen Caroline*, *supra* note 68.

[98] Freedman, *supra* note 64 at 6; Fried, *supra* note 71 at 1080-82.

[99] See *e.g.* CBA, *Code*, *supra* note 27.

[100] See *e.g.* Freedman, *supra* note 64 at 9-24.

[101] David A. Demers, "The Continuum of Professionalism" (1998-1999) 28 Stetson L. Rev. 319 at 319. See also Daniel J. Pope & Stephanie J. Kim, "Client Perjury: Should a Lawyer Defend the System or the Client?" (1997) 64 Def. Counsel J. 447 at 453.

[102] See *e.g.* LSUC, *Rules*, *supra* note 10, r. 4.01(2).

[103] For various code-based and legislative statements regarding the profession's obligations to the "public interest," see generally Part C.II of this article.

[104] See *e.g. Rondel v. Worsley*, [1967] 1 Q.B. 443, Lord Denning M.R. (C.A.), (following n. 27 and accompanying text), aff'd [1969] 1 A.C. 191 (H.L.). Similarly, the former Chief Justice of Ontario—when speaking on the topic of "advocacy in the 21st century"—emphasized the various competing interests to which advocates must be faithful: "Lawyers are not solely professional advocates or 'hired guns'. And while they do not surrender their free speech rights upon admission to the bar, they are also officers of the court with fundamental obligations to uphold the integrity of the judicial process, both inside and outside the courtroom. It is the duty of counsel to be faithful both to their client and to the administration of justice." Hon. R. Roy McMurtry, "Role of the Courts and Counsel in

expansive notions are captured in code provisions that require lawyers to temper their zeal and act not only "within the limits of the law" but also "honourably"[105] and by discharging "all responsibilities to … the public."[106]

However, but for understandings of what counts as acting "honourably" that include visions of the advocate as giving their "entire devotion to the interests of the client,"[107] or as acting to further the dictates of client autonomy within the spirit of the adversary system,[108] the dominant model of lawyering struggles to make sense of legislative dictates that put "duties" on professional bodies to act in the "public interest," "to maintain and advance the cause of justice and the rule of law," and "to act so as to facilitate access to justice."[109] To address these ethical challenges and duties, an alternative model has developed.[110] This alternative model is the second "school" contemplated by Atkinson in his discussion of the "fundamental question of professional ethics."[111]

C. Alternative Models of Professionalism

The basic point of departure for critiques of the dominant model, as intimated by Atkinson's question, is the opportunity for, or obligation on, lawyers to be guided by extra-legal norms, such as morality, religion, politics, and custom, when representing their clients. Further, critics of the dominant model have a much more expansive view of the kinds of interests that must be considered when determining the appropriate course of action in a given situation. As with the dominant model of professionalism, there are equally compelling arguments in support of these alternative models sounding in principle, policy, and practice.[112]

Justice" (The Advocates' Society Spring Symposium 2000, Advocacy in the 21st Century, 6 June 2000), online: <http://www.ontariocourts.on.ca/coa/en/ps/speeches/role.htm>.

[105] See *e.g.* CBA, *Code*, *supra* note 27. See also LSUC, *Rules*, *supra* note 10, r. 4.01(2)(b).

[106] See *e.g.* LSUC, *Rules*, *ibid.*, r. 1.03(1)(a).

[107] Freedman, *supra* note 64 at 9.

[108] See *e.g.* Pepper, *supra* note 71. See further Atkinson, "Perverted Professionalism," *supra* note 41.

[109] See *Law Society Act*, R.S.O. 1990, c. L.8, s. 4.2.

[110] But see Randal N.M. Graham, *Legal Ethics: Theories, Cases, and Professional Regulation* (Toronto: Emond Montgomery, 2004) at 103-28.

[111] Atkinson, "Perverted Professionalism," *supra* note 41 and 57.

[112] Although there clearly are differences between alternative models, as a general matter they maintain more similarities than differences. For a useful discussion of some of the leading alternative models, their similarities and differences, see Dolovich, *supra* note 76 at 1646-49, 1664-65, in which she writes that "[i]n the main" a number of alternative models share "the view that ethical lawyering requires the exercise of discretion by

I. Principle

The starting point for this discussion really comes from the foundational premise that lawyers, as self-regulated professionals, have been given the opportunity and responsibility to act not just in the interests of their clients but, more fundamentally, in furtherance of the "public interest."[113] Therefore, in addition to the interests of the client, the advocate must take into consideration a number of other interests (as required by his or her status as a member of the legal profession) including those of other clients, himself or herself, opposing lawyers, the court, and other sectors of society included in the overall administration of justice.[114]

A number of visions are contemplated by the various attempts to develop an alternative model, including descriptions of lawyers as "officers of justice" who are "morally reflective individuals";[115] descriptions of the lawyer's role as a "moral activist[],"[116] requiring a "profession-wide emphasis on greater moral sensitivity and self-awareness among attorneys";[117] and descriptions of the lawyer's professional duty as requiring "reflective judgment" to "further justice"[118] and provide "moral perspective"[119] through the

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individual lawyers, who must judge for themselves in any given situation what justice requires and act accordingly" (at 1648). For a useful discussion on the distinctions between the American and Canadian perspectives on legal ethics, see Woolley, "Integrity in Zealousness," *supra* note 83.

[113] For example, according to the Supreme Court of Canada,"[c]learly, a major objective of the [New Brunswick Law Society] Act is to create a self-regulating professional body with the authority to set and maintain professional standards of practice. This, in turn, requires that the Law Society perform its paramount role of protecting the interests of the public…'The privilege of self-government is granted to professional organizations only in exchange for, and to assist in, protecting the public interest with respect to the services concerned…'" *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 36 [references omitted].

[114] For a recent discussion of some of these competing interests and some of the challenges that come with seeking to balance them, see Farrow, "The Negotiator-As-Professional," *supra* note 15. See also Atkinson, "Perverted Professionalism," *supra* note 41; Wasserstrom, "Legal Education," *supra* note 37; Rhode, "Persistent Questions," *supra* note 3; and Beverley G. Smith, *Professional Conduct for Lawyers and Judges*, 3d ed. (Fredericton: Maritime Law Book, 2007) c. 1.

[115] Rhode, *Interests of Justice*, *supra* note 66 at 17, 67. See also Paul A. Teschner, "Lawyer Morality" (1970) 38 Geo. Wash. L. Rev. 789.

[116] Luban, *Lawyers and Justice*, *supra* note 79 at 160.

[117] Vischer, *supra* note 34 at 271.

[118] Simon, "Ethical Discretion," *supra* note 76 at 1083. Similarly, Simon articulates the normative underpinning of this model as a "'seek justice'" maxim. *Ibid*. at 1090. See further William H. Simon, "'Thinking Like a Lawyer' about Ethical Questions" (1998) 27 Hofstra L. Rev. 1.

[119] Vischer, *supra* note 34 at 225.

development of "critical morality."[120] All of these descriptions taken together, in response to Atkinson's question,[121] essentially require lawyers "to accept personal responsibility for the moral consequences of their professional actions."[122] In the "extreme" form, the lawyer should "avoid doing harm" by refusing to act if the lawyer thinks that the outcome of "winning" would be on balance a "bad thing" or "socially unfortunate," in spite of the fact that "the client will pay" and that the lawyer "wouldn't be doing anything that came close to violating the canons of professional ethics."[123]

As can be seen, when calculating what amounts to furthering the cause of justice or the public interest, these alternative accounts invariably rely on some sense of individual morality. They do not allow the lawyer morally to "insulat[e]" herself "within her role" from the justice or injustice of the client's cause.[124] These various accounts take seriously the lawyer's personal morality or sense of justice in the spirit of balancing, and indeed privileging, the interests of the public over those of the client, particularly when those interests collide. Beyond that, however, these views do not mandate *one* sense of what counts as morality. What is encouraged is not a shared sense of morality that provides "bright-line answers," but rather "ethically reflective analysis and commitments."[125]

Further, even if we thought that the dominant model provided a viable vision of the lawyer's role, that vision can only, in its best light, amount to a fiction. Because lawyering is a human exercise, it will always be accomplished through the lens of the human experience. According to Mark Orkin, "A lawyer cannot, more than any other man, keep his personal conscience and his professional conscience in separate pockets … it cannot be seriously denied that every lawyer is, in some measure, the keeper of his client's conscience."[126] Robert Vischer has more recently developed this line of thought. He

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[120] Allan C. Hutchinson, "Legal Ethics for a Fragmented Society: Between Professional and Personal" (1997) 5 Int'l J. Legal Prof. 175 at 187 [Hutchinson, "Legal Ethics for a Fragmented Society"]. More recently see generally c. 3 in Hutchinson, *Legal Ethics*, *supra* note 8.

[121] Atkinson, "Perverted Professionalism," *supra* note 41.

[122] Rhode, *Interests of Justice*, *supra* note 66 at 66-67. See also Hutchinson, *Legal Ethics*, *supra* note 8 at 50-58, 212; Allan C. Hutchinson, "Calgary and Everything After: A Postmodern Re-vision of Lawyering" (1995) 33 Alta. L. Rev. 768; and David Luban, "Integrity: Its Causes and Cures" (2003) 72 Fordham L. Rev. 279. Similarly, according to Atkinson's description of the moral activist, the lawyer cannot be "neutral professionally toward what she opposes personally." *Ibid* at 191.

[123] Duncan Kennedy, "The Responsibility of Lawyers for the Justice of Their Causes" (1987) 18 Tex. Tech. L. Rev. 1157 at 1159 [Kennedy, "The Responsibility of Lawyers"].

[124] See Atkinson, "Perverted Professionalism," *supra* note 41 at 190-91.

[125] Rhode, *Interests of Justice*, *supra* note 66 at 71. See *infra* notes 174 and 178 and accompanying text.

[126] Mark M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons, 1957) at 264-65 [footnotes omitted].

believes that a lawyer's own "moral convictions" are "inexorably part" of the "attorney-client dialogue," whether "acknowledged by the attorney or not."[127] If lawyers fail to acknowledge the morality that "holds sway" over their professional deliberation, that morality is "forced into the background, where it is not susceptible to exploration by the client."[128] As such, the dominant model of lawyering is a fiction and is "not a harmless fiction, for it facilitates the tendency of clients to equate legality with permissibility."[129]

Finally, even if lawyers were able to compartmentalize their moral deliberation in the spirit of robust role-differentiated behaviour, by so doing, they impoverish the possibilities of giving legally and ethically sound advice to their clients[130] and run the risk of paying a significant personal and social price. According to Wasserstrom, the "nature of professions … makes the role of professional a difficult one to shed … In important respects, one's professional role becomes and is one's dominant role … This is at a minimum a heavy price to pay for the professions as we know them in our culture, and especially so for lawyers."[131]

II. Policy

As with the dominant model of lawyering, there are equally—if not more—powerful policy statements supporting the alternative approaches to professionalism, including numerous code-based and legislative statements. From the perspective of professional codes of conduct, a good starting point in Canada is the "President's Message" that introduces the CBA's *Code*, which provides that "[s]tandards of professional ethics form the backdrop for everything lawyers do."[132] Further, the "Preface" to the CBA's *Code* provides that its "primary concern" is "the protection of the public interest."[133] Similarly, in Ontario, the *Law Society Act* provides that, "[i]n carrying out its functions, duties and powers under this Act," the LSUC has a "duty" to "maintain and advance the cause of justice and the rule of law"; "facilitate access to justice"; and "protect the public interest… ."[134]

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[127] Vischer, *supra* note 34 at 228-29.

[128] *Ibid*. at 229.

[129] *Ibid*.

[130] See *e.g.* Hutchinson, "Legal Ethics for a Fragmented Society," *supra* note 120 at 187-88.

[131] Wasserstrom, "Lawyers as Professionals," *supra* note 20 at 15. See also MacKenzie, *supra* note 63 at 1-8.

[132] Brian A. Tabor, "President's Message" (March 2006) in CBA, *Code*, *supra* note 27 at v [Tabor, "President's Message"].

[133] CBA *Code*, *ibid*. at ix.

[134] *Law Society Act*, *supra* note 109, s. 4.2. Similarly, in Alberta, the Preface to the LSA's *Code* provides that the "legal profession is largely self-governing and is therefore impressed with special responsibilities. For example, its rules and regulations must be cast in the public interest, and its members have an obligation to seek observance of those rules on an individual and collective basis." *Supra* note 88, Preface.

There are many different code statements that support this loose notion of acting in the "public interest." For example, the CBA's *Code*, in its provisions governing the lawyer's relationship to the "administration of justice," provides that "the lawyer should not hesitate to speak out against an injustice."[135] In Ontario, the LSUC's *Rules* dictate that, when acting as an advocate, "a lawyer shall not … knowingly assist or permit the client to do anything that the lawyer considers to be … dishonourable… ."[136] Similar international examples also obtain. For example, according to the *New York Lawyer's Code of Professional Responsibility* of the New York State Bar Association (NYSBA), a lawyer "should be temperate and dignified, and refrain from all illegal and morally reprehensible conduct."[137] As well, the *Basic Rules on the Duties of Practicing Attorneys* (*Basic Rules*) of the Japan Federation of Bar Associations (JFBA) provide that the "mission of an attorney is to protect fundamental human rights and realize social justice."[138]

Providing these justice-seeking policy statements, although important, is not the end of the matter. For the alternative models of professionalism, they form just the beginning of the conversation, since the codes fail to define what constitutes an "injustice," "dishonourable" or "morally reprehensible" conduct, or even "social justice." Often lawyers are left to their own moral devices to understand these provisions and their application to particular courses of action (thus creating contested devices, understandings, and applications[139]). For this reason, it is important to keep notions of ethics and professionalism distinct. There is also therefore a need for what Rhode contemplates as a lawyer's ability for "ethically reflective analysis."[140]

There are numerous policy-based statements recognizing the need for individual deliberation by lawyers. In Canada, for example, the Law Society of Alberta acknowledges that its professional "rules and regulations … cannot exhaustively cover all situations that may confront a lawyer, who may find it necessary to also consider legislation relating to lawyers, other legislation, or *general moral principles* in determining an appropriate course of action."[141] In Ontario, the LSUC regards the notion of a "competent lawyer" as someone

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[135] CBA, *Code*, *supra* note 27, c. XIII, commentary 3.

[136] LSUC, *Rules*, *supra* note 10, r. 4.01(2)(b). See similarly *ibid*., r. 1.03(1)(a) (which is not limited to the lawyer's role as advocate).

[137] NYSBA, *New York Lawyer's Code of Professional Responsibility*, Canon 1, EC 1-5, online: <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/LawyersCodeDec2807.pdf>.

[138] JFBA, *Basic Rules* (preliminary provision, adopted 10 November 2004) at 1, online: <http://www.nichibenren.or.jp/en/about/pdf/basic_rules.pdf>.

[139] See Part D.III, below.

[140] Rhode, *Interests of Justice*, *supra* note 66 at 71.

[141] LSA, *Code*, *supra* note 88, Preface [emphasis added].

"who has and applies relevant skills, attributes, and *values*… ."[142] Further, Ontario lawyers—"particularly in-house counsel"—acting for organizations in the post-Enron era "may guide organizations to act in ways that are legal, *ethical*, reputable, and consistent with the organization's responsibilities to its constituents and to the public."[143] By separating what amounts to "legal" and "ethical," clearly the LSUC contemplates professionalism as an advisory exercise that involves more than simply the consideration of client conduct that is "legal."[144] In the United States, the ABA acknowledges that its *Model Rules* "do not … exhaust the *moral and ethical considerations* that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."[145] Similarly, in Japan, even when a lawyer "endeavor[s] to realize his or her client's legitimate interest," that lawyer "shall follow the *dictates of his or her conscience*."[146]

It is possible, although often a stretch, to harmonize the above code-based goals (of encouraging lawyers to speak out against an injustice and to avoid dishonourable or morally reprehensible conduct) with the underlying institutionally-based and autonomy-seeking policies of the dominant model of professionalism. However, even if we accept that level of harmonization, it is not credibly feasible to harmonize the tools provided by the codes for realizing those challenging goals—"general moral principles," "relevant … values," "act[ing] in ways that are … ethical," "moral and ethical considerations," the lawyer's "conscience," et cetera.[147]—with the amoral "hired gun" principles underlying the traditional dominant model. Indeed, it is even difficult to harmonize these code-based tools with the policy-based tools used by the dominant model and found *in the very same codes*.

As I will discuss shortly, although difficult to reconcile with other seemingly conflicting code provisions that are traditionally relied upon by proponents of the dominant model,[148] the code provisions, discussed above, open up alternative ways of lawyering that do make meaningful room for the relevance of a lawyer's "moral principles" and "conscience," all of which take seriously interests beyond those of the client. We now appear to have two

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[142] LSUC, *Rules*, *supra* note 10, r. 2.01(1) [emphasis added].

[143] *Ibid*., r. 2.02(5.2), commentary [emphasis added].

[144] See similarly *ibid*., r. 4.01(2)(b): "When acting as an advocate, a lawyer shall not … knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable… ." For my discussion on a potential objection regarding the distinction between "legal" and "ethical," see *supra* note 59.

[145] ABA, *Model Rules*, *supra* note 23 at para. 16 [emphasis added].

[146] JFBA, *Basic Rules*, *supra* note 138, r. 21 [emphasis added].

[147] See *supra* notes 141-43 and 145-46.

[148] See Part B.II, above, for various dominant model code provisions.

viable visions of the lawyer actively grounded in two different but equally robust sets of code-based policy statements.

III. Practice

Notwithstanding the earlier discussion of the dominant role of the zealous advocate in today's practice, there is clear and convincing evidence that a lawyer's personal morality actively influences how lawyers practise law. Further to Vischer's argument that we cannot escape our own moral framework,[149] moral choices are made by lawyers throughout the project of law. As David Tanovich has argued, "over the last fifteen years, we have been engaged in an ongoing process of role morality reconstruction. Under this reconstructed institutional role, an ethic of client-centred zealous advocacy has slowly begun to be replaced with a justice-seeking ethic that seeks to give effect to law's ambition."[150] Starting from their first days in law school, students are making more informed choices about what law schools to attend, what courses to take, and what areas of law to pursue. Lawyers are actively making decisions about which clients to take, how to represent those clients, and how to withdraw their services when a client relationship breaks down (in terms of trust, respect, et cetera).[151] All of these practical trends accord with my own anecdotally-based assessments of lawyers and law students over the past twenty years of studying, practising, and teaching law. They also accord, as David Tanovich argues, with the conclusions of an empirical study of Ontario lawyers by Margaret Ann Wilkinson, Christa Walker, and Peter Mercer.[152] This study—although far from concluding that lawyers had moved from the dominant to an alternative sensibility of lawyering—"amply demonstrates that … lawyers are preoccupied with the constant tensions of specific solicitor-client relationships and the lawyer's overall obligations to society."[153]

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[149] Vischer, *supra* note 34 at 228-29.

[150] Tanovich, *supra* note 25 at 273.

[151] In these circumstances, decisions to withdraw need not be based simply on legal or financial conflicts, but can also be based on conflicts of a personal nature. See *e.g.* LSUC, *Rules*, *supra* note 10, r. 2.04. See also relevant competence principles, r. 2.01. For a general discussion of the alternative model playing itself out in practice, see *ibid.*

[152] Margaret Ann Wilkinson, Christa Walker & Peter Mercer, "Testing Theory and Debunking Stereotypes: Lawyers' Views On The Practice Of Law" (2005) 18 Can. J.L. & Jur. 165, cited in Tanovich, *supra* note 25 at n. 13-15 and accompanying text. See also Peter Mercer, Margaret Ann Wilkinson & Terra Strong, "The Practice of Ethical Precepts: Dissecting Decision-Making By Lawyers" (1996) 9 Can. J.L. & Jur. 141, cited in Tanovich, *ibid*. at 270, n. 13.

[153] Wilkinson *et al*., *ibid*. at 190, cited in Tanovich, *ibid*. at n. 15 and accompanying text.

IV. Competing Professionalisms

At the moment, then, students of professionalism are currently left with two broad and competing menu choices when thinking about how best to understand legal ethics, or put differently, how best to approach Atkinson's "fundamental question of professional ethics."[154] On the one hand—speaking from principle, policy, and practice—there is still robust life in the spirits of the dominant model. On the other hand, a self-conscious moral sensibility of lawyering is certainly not a stranger to the modern vision of professionalism. In fact, on each of these three indicators, there is powerful and persuasive support for those who believe that they are not guided only by law's limits in the exercise of their lawyering duties.

In my view, the principles and policies that support the alternative model fit more naturally with the modern realities of lawyering. They tend to support Tanovich's observations regarding the shift toward a "justice-seeking ethic" over the past fifteen years.[155] Moreover, they fit more naturally with an early version of the CBA's guiding ethics principles on a lawyer's duty: "to promote the interests of the State, serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to his clients, candid and courteous in his intercourse with his fellows and *true to himself*."[156] This vision nicely fits with the aspirations of my students when asked if they would prefer a vision of professionalism that allowed for the opportunity to maintain a meaningful sense and space for "self."[157]

However, even if Tanovich is correct in that the "zealous advocacy" model is slowly being replaced by a "justice-seeking ethic," we are clearly a long way from shedding the "names, battle slogans, and costumes"[158] of the dominant ideology. According to David Luban, one of the most vocal supporters of an alternative vision of lawyering, although those who subscribe to an alternative vision of professionalism represent "a substantial minority of the legal profession, it is a minority view nonetheless."[159] So why do we continue to be so powerfully influenced by the dominant trend of professionalism?

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[154] Atkinson, "Perverted Professionalism," *supra* note 41 and accompanying text.

[155] Tanovich, *supra* note 25 at 273.

[156] CBA, *Canons of Legal Ethics* (Ottawa: CBA, 1920) cited in Orkin, *supra* note 126 at 13 [emphasis added]. For a current articulation of these *Canons*, see *e.g.* Law Society of British Columbia, *Professional Conduct Handbook*, c. 1 (in force 1 January 1992).

[157] *Supra* note 9 and accompanying text.

[158] See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

[159] David Luban, "The Social Responsibilities of Lawyers: A Green Perspective" (1995) 63 Geo. Wash. L. Rev. 955 at 955 [Luban, "Social Responsibilities of Lawyers"].

Several possible answers obtain. First, there is the argument of tradition. There is no doubt that the dominant model enjoys the weight and sway of a long history and tradition. One only needs to look as far as the earlier discussion of Lord Brougham's vision of a lawyer[160] to find support for this tradition-based argument.[161] However, as is typically the case with tradition- (or precedent-) based arguments, without some other compelling reason, these arguments tend to be nothing more than self-serving tautologies; the model is persuasive, because the model has been persuasive for a long time. Without something more, this line of argument fails to account for the model's continued dominance, particularly in the face of viable alternative options.

Second, perhaps the dominant model continues its hegemonic prominence because it is simply more compelling. Given its autonomy-seeking focus and its one-size-fits-all foundation (one of its "dangerously attractive" features[162]), there is no need for uncomfortable ethical deliberation on the part of individual lawyers. The dominant model champions its amoral ability to be applied to all lawyers and all lawyering situations. It thereby criticizes the alternative models for overplaying the relevance or supremacy of the lawyer's individual moral choices or preferences (that risk usurping the ethical autonomy of the lawyer's client) while underplaying the institutional value of the lawyer in the adversary system. However, the problem with these arguments and justifications for the dominant model's continued prominence is that, as was demonstrated above,[163] there is compelling principle, policy, and practice-based evidence that in my view fatally challenges its assumptions and foundations.

A third and related basis for the model's continued hegemony stems from the power politics and economics of the lawyering process. Law has increasingly become a competitive business driven by complex needs of powerful clients. As Gavin MacKenzie comments, "Lawyers practise in a market economy, and the highest bidders in such an economy are wealthy and often powerful."[164] Having lawyers who will zealously do their bidding obviously serves the interests of clients. It also, however, often serves the interests of lawyers. Personally (and politically) it allows lawyers to sidestep the messy business of moralizing and taking personal responsibility for the deeds of their clients.[165] Economically, it allows lawyers to charge significant fees in exchange for adopting a morally role-differentiated professional position.

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[160] *Supra* note 68 and accompanying text.

[161] Compare Tanovich, *supra* note 25 at 272, n. 19 and accompanying text.

[162] Farrow, "The Negotiator-as-Professional," *supra* note 15 at 398.

[163] See Part B, above.

[164] MacKenzie, *supra* note 63 at 1-7. See also Iacobucci, *supra* note 36 at 860.

[165] Discussed further in Part B.I-II, above.

There is no doubt that this power-politics basis provides a significant justification for the persistence of the dominant model that views the lawyer-client relationship as symbiotic. However, in addition to the principle, policy, and practice examples that challenge the basis of these power politics,[166] there is also no direct evidence supporting the basis of this argument, which is—at its root—that lawyers are exclusively willing pawns of their clients, or as MacKenzie describes, willing to "fiddle on the corners where clients throw coins."[167] In my view, seeing lawyers in such a weak light cheapens not only the office of the lawyer but also the reality of the practice.[168] Further, as MacKenzie comments, "[t]here is no evidence that lawyers who act for the wealthy and powerful are any more or less ethical than are those who act for the poor and powerless."[169] Similarly, as Hutchinson remarks, "[l]aw may well be a business, but that does not necessarily entail an unethical or unprofessional approach to conducting that business."[170] These comments certainly accord with my own experience in the practice of law, in which complex and financially costly client demand often went hand-in-hand with a high degree of self-reflective ethical conduct.[171] They also accord with increasing demands (often by wealthy, powerful clients) for ethical practices from legal counsel.[172] So while certainly a significant answer, I do not think that power politics provides the ultimate answer for the dominant model's continued persistence.

The fourth and most persuasive reason for the continued prominence of the dominant model comes not from the strength of that model but rather from a weakness in the way that the alternative models have, to date, been presented. Specifically, the alternative models are often framed in terms of the "moral perspective," "moral lawyering," or "the good lawyer."[173] Even though proponents of these models sometimes see things differently,[174] these labels tend to connote some shared or required understanding of what counts as "moral" or "good." It has taken the Enlightenment three hundred years to move this understanding from the realm of the family and the personal to a collective understanding of autonomy and rights at the public level of civil society. It is an

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[166] See Part C, above.

[167] MacKenzie, *supra* note 63 at 1-7.

[168] See Part C.III, above.

[169] MacKenzie, *supra* note 63 at 1-7.

[170] Allan C. Hutchinson, "Who Are 'Clients'? (And Why it Matters)" (2005) 84 Can. Bar Rev. 411 at 430 [Hutchinson, "Who Are 'Clients'?"].

[171] For a brief discussion of my former practice experience, see *e.g. supra* note 40.

[172] See McClintock, *supra* note 14 and accompanying text.

[173] See *supra* notes 34-37 and accompanying text.

[174] See *e.g.* Rhode, *Interests of Justice*, *supra* note 66 at 71.

understanding that cannot, by most accounts of liberalism in a pluralistic and complex society, be defended.[175] To avoid this apparent trap, the dominant vision of the lawyer—"aiming not to inject her own vision of the good into the representation, but simply to pursue the client's vision of the good through the maximization of the client's legal rights"[176] (based on classic Rawlsian political liberalism that prefers the right over the good[177])—nicely sidesteps a search for shared values and visions of the good life through role-morality. As such, it fosters the Enlightenment project of individual freedom and autonomy.

Even if we are persuaded by, for example, Rhode's answer to the problem of shared morality,[178] these "intolerant"[179] labels, by their very nature, tend to characterize the "other" side as being the opposite of a "good" lawyer, a "moral" lawyer, or a "just" lawyer, which the "other" dominant view rejects. For example, when looking for a shared conception of the public interest, Tanovich argues that it must at least require "lawyers to act in the pursuit of justice."[180] In turn, justice for Tanovich "can be defined, for purposes of the lawyering process, as the *correct resolution of legal disputes or problems in a fair, responsible, and non-discriminatory manner*."[181] This definition of justice-seeking lawyering, or any of these alternative "moral" or "good"-based labels for that matter, are not wrong. In fact, by and large they are right. The problem is that these definitions and labels could be (and are) equally and credibly claimed by both sides to describe their lawyering projects. Lawyers on both sides think of themselves as "morally reflective individuals,"[182] "better people,"[183] "better lawyers,"[184] and "correct."[185] They just approach these labels from very different perspectives.

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[175] For leading accounts of this current theory of liberalism, see *e.g.* John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Belknap Press, 1999). See also Atkinson, "A Dissenter's Commentary," *supra* note 25 at 343. For a concise and powerful critique of Rawlsian liberalism—primarily animated by communitarian arguments that make space for a modern sense of the "good" being prior to the "right," see *e.g.* Michael J. Sandel, "Political Liberalism," Book Review of *Political Liberalism* by John Rawls, (1994) 107 Harv. L. Rev. 1765. See also Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge: Harvard University Press, 1996).

[176] Vischer, *supra* note 34 at 227.

[177] *Supra* note 175.

[178] See Rhode, *Interests of Justice*, *supra* note 66 at 71.

[179] See Atkinson, "A Dissenter's Commentary," *supra* note 25 at 343.

[180] Tanovich, *supra* note 25 at 284.

[181] *Ibid.* [citation omitted] [emphasis in original].

[182] Rhode, *Interests of Justice*, *supra* note 66 at 67.

[183] Dolovich, *supra* note 76 at 1649.

[184] *Ibid*.

And so we return to Atkinson with two competing and intractable stories. One story, by "anxiously conjur[ing] … up the spirits of the past,"[186] continues to create "a world after its own image."[187] The other story, a modern story that challenges this old world image, rejects much of its "names, battle slogans, and costumes."[188] In so doing, however, it has failed—at the moment of "revolutionizing" itself and of "creating something entirely new"[189]—to replace the "time-honoured disguise and … borrowed language."[190] What is needed is a new, persuasive lens through which to see the world not in the service of "all the dead generations,"[191] but in the service of the "living"[192] in "this society"[193] and in the service of "the world of our children."[194] What is needed is a story of professionalism that captures the energy and positive attributes of both sides of this debate. What is needed is a story of professionalism that is sustainable.

D. Sustainable Professionalism

A key aspect of the problem is that the two stories, on their face, disagree about how to evaluate what counts as the "right" course of action in a given circumstance. Their positions on this fundamental question[195] compete. If we continue to assert these competing positions without uncovering the interests that underlie their positions—unless we find some common ground or more specifically, a persuasive lens through which to see this potential common ground—we will maintain this gridlock.[196] By uncovering the underlying interests at stake in each of the two versions, we will start to

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[185] Tanovich, *supra* note 25 at 284 [citation omitted].

[186] See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

[187] See Marx & Engels, "Communist Manifesto," *supra* note 30 at 477.

[188] See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

[189] *Ibid*.

[190] *Ibid*.

[191] *Ibid*.

[192] *Ibid*.

[193] See Mayer, *supra* note 2.

[194] *Ibid*.

[195] Atkinson, "Perverted Professionalism," *supra* note 41.

[196] This process of uncovering "interests," in the face of competing "positions," is an application of interest-based negotiation theory. For a discussion of this theory, see Colleen M. Hanycz, "Introduction to the Negotiation Process Model" in Hanycz, Farrow & Zemans, *supra* note 15, c. 3.

see who and what we need to address and to protect in order to develop a story of professionalism that addresses all (or at least as many as possible) of those underlying interests. We will find common ground on which to build a theory of professionalism that is (as far as possible) acceptable to, or sustainable for, both sides.

I. Underlying Interests

So what are those underlying interests? For the dominant model, the client maintains the ultimate interest. More specifically, this model preferences the client's ability to maximize his or her autonomy and rights within the broad parameters of what counts as legal, and free from the moralizing of the advising lawyer. For the alternative visions, some version of "justice" or the "public interest" is the primary interest at stake. Again, this model specifically cares about the interests of a number of stakeholders—the client, the lawyer, the judge, the other side, and the public (present and future)—who, taken together, describe the interests of justice or what is thought of as the public interest. Under this model, discovering and balancing these interests actively engages the lawyer's own moral opinions and preferences in the dialogue.

The primary points of disagreement between these approaches are the number of relevant stakeholders (client versus client and others) and the relevance of a lawyer's own moral opinions (vis-à-vis the client's chosen course of legal conduct). Otherwise, both sides seem to agree on the basic justice-seeking premise of the lawyering exercise. We can recast this discussion, taking account of both the shared and competing interests, through a lens of sustainability.

II. Sustainability

My approach re-directs much of the positive energy and progressive ideas of the competing models of professionalism through a more persuasive, *sustainable* lens. This approach stems from my frustration from hearing students and lawyers say to me countless times that a new way of thinking about professionalism would be a good idea in theory, but is just not sustainable in reality.[197] This article therefore answers those skeptics by proposing a form of professionalism that is normatively sound, is descriptively accurate, and provides the basis for broad-based buy-in from as many justice-seeking stakeholders as possible. At the moment, neither the dominant nor the alternative model satisfies all three requirements.

[197] See *e.g. supra* notes 40 and 43 and accompanying text.

Interestingly, but for a handful of references to several useful but general social science initiatives looking at the role and future of professionalism,[198] there is little meaningful discussion of "sustainability" in the academic literature on legal ethics.[199] It is not a mantra that theories of professionalism have self-consciously embraced.[200]

As a general matter, sustainability has come to be primarily identified with three particular approaches: "sustainability as optimal living resource exploitation"; "sustainability as respect for ecological limits"; and "sustainability as sustainable development."[201] While all three approaches characterize the *typical* use of the concept in modern legal parlance, they do not preclude other, more general uses of the idea. Nor do they preclude a wide range of stakeholders from engaging in discussions of sustainability broadly defined. For example, according to Stepan Wood,

> [s]ustainability has emerged as one of the defining preoccupations of human affairs at the opening of the twenty-first century. It has proven to be simultaneously as alluring and as challenging to international lawyers as it has to scientists, politicians, businesspeople and others. It provides a powerful symbol around which diverse interests can converge, but at the same time it eludes concrete definition, encompasses conflicting agendas and promises to generate continuing debate and controversy.[202]

To my mind, the legal profession provides a new terrain for "continuing debate" about the utility of sustainability, broadly defined. There are many definitions of the word "sustain": for example, to "uphold the validity or rightfulness of" or to "keep (a person or community … etc.) from failing or giving way."[203] Further, "sustainable" was defined (in the context of development) in the foundational "Brundtland Report" as meeting "the needs of the present without compromising the ability of future generations to meet their own

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[198] See *e.g.* John Craig, ed., *Production Values: Futures for Professionalism* (London: Demos, 2006), online: Careers Scotland <http://www.careers-scotland.org.uk/nmsruntime/ saveasdialog.asp?lID=9439&sID=1164>.

[199] I realize that proving a negative is not an easy task. For purposes of this article, it is also not a necessary task.

[200] However, as is discussed in Part D.II.4, below, several theories of professionalism do provide some useful groundwork for this approach.

[201] See Stepan Wood, "Sustainability in International Law," *UNESCO Encyclopaedia of Life Support Systems* (Oxford: EOLSS Publishers, 2003) 1 at 1-2, online: <http://osgoode. yorku.ca/osgmedia.nsf/ research/wood_stepan>. I am grateful to Stepan Wood and Hugh Benevides for helpful background comments on the concept of sustainability.

[202] *Ibid*. at 2.

[203] William Little, *The Shorter Oxford English Dictionary on Historical Principles*, 3d ed. (Oxford: Clarendon Press, 1973), *s.v.* "sustain" [OED].

needs."[204] For my purpose, a lens of sustainability provides a "powerful symbol around which diverse interests can converge,"[205] "encompasses conflicting agendas,"[206] "promises to generate continuing debate and controversy,"[207] and is open to some normative notion of "rightfulness"[208] in the eyes of a "person or community."[209] Also important is the consideration of both current and future interests.[210]

From before, we saw that the primary conflicting agendas involved those solely of the client as compared to those of a broader range of voices.[211] Further, the theories of professionalism disagree as to the relevance or prominence of a lawyer's individual moral opinions vis-à-vis a client's legal course of action.[212] Therefore, a useful lens of sustainability must take into account a broad range of these competing interests, which I have organized into four main groups: client interests, lawyer interests, ethical and professional interests (of lawyers and the profession), and the public interest.[213] It is important to note that the following discussion purports to be neither comprehensive regarding an individual interest nor complete regarding the totality of interests. Rather, what follows is a brief treatment of a sampling of some fundamental, perhaps competing, interests.[214]

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[204] World Commission on Environment and Development (Brundtland Commission), "Our Common Future" (Oxford: Oxford University Press, 1987), transmitted to U.N. General Assembly as annex to *Development and International Co-operation: Environment*, UN GAOR, 42d Sess., Annex Agenda Item 82(e), UN Doc. A/42/427 (1987), c. 2 at para. 1, online: United Nations <http://www.un-documents.net/ocf-02.htm> (cited to UN Doc. A/42/427) [Brundtland Report].

[205] Wood, *supra* note 201 at 2.

[206] *Ibid*.

[207] *Ibid*.

[208] OED, *supra* note 203.

[209] *Ibid*.

[210] "Brundtland Report," *supra* note 204. For a useful judicial treatment of the term "sustainability," including the importance of non-economic "social values," see *Tsilhqot'in Nation v. British Columbia* (2007), [2008] 1 C.N.L.R. 112 at paras. 1295-1301, D.H. Vickers J. (S.C.).

[211] See Part D.I, above.

[212] *Ibid*.

[213] I am adapting this framework from earlier comments I made on the topic of professionalism (particularly in the context of professionalism from a negotiator's perspective). See Farrow, "The Negotiator-as-Professional," *supra* note 15 at 376-77.

[214] Because I am developing a general theory of sustainable professionalism in this article, what follows is a sampling of interests that could apply in a range of practice contexts (*e.g.*, corporate, family, real estate, and criminal). It would also be useful—and should be an issue for further research—to look at this theory of sustainability within the context of specific practice areas. One area of particular interest (given its prevalence)

1. Client Interests

The dominant model of professionalism described above[215] protects and fosters meaningful space for the interests of clients, particularly powerful and wealthy clients, typically to the exclusion of all others. As we saw, based on principle, policy, and practice-based arguments, any notion of professionalism must make robust space for the realization of a client's legal interests in a free and democratic society.

At the outset, nothing in a theory of sustainability seeks to reject the importance of a client's legal interests. In fact, as Hutchinson—a primary proponent of an alternative approach to professionalism—argues, a "directive to lawyers to take responsibility for what they do (and do not do) ought not to be viewed as an excuse to ignore the needs of clients...."[216] Further, "lawyers will not foist their own values on the client, nor will they work with clients in ways that offend their own moral convictions. Initiated and *sustained* in this way, the lawyer-client relationship will be mutually respectful and engaged."[217] Clients must play a central role in any calculus of a sustained theory of professionalism.[218] This makes sense as a descriptive matter. It also makes sense as a freedom-seeking normative matter. Important, however, is the realization that the conversation does not end here. If we are to make sense of the further principle, policy, and practice-based arguments that so powerfully animate the alternative models of professionalism,[219] we need to take seriously and make room for some of the other (sometimes competing) interests that are at stake in this discussion.

2. Lawyer Interests

As a starting point, there are numerous demands of the lawyering role that engage several self-interested notions of professionalism. First, there are pecuniary interests. Lawyers want to get paid and paid fairly for the hard work that they do and for the services that they provide. Therefore, a sustainable notion of professionalism must take

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and potential challenge, would be the corporate law context, in which clients often wield significant wealth, power and influence vis-à-vis the interests of their lawyers. See MacKenzie, *supra* note 63 at 1-8 (and accompanying text). As MacKenzie notes, in this world of increased commercialism within the practice of law, the "pressure to condone unethical or even unlawful but lucrative acts can be overwhelming." I am grateful to Allan Hutchinson for comments regarding this line of inquiry.

[215] See Part B, above.

[216] Hutchinson, *Legal Ethics*, *supra* note 8 at 213.

[217] *Ibid*. at 214 [emphasis added].

[218] A robust theory of client representation must also recognize the variety and diversity of clients and client interests. For a useful treatment of this issue, see *e.g.* Hutchinson, "Who Are 'Clients'?", *supra* note 170.

[219] See Part C, above.

into account the ability of lawyers to make a fair living. As the Honourable Frank Iacobucci comments, to the "extent that lawyers … are financially successful it is often because they effectively and efficiently serve the needs of their clients, and that is an admirable thing."[220]

Further, non-pecuniary interests of the lawyer will also play a prominent role in a sustainable notion of professionalism. Lawyers should expect to maintain a meaningful ability to pursue activities and interests that make for a full life not only as lawyers but also as members of society. Time at work, time at home, time with friends, and time engaging in social and political affairs should all be realizable goals of a sustainable professionalism. A sustainable notion of professionalism must avoid "slavishly adhering to billable hours and client getting at the cost of overlooking the quality of the work offered by lawyers or their contributions to the profession and the community both in legal and non-legal spheres."[221]

There already exists a rich and growing body of literature that deals with professional issues such as professionalism and work-life balance.[222] A sustainable discourse of professionalism must seriously grapple with those demands and that literature. As argued above,[223] doing so does not amount to ignoring the interests of clients. It also does not guarantee or mandate a certain lifestyle or work ethic. This discourse calls for the balancing of client interests with other interests, including—as contemplated by various canons of professional conduct[224]—those of the lawyer. By so doing, it creates more meaningful space for the interests of the lawyer, which the dominant model, by constantly foregrounding the interests of the client, invariably backgrounds. Under a sustainable model, lawyers have more choice in the calculus of how to proceed in a given context.

3. Ethical and Professional Interests (of Lawyers and the Profession)

Numerous ethical and professional interests are at play when mapping out a sustainable vision of professionalism.[225] The principles and policies that animate the alternative

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[220] Iacobucci, *supra* note 36 at 863.

[221] *Ibid*.

[222] See *e.g.* Farrow, "A Profession, Not a Life," *supra* note 5.

[223] See Part B, above.

[224] See *e.g. supra* note 156 and accompanying text.

[225] I recognize that some of these issues are equally of interest to the public, and could therefore be categorized in the fourth—"public interest"—subheading in this part.

models provide numerous robust bases for requiring that ethical and professional considerations be a meaningful part of a sustainable vision of professionalism.[226]

In addition to seeing the lawyer's role as one that should pursue "social justice" by avoiding "dishonourable" or "morally reprehensible conduct,"[227] several other ethical or professional interests must form part of a sustainable discourse of professionalism. As a starting point, for this discourse to include the many different faces that make up the bar today, we must first recognize and celebrate the diversity of that bar. We must reject stories of lawyers who, collectively, are members of a homogenized and unified profession. Why? First, as a descriptive matter, such stories are not reflective of reality. As numerous commentators have noticed, those who practice law make up an increasingly diverse social, political, economic, cultural, and gender-based background.[228] Second, as an economic matter, lawyers need increasingly to make sense of diversity obligations because clients are demanding that they do so. Market-based diversity incentives, in the form of diversity checklist programs, are a further reason why diversity matters in the context of understanding modern notions of professionalism.[229]

Third, as a normative matter, such stories act to exclude a wide range of people who are or want to be practising law in diverse and meaningful ways in society. As Constance Backhouse has articulated, traditional stories of the practice of law have often resorted to ideas of "professionalism" that "exercise power and exclusion based on gender, race, class and religion."[230] As such, the Honourable Bertha Wilson, in her seminal report, *Touchstones for Change*, to the CBA on equality and diversity, forcefully articulated the

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[226] See Part C.I-II, above.

[227] See *supra* notes 135-38 and accompanying text.

[228] For discussions of this contested complexity of the profession, see *e.g.* H.W. Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1994-1995) 33 Alta. L. Rev. 800 at 805; Matasar, *supra* note 23 at 986. See also Hutchinson, "Legal Ethics for a Fragmented Society," *supra* note 120; Harry W. Arthurs, Richard Weisman & Frederick H. Zemans, "Canadian Lawyers: A Peculiar Professionalism" in Richard L. Abel & Philip S.C. Lewis, eds., *Lawyers in Society: The Common Law World*, vol. 1 (Berkeley, Los Angeles: University of California Press, 1988) at 123; David A.A. Stager with Harry W. Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990) at 321; Hazard, Jr. & Rhode, *The Legal Profession*, *supra* note 76, c. 3; and David B. Wilkins, "Identities and Roles: Race, Recognition, and Professional Responsibility" (1998) 57 Md. L. Rev. 1502.

[229] See *e.g.* McClintock, *supra* note 14.

[230] Constance Backhouse, "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives" (Paper presented to the Chief Justice of Ontario's Advisory Committee on Professionalism, First Colloquium on the Legal Profession, 20 October 2003) at 2 [unpublished], online: <http://www.lsuc.on.ca/media/constance_backhouse_ gender_and_race.pdf>. See also Wilkins, *supra* note 228. See further Ulrike Schultz & Gisela Shaw, eds., *Women in the World's Legal Professions* (Portland: Hart, 2003); Joan Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould* (Vancouver: University of British Columbia Press, 2001); and Sheila McIntyre & Elizabeth Sheehy, eds., *Calling for Change: Women, Law, and the Legal Profession* (Ottawa: University of Ottawa Press, 2006).

premise that a "starting point for a discussion on the need for change must be the recognition that gender equality is a fundamental legal norm… . The law in Canada now demands adherence to the equality principle. The legal profession should show leadership by adopting equality norms as its own."[231] Clearly for a theory of professionalism to be sustainable for the diverse communities that practise law, it must speak in terms that honour that diversity, not in terms that marginalize it. As former Governor General Adrienne Clarkson argues:

> [The profession] should be more of a mirror of society—and the society we've become—if it is to have a truer perception of the public interest and a more self-conscious awareness of its role and responsibility in the creation of our new citizenry. And this starts with greater equity and equality in the legal profession itself.[232]

A greater understanding and openness to diversity in our notions of professionalism will provide a more welcome and meaningful home for more lawyers. It will also push the profession's understanding of and participation in a public interest that truly reflects the reality of our general pluralistic and globalized civil societies.[233] Further, however, it will also recognize the diversity of individual lawyers, with diverse moral perspectives, which will in turn assist with the charge that by allowing lawyers to moralize about their clients' causes, we will require some sense of a shared morality.[234] Andrew Kaufman states,

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[231] Report of the CBA Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: CBA, 1993) at 17. To date, only limited success in furthering the bar's commitment to a robust sense of equality has obtained. See *e.g.* Chief Justice of Ontario Advisory Committee on Professionalism, "Elements of Professionalism" (October 2001, rev. December 2001 and June 2002), online: <http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf>. See further Rosemary Cairns Way, "Reconceptualizing Professional Responsibility: Incorporating Equality" (2002) 25 Dal. L.J. 27.

[232] Adrienne Clarkson, "Speech on the Occasion of an Honorary Doctorate of Laws Degree from The Law Society of Upper Canada" (27 February 2003) [unpublished], online: Governor General of Canada <http://www.gg.ca/media/doc.asp?lang=e&DocID=1091>.

[233] For code-based recognition of the importance of diversity in local communities, see *e.g.* LSUC, *Rules*, *supra* note 10, r. 1.03(1)(b). For recent comments on the modern make-up of civil society, see *e.g.* Unnati Gandhi, "Facing up to a new identity" *The Globe and Mail* (3 April 2008) A1; Anthony Reinhart, "A nation of newcomers" *The Globe and Mail* (5 December 2007) A1. For general background discussions, see Leopold Posposil, "Legal Levels and Multiplicity of Legal Systems" in *Anthropology of Law: A Comparative Perspective* (New York: Harper & Row, 1971) at 97; Sally Engle Merry, "Legal Pluralism" (1988) 22 Law & Soc'y Rev. 869; Franz von Benda-Beckmann, "Comment on Merry" (1988) 22 Law & Soc'y Rev. 897; David Held *et al*., *Global Transformations: Politics, Economics and Culture* (Stanford: Stanford University Press, 1999) at 1-28; Boaventura de Sousa Santos, "Nature and Types of Globalization(s)" in *Toward A New Legal Common Sense: Law, Globalization, And Emancipation*, 2d ed. (London: Butterworths, 2002) at 177. For early comments of mine on the topic, see *e.g.* Trevor C.W. Farrow, "Reviewing Globalization: Three Competing Stories, Two Emerging Themes, and How Law Schools Can and Must Participate" (2003) 13 Meikei L. Rev. 176, trans. into Japanese by M. Kuwahara, (2003) 44 Aichigakuin L. Rev. 29, republished (2004) 5 J. Centre Int'l Stud. 1.

[234] See *e.g.* Rhode, *Interests of Justice*, *supra* note 66 at 71.

> I do not think it all bad that the kind of advice clients get depends to some extent on the chance of whom they choose or have chosen for them as lawyers… . In some cases there are costs to leaving things to chance. But so are there costs in trying to force very different lawyers with very different sensibilities into one attitudinal mold for nearly all situations.[235]

Celebrating a multiplicity of voices at the bar also assists with the "last lawyer in town" objection, which is often raised by dominant model theorists as a potentially fatal concern with alternative models of professionalism. As the argument goes, if all lawyers moralize about the causes of their clients, there is a good chance that clients with unpopular causes will not be able to find lawyers to take their cases.[236] The question then becomes even more difficult if you—as a moral lawyer—find yourself to be the last lawyer in town. Do you take the case? My first response to this question is: "show me evidence establishing this concern as a recurring problem and I will then start to worry about it."[237] Along the lines of "hard cases make bad law," it just has not been our typical experience that unpopular causes have systematically gone unrepresented. Second, if that unlikely scenario were to materialize, a balancing of competing interests—those of the client, the lawyer, and the state to provide for an adversarial system that is open to all comers—might well lead on balance, under a sustainable theory of professionalism,[238] to the lawyer taking the case. Third, even taking this concern at face value as a real concern (which some people do[239]), celebrating a pluralism of voices at the bar goes a long way to mitigating this risk. With a multitude of moral backgrounds and perspectives, a diverse bar becomes more welcoming to clients with diverse legal needs.

Other professional issues of interest to a theory of sustainable professionalism relate to some of the realities and responsibilities of practising lawyers, often seen in the context of litigation.[240] One issue in particular that strongly militates against a robust view of adversarialism as the basis for a persuasive model of professionalism is that, as Tanovich

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[235] Andrew L. Kaufman, "A Commentary on Pepper's 'The Lawyer's Amoral Ethical Role'" (1986) 11 Am. B. Found. Res. J. 651 at 655.

[236] For commentary raising this type of concern, see *e.g*. Dash, *supra* note 13 at 220 ("If a lawyer says my moral judgments don't allow me to support this particular person, even though I know he has a legal case, who will represent that person?"). See also Rhode, *supra* note 66 at 57; *Ibid*.

[237] I am anecdotally aware that such cases do exist, particularly in more rural contexts.

[238] Developed further, below, in Part D.III.

[239] See *e.g.* Kaufman, *supra* note 235.

[240] In addition to the issue of adversarialism, discussed in this section, another practice-related issue of interest to a sustainable understanding of professionalism is the issue of civility. See *e.g.* Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L. Rev. 97. But see Alice Woolley, "Does Civility Matter?" (2008) 46 Osgoode Hall L.J. 175.

has recognized, at least in the context of the civil dispute resolution system, almost all cases settle.[241] The dominant model typically takes as its paradigmatic lawyer the zealous advocate, most often as conceptualized in the litigation context. However, "the 'overwhelming preponderance' of what lawyers do 'involves negotiating with others,'"[242] which is invariably located outside of the courtroom. As such, a professionalism that is sustainable in the eyes of all lawyers, not just of those who act in the 2 per cent or so of cases that go to trial, must take into account the varied practice contexts of all non-courtroom lawyering experiences.[243]

4. Public Interest

Flowing from the third group is this fourth group of interests that, taken together, focus specifically on the public interest. Again, there is a vast array of interests that could be captured as part of this discussion. A notion of sustainable professionalism must maintain meaningful room for protection of the public interest, and in particular the robust and aspirational principle- and policy-based statements that animate the alternative models of professionalism in the spirit of protecting the public interest.[244] A notion of professionalism that does not acknowledge that "[s]tandards of professional ethics form the backdrop for everything lawyers do,"[245] and further, that a "primary concern" of the profession is "the protection of the public interest,"[246] will not be sustainable on any calculus that makes good on the bargain with society to protect the public interest in return for the privilege of self-regulation.[247]

As a starting point, the alternative model commentator who comes closest to articulating a self-conscious theory of sustainable professionalism—primarily in the spirit of the typical notions of sustainability that focus on living resources, ecology and development[248]—is

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[241] See Tanovich, *supra* note 25 at 282 [citation omitted]. For previous discussions of mine on settlement rates, see *e.g.* Trevor C.W. Farrow, "Dispute Resolution, Access to Justice and Legal Education" (2005) 42 Alta. L. Rev. 741 at 749, n. 43; Trevor C.W. Farrow, "Public Justice, Private Dispute Resolution and Democracy" in Ronalda Murphy and Patrick A. Molinari, eds., *Doing Justice: Dispute Resolution in the Courts and Beyond* (Canada: Canadian Institute for the Administration of Justice, 2009) 301 at 321, n. 59.

[242] Farrow, "The Negotiator-as-Professional," *supra* note 15 at 373 [footnote omitted].

[243] For a recent discussion of the varied roles of modern lawyers, specifically including their role as settlement counsel, see Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008). For a review of the Macfarlane book, see Andrew Pirie, (2008) 46 Osgoode Hall L.J. 203.

[244] See Parts C.I-II, above.

[245] Tabor, "President's Message," *supra* note 132.

[246] CBA, *Code*, *supra* note 27 at ix.

[247] Discussed in *supra* note 103 and accompanying text.

[248] Wood, *supra* note 201 at 1-4.

David Luban.[249] In his discussion of the "social responsibility of lawyers," Luban argues that lawyers have a responsibility in the project of "solving collective action problems."[250] He contemplates the notion of a "socially responsible" lawyer as a professional who "forbear[s] from collectively harmful action."[251] Further, he defines this notion of "collective responsibility" as "the responsibility we bear not to foul our own nest, to maintain the very systems that sustain us."[252] Echoing the green movement, Luban asks, "[w]hen will we reach the point of understanding that to evade our social responsibilities is little more than suicide?"[253]

Far from deferring to client interests that, while legal, may not be sustainable from the long-term perspective of the environment, Luban contemplates the lawyer's role as one of an active moral agent who takes seriously the responsibility to do good in the world. Luban's perspective is a self-consciously moral perspective. Of course what amounts to doing "good" in a given case may still be a contested discussion. And that is acceptable because having a discussion, rather than simply deferring to a client's interests, is a significant part of the exercise of a theory of sustainable professionalism. By allowing for this discussion, Luban's morally reflective approach enables multiple interests to be considered and balanced. It is also a perspective that takes seriously professional code dictates not only to avoid "injustice" and "dishonourable" or "morally reprehensible" conduct, but also to pursue courses of conduct that foster "social justice."[254]

Luban is not alone on this issue. Other commentators also advocate a theory of professionalism that makes meaningful space for lawyers pursuing just causes with their legal skills. Duncan Kennedy, for example, makes no apologies for his view that lawyers "should avoid doing harm" with their "lawyer skills."[255] Hutchinson, although leaving significant space for client autonomy in his alternative vision of professionalism, takes seriously the centrality of the lawyer's role by encouraging a sensibility of "critical morality" that asks: "What interests am I going to spend my life serving as a lawyer?"[256] Each of these accounts fits with Mayer's ultimate challenge to the bar, namely, that lawyers should demand that their efforts on behalf of their clients also amount to "a plus

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[249] Luban, "Social Responsibilities of Lawyers," *supra* note 159 at 955.

[250] *Ibid*.

[251] *Ibid*. at 963.

[252] *Ibid*. at 982.

[253] *Ibid*. at 983.

[254] See *supra* notes 135-38 and accompanying text.

[255] Kennedy, "The Responsibility of Lawyers," *supra* note 123 at 1161.

[256] Hutchinson, "Legal Ethics for a Fragmented Society," *supra* note 120 at 187.

for … society and for the world of our children."[257] A sustainable notion of professionalism—one that makes good on the promise of public interest protection—therefore needs to take seriously these alternative accounts. And in case this all seems far from what should reasonably be expected of the practising bar, we should remember that calls to "maintain and advance the cause of justice and the rule of law" and to "protect the public interest" come not only from these aspirational interpretations of professional principles, but also from foundational legislative dictates that establish our very professional existence.[258] They also, at least according to Tanovich, are already being realized.[259]

In addition to thinking about the substance of what our clients do under the rules of the legal system, there is a threshold discussion of whether or not clients can access the system in the first place. Protecting the public interest requires a theory of professionalism that contemplates a bar that is working toward meaningful access to the system for all members of society. For example, as Ontario's *Law Society Act* provides, the LSUC has a "duty" to "facilitate access to justice."[260] The dominant model of professionalism, by focusing on the courtroom battlefield of the zealous advocate, proceeds on the assumption that clients have access to that battlefield in the first place. We know, however, that such ready access is not a reality for most people.[261] Access to justice in this country (in the form of access to lawyers and access to the system),[262] and indeed around the world, is only a fiction. As such, a sustainable professionalism must not proceed on an assumption of full access. Rather, we must start at the problematic level of today's access realities and develop a theory of professionalism that seeks to be creative and successful vis-à-vis the bar's obligation to "facilitate access to justice."[263]

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[257] Mayer, *supra* note 2.

[258] See *Law Society Act*, *supra* note 109, s. 4.2.

[259] See Tanovich, *supra* note 25.

[260] See *Law Society Act*, *supra* note 109, s. 4.2.

[261] See *e.g.* Ab Currie, "A National Survey of the Civil Justice Problems of Low—and Moderate—Income Canadians: Incidence and Patterns" (2006) 13 Int'l J. Legal Prof. 217.

[262] For a broader discussion of access to justice in Canada, see Roderick A. Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, W.A. Bogart & Frederick H. Zemans, eds., *Access to Justice for a New Century – The Way Forward* (Toronto: LSUC, 2005) at 19 and Marc Galanter, "Access to Justice as a Moving Frontier" at 147.

[263] *Law Society Act*, *supra* note 109, s. 4.2. For a useful account of the bar's responsibilities to foster access to justice (which has influenced my thinking on the connections between access to justice and professionalism), see Richard Devlin, "Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002) 25 Dal. L.J. 335. See also Hutchinson, *Legal Ethics*, *supra* note 8 at 85-88.

III. Balance and Context

So where does this leave us? From a review of the competing principle, policy, and practice-based arguments that animate the dominant and alternative models of professionalism,[264] and trying to make sense of these various complex, contextual, and sometimes competing interests—reminiscent of some of the interests set out at the beginning of this article[265]—what remains is a challenge that neither the dominant nor the alternative model has fully overcome. As I argued earlier,[266] both sides must learn to think and speak in terms that are sustainable to a wide range of voices and interests. The dominant model, through its narrow focus primarily on one interest "in all the world,"[267] misses a variety of other relevant people and interests. The alternative model, on the other hand—through its typical focus on the "good lawyer"—has been seen to be unrealistic in practice, at least in light of the continued use of "time-honoured disguise[s] and … borrowed language."[268]

This theory of sustainable professionalism addresses the gridlock created by these competing notions of professionalism. It purports to do so by harnessing both the energy and optimism of the alternative models as well as the tenacity of the dominant model. Even more importantly, it self-consciously identifies the myriad interests that are at stake in the context—those of the client, lawyer, profession, and public—and draws them into a theory of professionalism that is sustainable.

By moving beyond the centrality of the client's interest as championed by the dominant model, instantly we open ourselves up to competing and potentially irreconcilable interests. This theory of sustainable professionalism takes seriously the complex and pluralistic landscapes of lawyers, clients, and the public. But in order to have a chance of buy-in from those broad-based stakeholders, we need to live in the world of those complexities, not in a world of fictional simplicity. As Backhouse reminds us, doing otherwise simply perpetuates exclusion.[269] Such exclusion, in turn, fails to develop a professionalism that is sustainable on any calculus. We also need to live in a world that is not afraid of those complexities. At times conflict will be unavoidable. And when it does occur, a sustainable theory of professionalism will seek to balance and respect as many interests as possible. For example, allowing for client autonomy and meaningful space for

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[264] See Parts B and C, above.

[265] See *supra* notes 3-14, 32, and accompanying text.

[266] See Part C.IV, above.

[267] *Trial of Queen Caroline*, *supra* note 68.

[268] See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

[269] Backhouse, *supra* note 230.

moral deliberation by a lawyer is not necessarily a mutually exclusive exercise. In fact, as Hutchinson argues, it is an exercise that can in fact be mutually beneficial: "To provide sound professional judgment, it is necessary to resort to a well-honed and mature sense of moral acuity."[270] Further, failing to develop "bridges" between the "professional role" and the "dictates of a personal morality" will "impoverish both professional and personal pursuits."[271]

At times, however, the conflict will be irreconcilable. The legal demands of a client retainer may collide head-on with the dictates of a lawyer's own personal moral code. For example, what if a rich, speculative, private land developer wishes to negotiate a deal with a slum landlord over the purchase of a fully functioning, low-income rental facility that currently houses eighty subsistence-income-level families, in favour of its demolition and replacement with a high-end, multi-use condo facility that would house eight high-income families?[272] Would you take the retainer? How would you advise the developer? Would it make a difference if you knew that alternative housing arrangements, given the current rental market, were not immediately available to those other families? Alternatively, what if the CEO of a large privately-held downsizing transnational security firm came to you and asked you to negotiate a deal in private that would result in the termination of all employees of the Muslim faith, based on your client's unfounded occupational requirement theory that these employees, while good people, simply pose too much of a reputational and security risk (in terms of attacks against security officers in the field) and are therefore too costly to the firm?[273] What course of action would avoid an "injustice," would avoid "dishonourable" or "morally reprehensible" conduct, and would promote a generally accepted notion of "social justice"?[274]

The dominant model and alternative models have not been able to find common ground on these sorts of questions. The dominant model provides that if the lawyer decides to accept the retainer (which is itself, although not required, an act that is encouraged by the dominant model), he or she must background his or her own moral views and proceed to effect the client's legally permitted instructions. Based on anecdotal experience, that is

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[270] Hutchinson, "Legal Ethics for a Fragmented Society," *supra* note 120 at 187-88.

[271] *Ibid*.

[272] See Farrow, "The Negotiator-as-Professional," *supra* note 15 at 388, n. 62. This hypothetical case, and my use of it in previous commentary and in class discussions, has been directly influenced by Duncan Kennedy's initial development of a similar scenario. See Kennedy, "The Responsibility of Lawyers," *supra* note 123 at 1161.

[273] See Farrow, "Negotiator-as-Professional," *ibid*. See similarly Rob Atkinson's treatment of Lord Darlington's instructions to his butler (Mr. Stevens) to "let … go" all the "Jews on the house staff" in the interests of the "safety and well-being" of his guests, based on Kazuo Ishiguro, *The Remains of the Day* (New York: Alfred A. Knopf, 1989), in Atkinson, "Perverted Professionalism," *supra* note 41 at 181-84.

[274] See *supra* notes 135-38 and accompanying text.

not a personally satisfying, acceptable, and therefore sustainable approach for many students and lawyers.[275]

The alternative models, by typically asking the question "what does justice require?" in a given situation, immediately open the door to contextual analysis.[276] By so doing, competing interests can be balanced and, in the end, be prioritized on a calculus of what a lawyer thinks is a "good" course of conduct. This is what Rhode contemplates as a lawyer's ability of "ethically reflective analysis."[277] As they currently stand, however, the alternative models—by perceiving themselves as taking the moral (justice-seeking) high ground and by casting the lawyering exercise into a normative hierarchy—have alienated both members of the dominant model and closet members of the alternative models who fail to see room for a theory of professionalism that makes space for the institutional practicalities and realities of the practice of law.

By seeking to normalize these competing interests and discourses, through an exercise of interest identification and rationalization, the theory of sustainable professionalism recasts these interests into a broad collective of inputs. These inputs are the landscape of what amounts to the "real world" of the modern lawyering project. Seeing competing interests in this light normalizes them. It also forces any theory of professionalism to take them into account in order to be sustainable in the eyes of its various interested stakeholders.

If a lawyer chooses to represent the "rich, speculative, private land developer,"[278] then—pursuant to a theory of sustainable professionalism—he or she is doing so because, based on an interest-based calculus that includes a broad range of voices (including the client, the lawyer, and the public), the lawyer thinks it is a "good" thing to do, not because of the feeling that he or she "has to do it." The lawyer may choose to do so because he or she agrees with the client's motivations. Alternatively, the lawyer may be persuaded by the principle of client autonomy that underlies the dominant model of professionalism.[279] In the further alternative, the lawyer may choose to take on the client but then try hard to persuade the client to pursue a different course of action. The lawyer's motivations may be that he or she disagrees with the goals of the retainer and seeks to change the client's mind. The lawyer may simply think that it is not the kind of work that he or she wants to do. Or the lawyer may think that it is not in the public interest, or that it is not

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[275] See Farrow, "The Negotiator-as-Professional," *supra* note 15 at 388, n. 62 and accompanying text.

[276] See *e.g.* Rhode, *Interests of Justice*, *supra* note 66 at 67; Tanovich, *supra* note 25 at 302.

[277] Rhode, *Interests of Justice*, *ibid.* at 71.

[278] See *supra* note 272 and accompanying text.

[279] See *supra* notes 71-76 and accompanying text.

"[]honourable," "moral[]," or in the pursuit of "social justice."[280] Regardless, the goal is to foster deliberation both for the lawyer and between the client and the lawyer, in the spirit of enabling a sustained and engaged discussion that takes seriously a variety of potentially competing interests. This is not simply an exercise in client autonomy or an exercise in moral superiority. It is an exercise in real world, sustainable lawyering.

Some may challenge this vision as simply restating the basic premise of the alternative models. There clearly are many similarities, and from the outset I have acknowledged my debt to these alternative models.[281] My point is not fully to reject the alternative models but rather to draw on their energy and optimism. However, as I have also argued, there has been a consistent lack of buy-in to these models. This model of sustainable professionalism takes seriously the merits of those alternative approaches. At the same time it adequately responds to, often resists, but in some cases benefits from, the power of the dominant model. In the end, by accessing and being accessible to multiple norms, models, and interests, this model of sustainable professionalism does a better job of being "normatively sound," being "descriptively accurate," and providing the premise "for broad-based buy-in from as many justice-seeking stakeholders as possible."[282]

IV. Legal Education

Before concluding, there is a further element of this discussion, and that is its connection to legal education. There are many moments within the profession at which the possibility of change can occur, including at law schools, bar admission programs, mentoring initiatives, continuing education courses, judicial speeches and judgments, discipline rulings, bencher directives, and in professional rules and commentaries. Of course external sources for change also obtain, including legislative limits on self-regulation, public opinion, client demands, and others. However, it is at the initial stage of the professional experience that a sensibility of openness to alternative discourses is most palpable, possible, and important.

How we see ourselves individually as lawyers and how we see ourselves collectively as a profession are foundational questions that must be addressed in legal education. We need to realize and make use of the fact that law schools retain significant power "to structure the moral perspectives of those who experience it."[283] As Richard Wasserstrom argues, the question of "what is the nature of the good lawyer?" is potentially "one of the central

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[280] See *supra* notes 135-38 and accompanying text. See further *supra* notes 252 and 272 and accompanying text.

[281] See *e.g. supra* notes 46, 154-56 and accompanying text. See also Part D.II, above.

[282] From Part D.II, above. See *supra* note 197 and accompanying text.

[283] Dolovich, *supra* note 76 at 1670.

questions, if not the central question, of legal education."[284] Similarly, according to Deborah Rhode, "[l]aw schools cannot be value-neutral on questions of value. One of their most crucial functions is to force a focus on the way that legal structures function, or fail to function, for the have-nots. Another is to equip and inspire students to contribute to the public good and to reflect more deeply on what that means in professional contexts."[285]

As discussed earlier[286] and elsewhere,[287] there continues to be an alarming disconnect between what students think is right in the world and what students think they are going to be required to do to be "good" lawyers. This is particularly problematic, for no other reason than that it assumes, at the outset, that the role-differentiated amoral advocate championed by the dominant model is the only viable model in the context of the "real world" of lawyering. If after a full exposure to and consideration of alternative models a student prefers the dominant model of lawyering as one that should animate his or her own practice vision, then so be it. However, at the moment, those alternative models apparently do not stand a chance. All of the aspirational language that animates the principle, policy, and practice-based arguments of the alternative models—*i.e.* statutory and code-based requirements designed to promote "the cause of justice and the rule of law"[288]—are missing from the ultimate calculus of what counts as a "good" lawyer. And here we see how the dominant model perpetuates itself, notwithstanding the desires of many students and lawyers—and even some clients[289]—to engage in a deliberative exercise of "creating something entirely new."[290] A modern theory of professionalism must make room for these competing principle, policy, and practice-based arguments in a way that is accessible to the broad range of relevant stakeholders.

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[284] Wasserstrom, "Legal Education," *supra* note 37 at 155.

[285] Rhode, "Persistent Questions," *supra* note 3 at 659-60. See generally Rhode, *Interests of Justice*, *supra* note 66, c. 7.

[286] See *e.g. supra* notes 40, 42, and accompanying text.

[287] See *e.g.* Joshua J.A. Henderson and Trevor C.W. Farrow, "The Ethical Development of Law Students: An Empirical Study" (2009) 72:1 Sask. L. Rev. 75; Farrow, "Negotiator-as-Professional," *supra* note 15 at 388, n. 62 and accompanying text; Kennedy, *supra* note 6 at 87 (discussed further at *supra* note 43 and accompanying text).

[288] See *Law Society Act*, *supra* note 109, s. 4.2.

[289] See *e.g.* McClintock, *supra* note 14 and accompanying text.

[290] See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

E. Conclusion

As Adam Dodek comments, with some notable exceptions, scholarship generally addressing legal ethics and professionalism in Canada is still in its early days.[291] Further, Tanovich comments: "[u]nfortunately, we have only had few attempts in Canada to set out systematically a … theory of ethical lawyering."[292] This article seeks to add to those attempts.

From the start I have been troubled by the fact that, notwithstanding these powerful arguments of the alternative models, there continues to be a remaking of history in the image of the past that favours the time-honoured but increasingly fictional vision of the dominant model of lawyering. It is a descriptively inaccurate model. It is a morally problematic model. It is an exclusionary model. It does not sit well with many current and future members of the bar. On that basis I have argued that it is not a sustainable model. Further, this resigned pose of un-sustainability is particularly pernicious in the context of law school. In its place, I have argued for a model of professionalism—seen through a lens of sustainability—that makes descriptive and normative sense of our complex modern legal world. I also hope, by so doing, to participate actively in the changing dynamic of law schools with a view to providing sustainable alternatives to the dominant stories of old. We need to recast our understandings of professionalism by way of a new lawyering sensibility, which is not of moral superiority (although that may, in the end, be the case), but of individual and collective sustainability. By moving away from a client-centered discussion and toward a discussion that takes seriously a plurality of voices and preferences, including but not exclusively those of the client, we will find many more takers for this theory of sustainable professionalism as a viable discourse for the practice of law. Given what is at stake, we cannot be agnostic to this exercise. Matasar argues:

> Lawyers … must … be the driving force behind ethical and moral change. It is not enough to bump along, oblivious of the questionable tactics the profession engages in under the name of advocacy, zealous representation, or the lawyerly posturing. Doing so diminishes us as individuals and collectively gives the profession a bad name. No, our strategies must be different. We must be disobedient when it matters most; we must be reformers, constantly seeking a more moral profession; and we must be willing to withdraw.[293]

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[291] See Dodek, "Canadian Legal Ethics," *supra* note 8. See also Michael Proulx & David Layton, *Ethics and the Canadian Criminal Law* (Toronto: Irwin, 2001) at 7-10.

[292] See Tanovich, *supra* note 25 at 309 [citation omitted].

[293] Matasar, *supra* note 23 at 986.

Staying the course of the dominant model will not allow us to fully realize our potential to be "the driving force behind ethical and moral change."[294] We need a sustainable alternative model to facilitate change. As Socrates commented in the *Republic*, the question of how we should live our lives—or in this context how we should view ourselves as professionals—is "no light matter."[295] This is because, as Mayer argues, in all likelihood "this society … and the world of our children"[296] will largely depend on how we view ourselves as professionals.

[294] *Ibid*.

[295] *Plato*, trans. by Jowett, *supra* note 50 at Bk. I, 352d.

[296] See Mayer, *supra* note 2.

SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

Canadian Legal Ethics: Ready for the Twenty-First Century at Last

By Adam M. Dodek **

This article analyzes the transformation in the scholarship of legal ethics that has occurred in Canada over the last decade, and maps out an agenda for future research. The author attributes the recent growth of Canadian legal ethics as an academic discipline to a number of interacting factors: a response to external pressures, initiatives within the legal profession, changes in Canadian legal education, and the emergence of a new cadre of legal ethics scholars. This article chronicles the public history of legal ethics in Canada over the last decade and analyzes the first and second wave of scholarship in the area. It integrates these developments within broader changes in legal education that set the stage for the continued expansion of Canadian legal ethics in the twenty-first century.

Cet article analyse la transformation que subit la connaissance profonde de la déontologie juridique, transformation qui s'est produite au Canada au cours de la dernière décennie, et trace un programme pour la recherche future. L'auteur attribue le récent essor de la déontologie juridique canadienne, en tant que discipline académique, à un certain nombre de facteurs s'influençant l'un l'autre : réaction aux pressions externes, initiatives au sein des professions juridiques, modification de la formation canadienne aux métiers juridiques, émergence d'un nouveau cadre de juristes spécialisés en déontologie juridique. Cet article relate l'histoire publique de la déontologie juridique au Canada durant la décennie écoulée. Il analyse la première et la seconde vagues de connaissance profonde dans ce domaine. Il intègre de tels développements à des mutations plus amples sur le plan de la formation juridique, lesquelles préparent le terrain à l'expansion continue de la déontologie juridique canadienne, qui se poursuivra au XXIè siècle.

** Associate Professor, Faculty of Law, University of Ottawa. Email: Adam.Dodek@uOttawa.ca. Thank you to Bruce Elman, Lorne Sossin, and Alice Woolley for taking the time to discuss some of the issues in this article and to my fellow teachers in Osgoode's inaugural Ethical Lawyering in a Global Community course (2007-08): Professors Trevor Farrow, Janet Mosher, and Robert Wai. Some of the ideas in this article grew out of the many hours of discussion we had in creating and preparing that course. It was and is a worthwhile and exciting endeavour. Thank you also to Laura Johnson, University of Toronto J.D. 2009, for providing invaluable research assistance. The Osgoode Hall Law Journal has granted the German Law Journal permission to reprint this paper. "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" was originally published in a special 50th anniversary issue of the Osgoode Hall Law Journal devoted to Legal Ethics & Professional Responsibility: (2009) 46:1 Osgoode Hall Law Journal 1.

A. What is Canadian Legal Ethics and Why Does it Matter?

Nearly a decade ago I described the bleak state of legal ethics scholarship in Canada.[1] This void surely was not for want of opportunity. It would have been difficult then, or even a decade or two before, to dispute the existence of a subject matter identified as "Canadian legal ethics." Legal ethics is not a post-modern academic school like Critical Legal Studies nor is it a result of new developments like Law and Internet or Law and Biotechnology. Canadian legal ethics has existed for decades, at least since there were Canadian lawyers, and perhaps earlier. However, for the most part, the academy has simply ignored it. It was, in short, a subject in search of scholarship.[2]

At the time that I wrote that article, I welcomed the publication of a new monograph by Allan Hutchinson of Osgoode Hall Law School ("Osgoode" or "Osgoode Hall"),[3] commenting facetiously that it reflected the trend in Canadian legal ethics of publishing one book per decade. In this respect, Canada compared quite unfavorably to other jurisdictions. The United Kingdom was witnessing a burst of scholarly activity about legal ethics: several books and a new journal devoted to the subject, appropriately titled *Legal Ethics.* With the United States, the contrast was even starker. After Watergate, legal ethics—often referred to as "professional responsibility"—became a compulsory subject in American law schools, resulting in a torrent of creative scholarship. In Canada, the situation was far less vibrant. At the turn of this century, one of the most cited Canadian texts remained Mark Orkin's 1957 classic,[4] which has only recently been usurped by Gavin MacKenzie's treatise,[5] now in its fourth edition.

While the scholarship of Canadian legal ethics still has far to go in order for it to become a truly vibrant discipline, it has grown significantly over the last decade as the profession and the academy have embarked on some interesting and exciting projects. Canadian legal

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[1] See Adam M. Dodek, "'Canadian Legal Ethics': A Subject in Search of Scholarship" (2000) 50 U.T.L.J. 115 [Dodek, "A Subject in Search of Scholarship"].

[2] *Ibid.*

[3] See Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999). The book is now in its second edition. See Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed. (Toronto: Irwin Law, 2006). Unless otherwise noted, all references are to Hutchinson's second edition [Hutchinson, *Legal Ethics*].

[4] Mark M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartright & Sons, 1957) [Orkin, *Legal Ethics*].

[5] Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 4th ed. (Toronto: Carswell, 2006), originally published in 1993. Two years before my 2000 article, Dodek, "A Subject in Search of Scholarship," *supra* note 1, Harry Arthurs described the lack of Canadian scholarship in even starker terms. See H.W. Arthurs, "Why Canadian Law Schools Do Not Teach Legal Ethics" in Kim Economides, ed., *Ethical Challenges to Legal Education & Conduct* (Oxford: Hart Publishing, 1998) 105 at 109 (noting the "almost total absence of a body of domestic scholarly literature on the subject").

ethics can no longer be described as a subject in search of scholarship; Canadian scholars have now begun to seek out answers to some of the most vexing ethical issues facing lawyers and our profession. For the first time, the foundations are in place for Canadian legal ethics to develop as a scholarly discipline.

The recent growth of Canadian legal ethics as an academic discipline can be attributed to a number of factors: a response to external pressures, initiatives within the legal profession, changes in Canadian legal education, and the emergence of a new cadre of scholars prioritizing legal ethics scholarship. These are not isolated factors but rather are overlapping and mutually reinforcing. This article chronicles the development of Canadian legal ethics over the last decade, analyzes its continuing challenges, and suggests some possible research agendas for the next stages in Canadian legal ethics development in the twenty-first century. Before I embark on this review and analysis, one might ask why any of it matters.

Developing a strong and sustained scholarship of legal ethics in Canada is imperative for a number of reasons. Canadian lawyers have been concerned about ethics going back as far as the creation of the organized profession in various jurisdictions. The profession's concern over its ethics and those of its members was given formal and public form through the adoption of codes of ethics, beginning with the Canadian Bar Association (CBA)'s *Canon of Legal Ethics* in 1920.[6] The motives and ramifications of this movement are themselves uncertain, subject to their own specific academic inquiry.[7] However, the profession's formal claim to ethics has been constant; the bar has always proclaimed that law is not merely a trade but rather a *profession*, which entails a higher calling in pursuit of the public interest. Examining this claim has motivated whatever scholarship of legal ethics has existed in Canada and will continue to do so for as long as there are lawyers.

More recently, additional factors—both within the legal profession and, more generally, within the professional world—have made the study of legal ethics more pressing. In the 1970s, the American public and the legal profession faced a crisis of ontological proportions in the Watergate scandal, "in which lawyers were placed under national scrutiny and obliged to reconsider the legitimacy of their professional practices and norms of conduct."[8] The American Bar Association responded by making the teaching of legal ethics mandatory for all accredited law schools. Subsequent crises involving lawyers, such as the collapse of the savings and loan industry in the 1980s, the near-collapse of Salomon Brothers in the early 1990s, and of course the fall of Enron in the early years of this decade,

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[6] Canadian Bar Association, *Canons of Legal Ethics* (Ottawa: Canadian Bar Association, 1920) available in W. Wesley Pue, "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada" (1991) 20 Man L.J. 227 at 234-37 [Pue, "Becoming 'Ethical'"].

[7] See *e.g.* Pue, "Becoming 'Ethical,'" *ibid.*

[8] Hutchinson, *Legal Ethics, supra* note 3 at 5-6.

served to continuously reinvigorate debate—academic and public—over lawyers' ethics south of the border. Canada has not endured scandals of the same magnitude as the United States; however, this does not make the need for academic ethical inquiry any less pressing.[9]

On a more general level, we value professional ethics differently than we did twenty or even ten years ago.[10] We need only think of the rise of bioethics in the medical field and corporate social responsibility and corporate governance in the business field as leading indicators of these changes. In attention to ethics, the Canadian legal profession and the legal academy have fallen behind their medical and business counterparts. Ethics courses have become part of the curriculum of those professional schools, helping to develop a common understanding that the academic study of ethics is a legitimate if not a necessary scholarly undertaking, connected to the instruction of new professionals in these and other fields.[11] The growth of professional ethics in other disciplines legitimizes legal ethics as a field of academic inquiry, and makes its work more urgent, as the academic study of legal ethics lags behind several of its professional counterparts.

The forces of globalization are making ethical issues for lawyers and the legal profession more apparent and are generating new issues. When the practice of law was more localized and the legal profession more homogenized, ethical inquiry could be more easily ignored because ethical behaviour was determined largely by resorting to a common legal culture, expressed in written and unwritten codes of conduct. However, the national and international mobility of legal practice brings existing understandings of ethics into a comparative perspective, providing the opportunity for reflection on the basis for such ethics, as well as creating conflicts at times between local or prevailing ethical understandings and those in other jurisdictions. This necessitates both ethical inquiry and the creation of a new field of "conflicts of legal ethics" analogous to conflict of laws in private international law.

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[9] On corresponding crises in the Canadian legal profession see generally *ibid.* at 2-5.

[10] I leave aside the whole question of the gendered and racial conception of legal ethics and professionalism, itself a very fertile field of ethical inquiry. See *e.g.* Constance Backhouse, "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives" (Paper Presented at the First Colloquium on the Legal Profession, Faculty of Law, University of Western Ontario, London, Ontario, 20 October 2003), online: Law Society of Upper Canada (LSUC) <http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf> [Backhouse, "Gender and Race in the Construction of 'Legal Professionalism'"].

[11] On mandatory ethics instruction for medical students see Richard Devlin, Jocelyn Downie & Stephanie Lane, "Taking Responsibility: Mandatory Legal Ethics in Canadian Law Schools" (2007) 65 The Advocate 761 at 761 [Devlin, Downie & Lane], citing Lisa S. Lehmann *et al.*, "A Survey of Medical Ethics Education at U.S. and Canadian Medical Schools" (2004) 79 Acad. Med. 682 at 683. Devlin, Downie & Lane also note that the Canadian Council for Accreditation of Pharmacy Programs requires content in ethics and professionalism. Similarly the relevant accounting bodies have mandatory pervasive ethics instruction requirements. See Devlin, Downie & Lane at 773.

Given the evolving nature of legal ethics, "Canadian legal ethics" could mean several different things. A strong positivist strain permeates legal ethics in Canada, which views the field as simply encompassing the ethical rules of lawyering, contained for the most part in the CBA's *Code of Professional Conduct*[12] (and its provincial counterparts) as well as in traditional areas of law, such as tort, contract, and agency, among others. While the issues in the codes of conduct provide excellent fodder for analysis and debate, legal ethics consists of much more than "the law governing lawyers."[13] To begin with, the prominence or the relevance of such codes is itself a hotly contested issue in legal ethics, Canadian and otherwise.[14] In addition, many of the codes are silent on some of the most interesting and most debated issues in Canadian legal ethics: lawyers' duties respecting physical evidence of a crime, sex with clients, and corporate fraud, among others. Legal ethics is concerned not only with the positivist inquiry of what is, but very much with the normative inquiry of what ought to be.[15]

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[12] Canadian Bar Association, *Code of Professional Conduct*, rev. ed. 2004 and 2006 (Ottawa: Canadian Bar Association, 2006) [CBA, *Code of Professional Conduct*].

[13] The "Law Governing Lawyers" is one aspect or approach to legal ethics. See Susan Martyn, Lawrence Fox & W. Bradley Wendel, *The Law Governing Lawyers: National Rules, Standards, Statutes, and State Lawyer Codes, 2007-08 Statutory Supplement* (Waltham, MA: Aspen Publishers, 2007).

[14] In Canada see *e.g.* Hutchinson, *Legal Ethics, supra* note 3 at 13-17; Margaret Ann Wilkinson, Christa Walker & Peter Mercer, "Do Codes of Ethics Actually Shape Legal Practice?" (2000) 45 McGill L.J. 645 (results of the study indicated that the majority of participant-lawyers did not use Ontario's Professional Conduct Handbook as a means of solving ethical problems); Joan Brockman, "The Use of Self-Regulation to Curb Discrimination and Sexual Harassment in the Legal Profession" (1997) 35 Osgoode Hall L.J. 209; Gavin MacKenzie, "The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession" (1995) 33 Alta. L. Rev. 859; Pue, "Becoming 'Ethical,'" *supra* note 6 (describing the adoption of professional codes as a mechanism by which the legal profession could justify its special privileges and roles to the public); and John Honsberger, "Legal Rules, Ethical Choices and Professional Conduct" (1987) 21 L. Soc'y Gaz. 113. Regarding the United States see Samuel J. Levine, "Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework" (2003) 77 Tulane L. Rev. 527; J. Ladd, "The Quest for a Code of Professional Ethics: An Intellectual and Moral Confusion" in Geoffrey C. Hazard, Jr. & Deborah L. Rhode, *Professional Responsibility and Regulation*, 2d ed. (New York: Foundation Press, 2006) 105; Deborah L. Rhode, "Why the ABA Bothers: A Functional Perspective on Professional Codes" (1981) 59 Texas L. Rev. 689; and Deborah L. Rhode, ed., *The Legal Profession: Responsibility and Regulation*, 2d ed. (Westbury, NY: Foundation Press, 1988).

[15] An excellent statement of the possible scope of inquiry for legal ethics is found on the homepage of the British journal *Legal Ethics*:

> The journal is intended to provide an intellectual meeting ground for academic lawyers, practitioners and policy-makers to debate developments shaping the ethics of law and its practice at the micro and macro levels. Its focus is broad enough to encompass empirical research on the ethics and conduct of the legal professions and judiciary, studies of legal ethics education and moral development, ethics development in contemporary professional practice, the ethical responsibilities of law schools, professional bodies and government, and the jurisprudential or wider philosophical reflections on law as an ethical system and on the moral obligations of individual lawyers.
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> *Legal Ethics*, online: http://www.hartjournals.co.uk/le/.

Legal ethics consists of "macro-ethics" as well as "micro-ethics." Macro-ethical inquiries address systemic issues within the legal system and the legal profession, such as access to justice, public interest, diversity within the profession, and independence of the bar. Micro-ethics focuses on the ethical issues that confront individuals within the legal system. Micro-ethics—issues such as conflicts of interest, confidentiality, and client perjury—occupy most of the ethical space in discussions about legal ethics, but the macro-ethical issues go to the heart of the legitimacy of the legal profession and the legal system. In addition, legal ethics should be concerned about all of the actors in the legal system: lawyers, judges, clients, self-represented litigants, witnesses, jurors, court administrators, and the media, as well as those outside the formal boundaries of the profession who also provide legal services, such as notaries, immigration consultants, Aboriginal caseworkers, and—dare I suggest—paralegals.[16]

Canadian legal ethics must also attempt to situate ethical issues within a distinctly *Canadian* context.[17] A Canadian scholarship of legal ethics must further seek to identify and articulate uniquely Canadian aspects of our legal system and the practice of lawyering in our country. These distinctions may be structural (such as the impact of federalism, articling, discipline by law societies, and a unitary legal profession, among others) as well as normative or cultural (such as the values of multiculturalism and diversity,[18] or the ethic of "zealous

[16] In 2006, the Government of Ontario enacted legislation to regulate paralegals under the LSUC's oversight. See Bill 14, *Access to Justice Act*, 2nd sess., 38th Leg., Ontario, 2006 (assented to 19 October 2006), S.O., 2006, c. 21, Sch. B; Ministry of the Attorney General, Ontario, News Release/Comuniqué "New Era Begins with Pathbreaking Paralegal Regulation" (17 November 2006), online: Ministry of Attorney General <http://www.attorneygeneral.

jus.gov.on.ca/english/news/2006/20061117-paraleg-EN.pdf>; and Law Society of Upper Canada, "Paralegal Regulation," online: <http://www.lsuc.on.ca/paralegals>. In more narrow terms, Justice Major defined the ethical standard that the legal profession must adhere to as "not only concerned with the immediate and narrow relationship between the lawyer and the client, but with the wide issue of the place of a profession in society and its corresponding obligation to that society as a whole." Justice J.C. Major, "Lawyers' Obligation to Provide Legal Services" (Address to the National Conference on the Legal Profession and Professional Ethics, 9 June 1994), (1995) 33 Alta. L. Rev. 719 at 719.

[17] Hutchinson, *Legal Ethics, supra* note 3 at 7 (noting that his theory of legal ethics emphasizes "the Canadian predicament").

[18] See *e.g.* Rosemary Cairns Way, "Reconceptualizing Professional Responsibility: Incorporating Equality" (2002) 25 Dal. L.J. 27; and Backhouse, "Gender and Race in the Construction of 'Legal Professionalism,'" *supra* note 10. On Canada's Aboriginal persons, see Larry Chartrand, "The Appropriateness of the Lawyer as Advocate in Contemporary Aboriginal Justice Initiatives" (1995) 33 Alta. L. Rev. 874. See Canadian Bar Association, "Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools" (2000), online: <http://www.cba.org/cba/EPIIgram/february2002/Resolutions.pdf> [CBA, "Acting for Survivors of Aboriginal Residential Schools"]; Law Society of Yukon, *Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools* (2000) [Yukon, "Acting for Survivors of Aboriginal Residential Schools"]; and Law Society of Upper Canada, *Guidelines for Lawyers Acting in Cases involving Aboriginal Residential School Abuse*, online: <http://www.lsuc.on.ca/media/guideline_aboriginal_res.pdf> [LSUC Guidelines, "Acting in Cases involving Aboriginal Residential School Abuse"]. See also Paul Jonathan Saguil, "Ethical Lawyering Across Canada's Legal Traditions: Can Indigenous Legal Principles Inform Legal Ethics?" (2006) [unpublished, draft paper on file with author].

representation.")[19]

One theme of this article is that there are multiple accounts of legal ethics in Canada and that significant disparities exist between them. A public account of Canadian legal ethics emphasizes the issues that the public sees, mostly through reporting in the popular press. The legal profession's account of legal ethics is reflected by the activities of law societies and legal associations, most notably through codes of conduct and discipline, but also through other activities such as task forces, public advocacy, and litigation. Sociological accounts examine what is actually happening within the profession and historical accounts analyze what has happened in the past. We can also conceive of the body of collected academic work on Canadian legal ethics as the scholarly account of the subject. As will be apparent throughout this article, significant gaps exist between the different accounts. In this article, I focus on the accounts of the public and the legal profession and compare their contents to the developing scholarly account of Canadian legal ethics.

In addition to the introduction, this article consists of six parts. In Part B, I briefly review the history of legal ethics in Canada over the last decade, focusing on the public account and the legal profession's account. This part provides a basis for analyzing the scholarly developments during this period, as well as for mapping out an agenda for future scholarship. Part C introduces the idea of "waves" of legal scholarship. Essentially, I contend that we can think of different types of scholarship in terms of waves, the first of which consists of treatises and doctrinal analyses. In Part D, I examine the second wave of scholarship of Canadian legal ethics, which is closely associated with Hutchinson's text and represents a deeper, more reflective and analytical, and at times critical, analysis of issues of legal ethics in Canada. In Part E, I turn to legal education and analyze significant developments that have taken place generally, and particularly with respect to legal ethics in the Canadian legal academy. Part F articulates a proposal for a Canadian legal ethics research agenda, and the article ends with a brief conclusion in Part G.

B. A Brief History of Canadian Legal Ethics in the First Decade of the Twenty-First Century

Until recently, the Canadian legal academy was not particularly interested in legal ethics. Hutchinson attributes this to the lack of a defining Canadian cultural moment like Watergate "in which lawyers were placed under national scrutiny and obliged to reconsider the legitimacy of their professional practices and norms of conduct."[20] While Hutchinson is correct that there has been no "lawyergate" in Canada to capture the public imagination, the last few years have seen numerous ethical scandals that, cumulatively,

[19] Alice Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer" (1996) 9 Can. J.L. & Jur. 61.

[20] Hutchinson, *Legal Ethics, supra* note 3 at 5-6.

seemed capable of exerting some pressure on the legal profession. In this Part, I outline a brief history of Canadian legal ethics in the first decade of this century. For the most part, this history draws heavily on the public account of Canadian legal ethics, but also includes elements from the legal profession's account. The purpose of this section is to discuss examples of lawyers' poor ethical behaviour to which the public has been recently exposed and the legal profession's responses, or lack thereof in some cases, to these and other issues.

For Canadian legal ethics it has been an eventful and challenging decade. The twenty-first century began with the trial of Ken Murray, the lawyer originally retained to defend Canada's notorious murderer, Paul Bernardo. Murray was acquitted, barely, of obstruction of justice in connection with the infamous Bernardo/Homolka videotapes.[21] The Law Society of Upper Canada (LSUC) began a disciplinary investigation into Murray's conduct, but abandoned it in favour of enacting a rule of professional conduct on the issue of lawyers' duties respecting physical evidence of a crime. After releasing a draft rule, the LSUC shelved this project as well. The Murray case thus ended in three negatives: no conviction against Murray, no disciplinary action by the LSUC, and no action by the LSUC to address the issue.[22]

The next big ethical scandal involved law students, rather than lawyers. In 2001, thirty students at the University of Toronto Law School ("U of T" or "Toronto") were caught up in

[21] *R. v. Murray* (2000), 144 C.C.C. (3d) 289 (Ont. Sup. Ct. J.) (acquitting Murray of charges of attempting to obstruct evidence by retaining physical evidence of a crime for seventeen months after his client Paul Bernardo had instructed him on how to locate videotapes which showed Bernardo committing crimes; Murray was acquitted on grounds that he lacked the *mens rea* to commit the crime).

[22] For a critical reaction to the LSUC's decision to drop its disciplinary investigation against Murray, see "The Law Society failed the public," Editorial, *The Globe and Mail* (2 December 2000) F6. For the Law Society's reaction see Robert P. Armstrong & Gavin MacKenzie, Letter to the Editor, "Law Society did not fail" *The Globe and Mail* (13 December 2000) A14. See also Kirk Makin, "A clean escape from the house of Bernardo" *The Globe and Mail* (30 November 2000) A1. After the acquittal of Ken Murray and the decision not to pursue disciplinary sanctions against him, the LSUC struck a special committee to propose a professional conduct rule for lawyers' duties respecting physical evidence of a crime. The Committee submitted a report to Convocation on 21 March 2002 with a proposed rule. See Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence, Report to Convocation (21 March 2002), online: <http://www.lsuc.on.ca/news/pdf/convmay 02_propertyrelecrime.pdf>. Convocation sought a legal opinion on the proposed rule. See "Law Society to obtain legal opinion on proposed conduct for lawyers" *Canada Newswire* (23 May 2002). The LSUC decided not to pursue the matter further, and as of December 2007, the Rules of Professional Conduct have not been amended to address this issue. Similarly, in its 2006 revision of its Code of Professional Conduct, the CBA did not address this issue. For a detailed analysis of the problem of the lawyer's duties respecting physical evidence of a crime, see Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 481-530; Austin M. Cooper, "The Ken Murray Case: Defence Counsel's Dilemma" (2003) 47 Crim. L.Q. 141; and Kent Roach, "Smoking Guns: Beyond the Murray Case," Editorial Comment (2000) 43 Crim. L.Q. 409. For an example of a jurisdiction that does specifically address the lawyer's duty respecting physical evidence of a crime, see Alberta, *Law Society of Alberta: Code of Professional Conduct*, c. 10, r. 20, online: http://www.lawsociety alberta.com/files/Code.pdf.

allegations of misrepresenting their grades to prospective summer employers, and twenty-four received sanctions ranging from reprimands to one-year suspensions. The U of T "fake grades scandal" also became an international *cause célèbre* in academic freedom circles because of allegations against a U of T law professor.[23] As might be expected, one of the students sought judicial review and succeeded in having the Dean's decision against her quashed on jurisdictional grounds.[24] Three years later, another cheating scandal erupted in Toronto, this time at the LSUC's Bar Admission Course. However, while the U of T "fake grades scandal" dragged on for over a year, the Bar Admission Course cheating scandal ended abruptly after a few weeks. When the LSUC made an allegedly secret decision to abandon the investigation,[25] the scandal continued to fester.[26] In between the two Toronto student scandals, the President of the Law Society of British Columbia resigned in 2003, after a conviction for impaired driving, and was subsequently suspended from practice.[27] He would not be the last law society head during the decade forced to resign amidst ethical improprieties.

Lawyers' conduct in the courtroom and in the bedroom dominated ethical discussions at the beginning of this century. Midway through the decade, the CBA embarked on another revision to its Code of Conduct, which had not been overhauled since 1987. The revised CBA Code, based on amendments in 2004 and 2006, is notable mostly for what it did not address, rather than for any ethical boldness. The CBA ducked the Ken Murray problem, took a very modest approach to the issue of dealing with corporate fraud, and rejected a

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[23] See Michael Valpy, "U of T suspends law students for year in fake-marks scandal" *The Globe and Mail* (2 May 2001) A1; Michael Valpy, "Nolo contendre" *The Globe and Mail* (4 May 2001) A11; Sean Fine, "U of T professor cleared in law-school grades affair" *The Globe and Mail* (19 June 2001) A5; Tracey Tyler, "Professor cleared in cheating probe. A 'vindication' for academic freedom, she says" *Toronto Star* (19 June 2001) A1; and James Cowan, "Atonement: when 24 students at U of T's Faculty of Law lied about their grades to land summer jobs, they tarnished the school's reputation and risked their own futures" *Toronto Life* 36:9 (June 2002) 57. For a catalogue of this whole affair, see the homepage of Toronto lawyer Selwyn Pieters, "The Inside Scoop! What's So Special About U of T Law," online: <http://www.geocities.com/CapitolHill/2381/Lawschoolscase/cheating scandal.html>.

[24] See *Shank v. Daniels* (2002), 57 O.R. (3d) 559 (Sup. Ct. J.). See Graeme Smith, "Court quashes U of T student's suspension" *The Globe and Mail* (12 January 2002) A7.

[25] See Tracey Tyler, "Cheating probe ends abruptly; Law students' e-mails probed: Governing body sworn to secrecy" *Toronto Star* (16 July 2004) A1 (noting that thirteen articling students had been the subject of a Law Society investigation into allegations that they cheated on their bar admission course by sharing and copying work and that the investigation had been abruptly halted without any explanation).

[26] See Tracey Tyler, "Law society urged to 'clear the air'; Cheating probe held in near secret; Elected governors want information" *Toronto Star* (17 July 2004) A4; Tracey Tyler, "Veil of secrecy called unacceptable; Bencher calls for Law Society head to resign; Controversy over handling of cheating probe" *Toronto Star* (4 August 2004) A4.

[27] See Law Society of British Columbia, News Release, "Law Society of B.C. President resigns" (10 October 2003), online: <http://www.lawsociety.bc.ca/media/news/03-10-10_Berge.html>; "Lawyer who drank, drove suspended from practice" *The Globe and Mail* (22 December 2005) S3; and *Re Howard Raymond Berge, Q.C.* 2007 LSBC 07, online: <http://alt.lawsociety.bc.ca/hearing_decisions/viewreport.cfm?hearing_id=235&h=+berge&h>.

proposed amendment to restrict sexual relations between lawyers and clients,[28] an issue that would resurface sooner rather than later. In 2007, the former Treasurer of the LSUC received a two-month suspension for conflict of interest arising out of a sexual relationship with a client who is now suing him and his law firm.[29] Concerned also with lawyers' misbehaviour in the courtroom, the decade saw the rise of the civility and professionalism movement. Precipitated by the conduct of counsel in several cases,[30] Ontario's Advocate's Society formed a Civility Committee, which produced a Code of Civility[31] that the CBA included as an appendix in its revised Code. Similar concerns motivated the Nova Scotia Barristers' Society to establish a Task Force on Civility.[32] Meanwhile, in British Columbia, solicitor Martin Wirick perpetrated the largest legal fraud in Canadian history, an estimated $50 million, triggering the largest audit and investigation ever undertaken by the Law Society of British Columbia and sending shockwaves throughout the legal profession, as well as the real estate and business communities.[33]

As class action lawsuits began proliferating across the country, the role of lawyers came under scrutiny, especially with regard to fees. Whether it was the $56 million in fees for the settlement of the tainted blood scandal before a single victim was paid, or the $100 million that Regina's Tony Merchant hoped to obtain as part of the record estimated $1.9 billion settlement of residential schools abuse claims, public perception that lawyers put

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[28] See Michelle MacAfee, "Lawyers reject new rules restricting sex with clients" *The Globe and Mail* (16 August 2004) A1.

[29] See *Law Society of Upper Canada v. Hunter*, 2007 ONLSHP 27. See Shannon Kari, "Former head of law society sued for $1.4 M" *National Post* (5 January 2008) A6.

[30] See *R. v. Felderhof*, [2002] C.C.S. No. 21535 (Sup. Ct. J.), aff'd (2003), 68 O.R. (3d) 481 (C.A.); *Marchand v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (C.A.).

[31] See The Advocates' Society, *Principles of Civility for Advocates*, online: <http://www.advocates.ca/

pdf/100_Civility.pdf>. On civility see *e.g.* Michael Code, "Counsel's Duty of Civility: an Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L. Rev. 97; Alice Woolley, "Does Civility Matter?" (2008) 46 Osgoode Hall L.J. 175.

[32] See Nova Scotia Barristers' Society, *Task Force on Professional Civility 2002 Report*, online: <http://www.nsbs.ns.ca/publications/civ.pdf>.

[33] See David Baines, "Massive fraud puts law society on hook for up to $46 million: Special fee on clients' real estate transactions will fund fraud claims" *The Vancouver Sun* (17 September 2002) A1; David Baines, "Time taken to investigate fraud case inordinate" *The Vancouver Sun* (25 January 2006) D1. See also *Law Society of British Columbia v. Wirick*, 2002 LSBC 32. This case is chronicled in Philip Slayton, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession* (Toronto: Viking Canada, 2007) at 178-92 [Slayton, *Lawyers Gone Bad*].

their own interests ahead of those of their clients ran high.[34] Along these lines, concerns about lawyers taking advantage of vulnerable clients led the CBA, the Law Society of Yukon, and the LSUC to each establish guidelines for lawyers acting in Aboriginal residential school abuse cases.[35]

In the courts, the Supreme Court of Canada continued where it left off in *Martin v. Gray* (1990),[36] issuing two decisions, *Neil* (2002)[37] and *Strother* (2007),[38] which helped keep conflict of interest at the top of the legal profession's ethical priority list.[39] On the regulatory front, the Court held that provincial law societies could not prohibit non-lawyers from appearing as counsel before the Immigration and Refugee Board,[40] but that law

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[34] On tainted blood, see Simon Tuck, "Victim fund in danger, Hepatitis C Society says" *The Globe and Mail* (3 June 2004) A9 (noting that legal fees and costs of administration had eaten up $91 million or almost one quarter of the funds set aside for compensating Hepatitis C victims). On Merchant, see Jonathon Gatehouse, "White man's windfall" *Maclean's* 119:35 (4 September 2006), online: <http://www.macleans.ca/canada/national/article.jsp?content=

20060911_133025_133025>; Timothy Taylor, "The Merchant of Menace" *Report on Business Magazine* (January 2008) at 24 (profiling the controversial Merchant who has been disciplined by the Law Society of Saskatchewan on three occasions) [Timothy Taylor, "The Merchant of Menace"]. See also "School abuse deal includes $80M for lawyers" *CBC News* (8 May 2006), online: <http://www.cbc.ca/story/canada/national/2006/05/08/residential-legal-fees.html>.

[35] See CBA Guidelines, *Acting for Survivors of Aboriginal Residential Schools*; Yukon Guidelines, "Acting for Survivors of Aboriginal Residential Schools"; and LSUC Guidelines, "Acting in Cases involving Aboriginal Residential School Abuse," *supra* note 18.

[36] *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235.

[37] *R. v. Neil*, [2002] 2 S.C.R. 177.

[38] *Strother v. 3464920 Canada Inc.*, [2007] S.C.J. No. 24.

[39] The sections on conflicts of interest are by far the longest of any subject in the codes of conduct. See *e.g.* CBA, *Code of Professional Conduct*, *supra* note 12, c. V (Impartiality and Conflict of Interest Between Clients) (20 pages). The second longest chapter is c. IX (The Lawyer as Advocate), which runs 14 pages. See also Law Society of Upper Canada, *Rules of Professional Conduct*, rr. 2.04 (Avoidance of Conflicts of Interest) and 2.05 (Conflicts from Transfer Between Law Firms) (17 pages) [LSUC Rules]; Law Society of British Columbia, *Professional Conduct Handbook*, c. 6 (Conflicts of Interest Between Clients); and Nova Scotia Barristers' Society, *Legal Ethics Handbook*, c. 6 (Impartiality and Conflict of Interest Between Clients) and c. 6A (Conflicts Arising out of Transfer Between Law Firms). In March 2007, the CBA established a Task Force on Conflicts of Interest with a mandate (1) to propose practical guidelines for the profession (a) in applying the duty of loyalty, and (b) in implementing appropriate modifications or waivers of the duty; (2) to consider the appropriate scope and content of client engagement letters; and (3) to propose practical guidelines for the profession in the application of the duty of confidentiality, particularly in the areas of deemed knowledge and relevance of information. In October 2007, the CBA Task Force issued a Background Paper entitled *Developing an Effective and Practical Conflicts of Interest Regime* and also released a Consultation Paper, seeking feedback by the end of November 2007. The Task Force will then make recommendations to the CBA. See generally Canadian Bar Association Task Force on Conflicts of Interest, online: <http://www.cba.org/CBA/groups/conflicts/>.

[40] See *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113.

societies do have the power to regulate Crown prosecutors.[41] In a leading case, the Ontario Court of Appeal held that the Ontario Securities Commission (OSC) could regulate the conduct of lawyers appearing before it.[42] The Supreme Court held that law societies do not have a general duty of care to persons who are defrauded by their lawyers,[43] but also that law societies will not be immunized from liability by ignoring their statutory responsibilities to protect the public.[44] Along these lines, the Court vindicated the Law Society of New Brunswick for meting out the ultimate sanction of disbarment to a lawyer who misled his clients for five years.[45] The Court continued its strong interest in solicitor-client privilege that began in 1999,[46] deciding no fewer than eight cases since then,[47] and elevating that privilege to a constitutional right.[48] The bar across Canada, led by the Federation of Law Societies, exerted tremendous energy and resources to successfully challenge regulations that, among other things, would have required lawyers to report "suspicious transactions" involving $10,000 or more in cash.[49]

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[41] See *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372.

[42] See *Wilder v. Ontario Securities Commission* (2001), 53 O.R. (3d) 519 (C.A.).

[43] See *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562.

[44] See *Finney v. Barreau du Quebec*, [2004] 2 S.C.R. 17. Philip Slayton writes about this case in Slayton, *Lawyers Gone Bad, supra* note 33 at 208-18. I was a member of Finney's legal team until the fall of 2003 when I joined the staff of Ontario's former Attorney General, the Hon. Michael Bryant.

[45] See *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 [*Ryan*]. I was co-counsel with Gavin MacKenzie for the intervenor Federation of Law Societies in this case.

[46] See *R. v. Campbell*, [1999] 1 S.C.R. 565; *Smith v. Jones*, [1999] 1 S.C.R. 455.

[47] See *R. v. McClure*, [2001] 1 S.C.R. 445; *R. v. Brown*, [2002] 2 S.C.R. 185; *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 S.C.R. 209; *Maranda v. Richer*, [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission*), [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319; and *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189. See also *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, [2004] 1 S.C.R. 456 (on the related concept of professional secrecy under Quebec civil law). In one case, an issue relating to the privilege existed in the lower courts but the litigant no longer relied upon it by the time the case reached the Supreme Court. See *London (City) v. RSJ Holdings*, [2007] 2 S.C.R. 588.

[48] See Mahmud Jamal & Brian Morgan, "The Constitutionalization of Solicitor-Client Privilege" (2003) 20 Sup. Ct. L. Rev. (2d) 213.

[49] See *Law Society of British Columbia v. Canada (Attorney General)* (2001), 207 D.L.R. (4th) 705, aff'd [2002] 207 D.L.R. (4th) 736 (C.A.), leave to appeal granted 25 April 2002 and notice of discontinuance of appeal filed 25 May 2002, [2002] S.C.C.A. No. 52 (QL); *Federation of Law Societies of Canada v. Canada (Attorney General),* [2001] A.J. No. 1697 (QL) (Q.B.); *Federation of Law Societies of Canada v. Canada (Attorney General* (2002), 203 N.S.R. (2d) 53; *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 57 O.R. (3d) 383 (Sup. Ct. J.); and *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 218 Sask. R. 193. The Federation of Law Societies launched an assault on the federal government's money laundering reporting requirements. After several court decisions in the Federation's favour, the federal government settled these actions with the Federation. See Kirk Makin, "Ottawa gives up forcing lawyers to tell on clients" *The Globe and Mail* (25 March

In the area of judicial ethics, the Court decided two cases regarding judicial discipline, one involving statements made by a judge in court,[50] and the other concerning attempts to remove a judge because of a later-discovered criminal conviction.[51] The Court dealt with two judicial disqualification cases, both of which arose under unique circumstances and both involving allegations of bias against members of the Court itself. First, in *Wewaykum* (2003), the losing litigant before the Court was unsuccessful in its attempt to vacate the decision based on the alleged reasonable apprehension of bias arising from Justice Binnie's involvement in the case while holding the position of Associate Deputy Minister of Justice.[52] Second, in *Mugesera* (2005), lawyer Guy Bertrand made accusations that a Jewish conspiracy had tainted the impartiality of the Court, which the Court found was an "unqualified and abusive attack on the integrity of the Judges of this Court."[53] Bertrand was later formally reprimanded by the Barreau du Quebec.[54]

Over the decade, access to justice was increasingly recognized as an important issue by the courts, the profession, and the media. The Court recognized a doctrine of advance costs but then significantly narrowed it.[55] It unanimously and unceremoniously rejected the constitutional claim for state-funded legal counsel in civil cases,[56] and it forced a representative plaintiff to pay costs likely totaling over one million dollars in an

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2003) A13. In 2006, the government passed Bill C-25, which exempts lawyers from the reporting requirements of this regime, but would require lawyers to record all transactions of $3,000 or more. The battle continues: see "Lawyers back on the hook in revised money laundering act" *Law Times* (16 July 2007), online: <http://www.lawtimesnews.com/index.php?option=com_content&task=view&id=2503>.

[50] See *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249.

[51] See *Re Therrien*, [2001] 2 S.C.R. 3.

[52] See *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 [*Wewaykum* (2003)]. See also Adam M. Dodek, "Constitutional Legitimacy and Responsibility: Confronting Allegations of Bias After *Wewaykum Indian Band v. Canada*" (2004) 25 Sup. Ct. L. Rev. (2d) 165 [Dodek, "Constitutional Legitimacy"].

[53] See *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 91 at 16 [*Mugesera* (2005)]. For earlier bias cases that have more general application see *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851 (dismissing motion to recuse Justice Bastarache because of his advocacy and scholarship in the area of language rights before being appointed to the bench); *R. v. R.D.S.,* [1997] 3 S.C.R. 484 (allowing appeal from decision holding that trial judge's remarks created reasonable apprehension of bias).

[54] See *Guimont c. Bertrand*, 2005 CanLII 57406 (QC C.D.B.Q.).

[55] See *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38.

[56] See *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873.

unsuccessful class proceeding.[57] The Court's treatment of access to justice issues was at odds with an increasingly strong *cri de coeur* being heard both within the profession[58] and in the press.[59] The Chief Justice of Canada and other justices and leaders of the bar frequently lament barriers to access to justice for Canadians, but have offered little in the way of solutions. One bright note has been the rise of institutionalized pro bono initiatives, through Pro Bono Law Ontario, Pro Bono Law of British Columbia, and now Pro Bono Law Alberta. Over the decade, the plight of self-represented litigants has increasingly caught the attention of Canada's judges, lawyers, policy-makers, and to some extent, the press.[60]

The years 2006 and 2007 might well be considered the legal profession's *anni horribiles* from the perspective of Canadian legal ethics. With British Columbia still reeling from the Wirick fraud, the Treasurer of the LSUC in Ontario resigned in January 2006 and was ultimately disciplined and suspended for two months in connection with a sexual relationship with a client.[61] In August 2006, legal heavyweight Peter Shoniker pled guilty to

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[57] See *Kerr v. Danier Leather Inc*., [2007] 286 D.L.R. (4th) 601; Jacquie McNish, "Plaintiff to foot bill as Danier wins" *The Globe and Mail* (13 October 2007) B7.

[58] See *e.g.* The Right Honourable Beverley McLachlin, P.C., "The Challenges We Face" (Remarks presented at the Empire Club of Canada, 8 March 2007), online: <http://www.scc-csc.gc.ca/AboutCourt/judges/speeches/Challenges_e.asp>.

[59] In Ontario, the *Toronto Star* began a series on access to justice in March 2007 with the attention-grabbing headline, "A 3-day trial likely to cost you $60,000." See Tracey Tyler, "A 3-day trial likely to cost you $60,000; But that won't cover an expert witness, or opponent's legal costs if you lose" *Toronto Star* (3 March 2007) A25 [Tyler, "A 3-day trial likely to cost you $60,000"]. For other articles in this series see Tracey Tyler, "The dark side of justice" *Toronto Star* (3 March 2007) A1; Tracey Tyler, "Legal aid rules shut out thousands; Many earning under $16,000 face uphill battle trying to represent themselves in complex cases" *Toronto Star* (3 March 2007) A24; Tracey Tyler, "Ever-expanding trials; not our fault Defence lawyers" *Toronto Star* (5 March 2007) A8; Tracey Tyler, "A 'ruinous' system for losers; Canadian courts that award financially punitive lawyers' costs create a 'huge barrier' to legal access, say judges and lawyers" *Toronto Star* (30 March 2007) A3; and Tracey Tyler, "Small claims hit the big time" *Toronto Star* (28 July 2007) ID1. See also John Intini, "No Justice for the Middle Class" *Maclean's* 120:35/36 (10 September 2007) 68; Canadian Judicial Council, "Access to Justice: Meeting the Challenge (2006-2007 Annual Report)" (Ottawa: Canadian Judicial Council, 2007).

[60] See *e.g. ibid.*

[61] See Law Society of Upper Canada, "Law Society of Upper Canada Announcement" (23 January 2006), online: <http://www.lsuc.on.ca/media/jan2306hunter.pdf>. Hunter had tendered his resignation in December 2005 but Convocation chose to treat it as a request for a leave of absence, and bencher Clayton Ruby became Interim Treasurer until Gavin MacKenzie was elected in a special election. The election was held in February 2006 after Hunter permanently resigned. See Law Society of Upper Canada, "Law Society of Upper Canada Announcement" (7 December 2005), online: <http://www.lsuc.on.ca/latest-news/b/archives/index.cfm?c=1029&i=8432>; Law Society of Upper Canada, "Law Society of Upper Canada Announcement" (9 December 2005), online: <http://www.lsuc.on.ca/latest-news/b/archives/index.cfm?c=1029&i=8450>; Tracey Tyler, "Clayton Ruby to lead law society; Treasurer resigned for 'family reasons'; Ruby automatically moves to top post" *Toronto Star* (8 December 2005) B.04; and Law Society of Upper Canada, "Gavin MacKenzie elected Treasurer of the Law Society of Upper Canada" (23 February 2006), online: <http://www.lsuc.on.ca/media/feb2306_new_treasurer.pdf>. On the Law Society's discipline of Mr. Hunter see *supra* note 29.

money laundering and was sentenced to fifteen months of incarceration.[62] In the spring of 2007, lawyers from Torys LLP were frequently in the news in relation to advice that they gave Conrad Black and other members of Hollinger Inc. regarding non-compete agreements at the center of the Black trial in Chicago. In a deal struck between Torys and the prosecution, the Torys lawyers—not subject to the jurisdiction of the American courts—agreed to testify by recorded videotape in Toronto, with resulting negative press coverage of the lawyers and the law firm.[63] Not to be missed, of course, was the fact that two of the defendants in the Black trial were lawyers: Mark Kipnis and Peter Atkinson (a member of the Ontario bar and a former Torys partner). Rarely mentioned was the fact that Conrad Black is a law graduate (Laval), although not a member of the bar.

In July, lawyers were featured on the cover of *Maclean's* under the headline "Lawyers Are Rats" with titles above various lawyers reading, "I Pad My Bills," "I'm Dishonest," "I sleep with my clients," and "I take bribes" among other things.[64] The cover accompanied an interview with Philip Slayton, ethics columnist for Canadian Lawyer and former law professor, law dean, Bay Street lawyer, and author of *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession*.[65] The sensationalism of *Maclean's* succeeded in provoking a rash of responses from the organized bar as well as from its individual members.[66] It was likely responsible for temporarily catapulting Slayton's anecdotal

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[62] *R. v. Shoniker*, [2006] O.J. No. 5368 (Sup. Ct. J.) (QL); Peter Brieger, "Cash sting lawyer: 'I'm guilty'" *National Post* (19 August 2006) A12, online: <http://www.nationalpost.com/news/toronto/story.html?id=50d2db24-cdbb-4739-b1fa-a32a7c24c84e>. Of Shoniker, *Canadian Lawyer* said: "At the pinnacle of his career, [he] met the Pope and could count generals, police chiefs, judges, and politicians among his coterie of friends and acquaintances. At his nadir, he was a shattered man sitting in a Toronto courtroom … ." See Bruce Livesey, "Fall from grace: The Rise and Fall of Peter Shoniker" *Canadian Lawyer* (September 2007) 34.

[63] See Jacquie McNish & Paul Waldie, "Advisers won't look 'this jury in the eye'" *The Globe and Mail* (22 March 2007) A1; Paul Waldie, "Focus turns to former Hollinger lawyers" *The Globe and Mail* (9 April 2007) A11; Paul Waldie, "Lawyer in CanWest deal comes under the gun" *The Globe and Mail* (12 April 2007) A2; Margaret Wente, "The brilliant career of Mr. Sukonick" *The Globe and Mail* (12 April 2007) A17; Rick Westhead, "Defence spotlights lawyer's message" *Toronto Star* (13 April 2007) A12; Paul Waldie, "Non-compete payments increased before CanWest deal, lawyer testifies" *The Globe and Mail* (13 April 2007) A14; Rick Westhead, "Black saga hasn't hurt law firm; Torys LLP lawyer suffers verbal mauling but, observers say, prestige is still intact" *Toronto Star* (14 April 2007) A10; Paul Waldie, "Lawyer 'shocked' by Torys' take on his advice" *The Globe and Mail* (17 April 2007) A18; Paul Waldie, "Former Torys' lawyer squirms over questions about her income" *The Globe and Mail* (20 April 2007) A2; Paul Waldie, "Key witness lied, lawyer says" *The Globe and Mail* (22 June 2007) A14; and Jacquie McNish, "Penalties for referees who didn't blow the whistle" *The Globe and Mail* (14 July 2007) A8.

[64] *Maclean's* 120:30 (6 August 2007) cover.

[65] Philip Slayton, *Lawyers Gone Bad, supra* note 33.

[66] See Letters to the Editor, *Maclean's* 120:31/32 (13 August 2007) 4-6 (including letters from CBA President J. Parker MacCarthy, numerous lawyers, and members of the public); and the magazine's unusually long defence of the article in its column "From the Editors": "Not just a lone voice in the wilderness," Editorial, *Maclean's* 120:31/32 (13 August 2007) 2. See also Law Society of Upper Canada, News Release, "*Maclean's* article a disservice to Canadians" (30 July 2007), online: <http://www.lsuc.on.ca/media/jul3007_macleans_article.pdf>; Michael Milani, "Who lawyers the lawyers? We do, and it works" *The Globe and Mail* (9 August 2007) A17; Natalie

collection of lawyer malfeasance onto the bestseller list where it quietly retreated after having wrought havoc on the legal profession for two months.

The year ended with a collective sigh of relief from the legal profession with the Competition Bureau of Canada's report on self-regulated professions, including law.[67] The legal profession had been anxiously awaiting this report, looking over its shoulder at the changes precipitated by similar reports in the United Kingdom and the European Union.[68] On 11 December 2007, the Commissioner released her report amidst minimal fanfare and negligible public interest.[69] While the follow-up remains uncertain, law societies will be able to make small changes in response to the Competition Bureau's report without upsetting the apple cart.

Thus ended the Canadian legal profession's two-year *anni horribiles*, with a whimper not a bang. Somewhat surprisingly, these events appear not to have had much impact on the level of public trust towards lawyers in Canada, which actually went up in 2006 and again in 2007 after a decrease for several years in a row. In 2007, 54 per cent of Canadians said that they trust lawyers, the same level as in 2002. This is a much lower level of trust than that received by perennial favourites—firefighters (97 per cent) and nurses (94 per cent)—

Fraser, "Lawyers get mad about *Lawyers Gone Bad*" *The Lawyers Weekly* (10 August 2007) 1. For an excellent perspective see Alan Young, "We're Not Rats… But Snooty Lawyers are bullying their way out of favour" *NOW Magazine* (6 September 2007), online: http://www.nowtoronto.com/issues/2007-09-06/news_story6_p.html/.

[67] See Competition Bureau of Canada, Report, *Self-Regulated Professions—Balancing Competition and Regulation* (11 December 2007) [Competition Bureau, *Self-Regulated Professions*]. (The professions studied included accountants, lawyers, optometrists, pharmacists, and real estate agents).

[68] See UK, Secretary of State for Constitutional Affairs, *Review of the Regulatory Framework For Legal Services in England and Wales* by Sir David Clementi (London: Ministry of Justice, 2004); and *Legal Services Act 2007* (UK), 2007, c. 29.

[69] See *e.g.* Virginia Galt, "Shakeup urged for the professions" *The Globe and Mail* (12 December 2007) B5; Madhavi Acharya & Tom Yew, "Watchdog scrutinizes professions; Protect consumers first, self-regulators are told" *The Toronto Star* (12 December 2007) B1; and William Watson, "Professional protection" *National Post* (14 December 2007), online: <http://www.nationalpost.com/rss/Story.html?id=166988>. A search conducted in January 2008 on FP Infomart—a database containing the leading newspapers in Canada—revealed only six stories on the report, including wire stories. There was no formal reaction by the Federation of Law Societies. See Federation of Law Societies, "What's New," online: <http://www.flsc.ca/en/whatsnew/whatsnew.asp>. A review of the websites of all of the law societies in Canada reveals no press releases or statements in response to the report. See *e.g.* Law Society of Upper Canada, News Releases, online: <http://www.lsuc.on.ca/latest-news/

b/news-releases/index.cfm?expandYear=2007>; Law Society of British Columbia, Media-News Releases, online: <http://www.lawsociety.bc.ca/media/news/intro.html>. For a report on the reaction of the legal profession see Michael Rappaport, "Competition bureau's study draws tepid reaction from legal community" *The Lawyers Weekly* (11 January 2008), online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=599>. In this article, Queen's law professor Paul Paton refers to the study as "not as bold as it could be."

but far ahead of politicians (15 per cent) and used car salespersons (12 per cent).[70] While the decade was full of ethical lows and challenges for the Canadian legal profession, Hutchinson's point, first made in 1999, that there has not been a single defining cultural moment for lawyering in Canada, is still the case. Despite the absence of a "lawyergate" that succeeded in capturing the public imagination and spurring an agenda for reform, many of the events described above did have an impact within the profession and the legal academy. Importantly, these events helped stimulate some of the initiatives described in Parts C and D below, and certainly provided both motivation and opportunities for the scholarship described in the following parts.[71]

C. The First Wave of Canadian Legal Ethics Scholarship

Canadian legal ethics scholarship can be thought of as a series of waves,[72] with each wave representing a particular approach to legal scholarship. Rather than supplanting each other, they co-exist and indeed draw upon one another. The first wave consists of doctrinal analysis, and is heavily focused on the codes of ethics and on law societies' regulations. This wave has existed since at least Orkin's 1957 book,[73] but only operated in fits and spurts since that time. It was given a tremendous boost with the 1993 publication

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[70] See Leger Marketing, Report, "Profession Barometer" (15 May 2007), online: <http://www.legermarketing.com/documents/spclm/070522ENG.pdf>. The level of trust in lawyers was highest in the Atlantic provinces (57%) and lowest in British Columbia (46%). Consistent with the national trend, public trust in lawyers actually increased in Ontario between 2006 (48%) and 2007 (51%), despite or irrespective of the various public scandals there.

[71] In a paper that he presented at the Law Society of Alberta's 100th Anniversary, Richard Devlin offered ten reasons that raise concern that the regulation of the legal system might not be working as well as it should in a democratic society. There is significant overlap between Devlin's list and my account in this part. Devlin's list contains: (1) The Ken Murray case; (2) Disclosure of Imminent Financial Harm; (3) Protection of the Public from Incompetent Lawyers, *i.e.*, the *Finney* case, *supra* note 44; (4) Sexual Relations with a Client / George Hunter; (5) Discipline in the Protection of Victims of Residential Schools; (6) Billing and Fees in the Residential Schools Cases; (7) Mandatory Continuing Legal Education; (8) Fees and Concerns over Access to Justice; (9) Self-Represented Litigants in Court; and (10) Pro Bono. See Richard Devlin, "The End(s) of Self-Regulation" (Paper presented at the Law Society of Alberta's 100th Year Anniversary Conference, "Canadian Lawyers in the 21st Century," Edmonton, Alberta, 27 October 2007), Alta. L. Rev. [forthcoming in 2008] [Devlin, "Self-Regulation"].

[72] In my earlier article, Dodek, "A Subject in Search of Scholarship," *supra* note 1 at 119, 122, I wrote about first and second generations of scholarship on Canadian legal ethics. I think it makes more sense to conceive of different approaches as waves, rather than as generations which succeed each other. In this I owe a debt of gratitude to the excellent article which analyzes different conceptions of access to justice in terms of successive waves. See Roderick A. Macdonald, "Access to Justice in Canada Today: Scope, Scale, Ambitions" in Julia Bass, W.A. Bogart & Frederick H. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 at 20-23 [Bass, Bogart & Zemans, *Access to Justice for a New Century*].

[73] Orkin, *Legal Ethics, supra* note 4.

of MacKenzie's treatise, *Lawyers and Ethics*,[74] which continues to be a leading source in the field. MacKenzie, along with Justice Mary Newbury of the British Columbia Court of Appeal and Toronto lawyer/writer Derek Lundy,[75] were the founding editors of a new loose-leaf by Butterworths in the late 1990s, modeled on the English text, *Cordery on Solicitors*.[76] On this basis, *Barristers & Solicitors in Practice*[77] was conceived as a treatise on the law of lawyering, focusing on the structure of the legal profession and issues such as accepting and carrying out instructions, professional relationships, advertising, professional conduct, professional liability, conflicts of interest, financial regulation, remuneration, and professional indemnity. Under the editorship of the late Justice Ken Lysyk of the British Columbia Court of Appeal and Professor Lorne Sossin, the mandate of the text was expanded and chapters on legal aid, mediation, and injunctions were added. Under new editors,[78] the text is currently being updated and new chapters are planned to reflect current issues in the legal profession, including pro bono, paralegals, and unrepresented litigants. The text will be relaunched later in 2008 with a broader focus on all the actors in the legal system: lawyers, judges, and paralegals, among others.

Meanwhile, in 2006, LexisNexis commenced publication of the first edition of *Halsbury's Laws of Canada*[79] modeled on *Halsbury's Laws of England* and the various other Halsbury's series in the common law world.[80] At its completion, *Halsbury's Laws of Canada* will comprise some fifty-seven volumes. One of the first volumes, published at the end of 2007, is on the topic of Legal Profession.[81] Other loose-leaf treatises produced over the last decade have

[74] See MacKenzie, *supra* note 5.

[75] Derek Lundy spearheaded the Barristers & Solicitors in Practice (BSIP) project. He is the best-selling author of *The Bloody Red Hand: A Journey through Truth, Myth and Terror in Northern Ireland* (Toronto: Knopf Canada, 2006); *The Way of a Ship: A Square-Rigger Voyage in the Last Days of Sail* (Toronto: Knopf Canada, 2002); *Godforsaken Sea: Racing the World's Most Dangerous Waters* (Toronto: Knopf Canada, 1998); and *Scott Turow: Meeting the Enemy* (Toronto: ECW Press, 1995).

[76] See *Cordery on Solicitors*, 9th rev. ed., (London: Butterworths Law, 1995) (loose-leaf). As one of the original contributors to BSIP (with Jerome D. Ziskrout for the chapter on Professional Conduct), I recall being sent the corresponding chapter of *Cordery on Solicitors* and being instructed to follow that format. See also the comments of Derek Lundy in the original Preface to Adam M. Dodek & Jeffrey G. Hoskins, *Barristers & Solicitors in Practice* (Markham: LexisNexis Canada, 2007) at 1 (Preface).

[77] Dodek & Hoskins*, ibid*.

[78] *Ibid.*

[79] *Halsbury's Laws of Canada,* (Markham: LexisNexis, 2006).

[80] Lord Hailsham of St. Marylebone, ed., *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1973); see *e.g. Halsbury's Laws of Australia* (Sydney: Butterworths, 1991).

[81] *Halsbury's Laws of Canada, 1st ed., Legal Profession* (Markham: LexisNexis Canada, 2007).

reflected some of the predominant issues of the era: conflicts of interest[82] and privilege.[83]

The most ambitious treatise published over the last decade is the *Ethics and Canadian Criminal Law*,[84] by the late Justice Michel Proulx of the Quebec Court of Appeal and criminal lawyer David Layton, now of Vancouver and formerly of Toronto and Halifax. This 2001 treatise is widely recognized as a tour de force in its field, and is frequently cited by the Supreme Court and other courts.[85] *Ethics and Canadian Criminal Law* bridges the first and second waves of Canadian legal ethics scholarship. Not only does it analyze particular ethical issues facing criminal lawyers, but it also directly tackles some of the most vexing matters in the field and prescribes its own solutions. For example, it provides the best treatment of the "Ken Murray problem"—a lawyer's duties respecting physical evidence of a crime, an issue that, as we have seen, the law societies and the CBA have failed to address adequately.[86] For this reason the book is praised, appreciated, and referenced by jurists, lawyers, and scholars across the country. An updated and revised edition is planned and will be eagerly received.

D. The Second Wave and the Rise of the New Legal Ethics Scholars

The second wave of scholarship of Canadian legal ethics moves beyond the descriptive into the analytical and prescriptive. It comprises scholarly writings that may be analytical, critical, prescriptive, or some combination thereof. The intellectual progenitor of the second wave is Harry Arthurs, who has tilled this scholarly soil mostly alone.[87] Other

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[82] See M. Deborah MacNair, *Conflicts of Interest: Principles of the Legal Profession* (Aurora: Canada Law Book, 2005).

[83] See Robert W. Hubbard, Susan Magotiaux & Suzanne M. Duncan, *The Law of Privilege in Canada* (Aurora: Canada Law Book, 2006). For another comprehensive treatise see Beverley G. Smith, *Professional Conduct for Lawyers and Judges,* 3d ed. (Fredericton: Maritime Law Book, 2007).

[84] Proulx & Layton*, supra* note 22.

[85] *Ethics and Canadian Criminal Law* received the 2003 Walter Owen Book Prize from the Foundation for Legal Research in recognition of "outstanding new contributions to Canadian legal literature that enhance the quality of legal research in this country." See The Walter Owen Book Prize, online: <http://www.irwinlaw.com/newsdetail.aspx?newsid=51>.

[86] See Proulx & Layton, *supra* note 22 at 481-530.

[87] For Harry Arthurs' work on the legal profession during these lean years of legal ethics scholarship, see "The Study of the Legal Profession in the Law School" (1970) 8 Osgoode Hall L.J. 183; "Discipline in the Legal Profession in Ontario" (1970) 7 Osgoode Hall L.J. 235; "Toronto Legal Profession: An Exploratory Survey" (1971) 21 U.T.L.J. 498; "Authority, Accountability and Democracy in the Government of the Ontario Legal Profession" (1971) 49 Can. Bar Rev. 1; "Counsel, Clients and Community" (1973) 11 Osgoode Hall L.J. 437; "The Future of Legal Services" (1973) 51 Can. Bar Rev. 15; "Progress and Professionalism: The Canadian Legal Profession in Transition" (1973) Law & Soc'y 1; "Barristers and Barricades: Prospects for the Lawyer as a Reformer" (1976) 15 U.W.O. L. Rev. 59; "Paradoxes of Canadian Legal Education" (1977) 3 Dal. L.J. 639; "Le droit vit-il à l'heure de sa société: allocution"

scholars contributed noteworthy works, which should be considered part of this genre;[88] however, the body of scholarship did not start to coalesce into a notable and coherent subject matter until recently.

(1978) 13 Thémis 243; "To Know Ourselves: Exploring the Secret Life of Canadian Legal Scholarship" (1985) 23 Osgoode Hall L.J. 403; "Law, Society and the Law Society" (1993) 27 L. Soc'y Gaz. 85; "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33 Alta. L. Rev. 800 [Arthurs, "The Dead Parrot"]; "A Lot of Knowledge is a Dangerous Thing: Will the Legal Profession Survive the Knowledge Explosion?" (1995) 18 Dal. L.J. 295; "Law, Legal Institutions, and the Legal Profession in the New Economy" (1996) 34 Osgoode Hall L.J. 1; "Lawyering in Canada in the 21st Century" (1996) 15 Windsor Y.B. Access Just. 202; "Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields" (1997) 12:2 C.J.L.S. 219; "Why Canadian Law Schools Do Not Teach Legal Ethics," *supra* note 5; with Richard Weisman & Frederick H. Zemans, "Canadian Lawyers: A Peculiar Professionalism" in Richard L. Abel & Philip S.C. Lewis, eds., *Lawyers in Society: The Common Law World* (Berkeley: University of California Press, 1988) 123; and with David A.A. Stager, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990) [Stager & Arthurs, *Lawyers in Canada*].

[88] There were a number of symposia or special editions of journals in the 1990s which produced thoughtful articles in the area. In August 1995, the Alberta Law Review published a special edition on "The Legal Profession and Ethics" (1995) 33 Alta. L. Rev. 719-943. Articles include Justice J.C. Major, "Lawyers' Obligation to Provide Legal Services" at 719; W. Wesley Pue, "In Pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers" at 730 [Pue, "In Pursuit of Better Myth"]; Allan C. Hutchinson, "Calgary and Everything After: A Postmodern Re-vision of Lawyering" at 768 [Hutchinson, "Calgary and Everything After"]; Carole Curtis, "Alternative Visions of the Legal Profession in Society: A Perspective on Ontario" at 787; H.W. Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" at 800; Esmeralda M.A Thornhill, "Ethics in the Legal Profession: The Issue of Access" at 810; Dianne Pothier, "On Not 'Getting It'" at 817; The Hon. Wendy G. Baker, "Structure of the Workplace or, Should We Continue to Knock the Corners Off the Square Pegs or Can We Change The Shape of the Holes?" at 821; Alan D. Hunter, "A View as to the Profile of a Lawyer in Private Practice" at 831; Jonnette Watson Hamilton, "Metaphors of Lawyers' Professionalism" at 833; Gavin MacKenzie, "The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession" at 859; Larry Chartrand, "The Appropriateness of the Lawyer as Advocate in Contemporary Aboriginal Justice Initiatives" at 874; René Laperriére, "L'éthique Et La Responsabilité Professionnelle Des Juristes En Matière De Compétence" at 882; A. Wayne MacKay, "Some Thoughts on a More Humanist and Equitable Legal Education" at 920; and Richard F. Devlin, "Normative, and Somewhere to Go? Reflections on Professional Responsibility" at 924 [Devlin, "Reflections"].

In 1996, the Canadian Journal of Law and Jurisprudence also published a symposium edition on legal ethics. See (1996) 9 Can. J.L. & Jur. 3 et seq. (wherein David Luban speaks prematurely of "A New Canadian legal ethics" in his introduction). Articles in this collection include David Luban, "Introduction: A New Canadian legal ethics?" at 3; Hon. James M. Spence, "Called to the Bar" at 5; Susan P. Koniak, "Law and Ethics in a World of Rights and Unsuitable Wrongs" at 11; Gavin MacKenzie, "Breaking the Dichotomy Habit: The Adversary System and the Ethics of Professionalism" at 33; Jerome E. Bickenbach, "The Redemption of the Moral Mandate of the Profession of Law" at 51; Alice Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer" at 61 [Woolley, "Zealousness"]; Richard Bronaugh, "Thoughts on Money, Winning, and Happiness in the Practice of Law" at 101; Donald E. Buckingham, "Rules and Roles: Casting Off Legal Education's Moral Blinders for an Approach that Encourages Moral Development" at 111; Barry Hoffmaster, "Hanging Out a Shingle: The Public and Private Services of Professionals" at 127; and Peter Mercer, Margaret Ann Wilkinson & Terra Strong, "The Practice of Ethical Precepts: Dissecting Decision-Making by Lawyers" at 141. Of the Canadians in this group (Luban and Koniak are American legal academics), a few—including Alice Woolley of the University of Calgary and Mary Ann Wilkinson and Peter Mercer of the University of Western Ontario—continued with subsequent scholarly work in legal ethics. See Margaret Ann Wilkinson, Christa Walker & Peter Mercer, "Testing Theory and Debunking Stereotypes: Lawyers' Views on the Practice of Law" (2005) 18 Can. J.L. & Jur. 165; Margaret Ann Wilkinson, Christa Walker & Peter Mercer, "Do Codes of Ethics Actually Shape Legal Practice?"

With the rise of a new group of legal ethics scholars in Canada over the past decade, the second wave reached critical mass. This group is not new relative to any older, earlier group (which could not be said to exist as an identifiable group). Rather, it is new in the sense of being novel to the Canadian legal academy. These "New Legal Ethics Scholars" consist both of scholars who are actively engaged in research in Canadian legal ethics as a significant component of their research agenda, as well as scholars who teach in the growing area and who may publish ethics-related articles from time to time.[89] To a large degree, this group is represented in the composition of a Canadian legal ethics and professional responsibility curricular network, the Legal Ethics Curriculum Network, established in 2006, which met that year in Halifax[90] and in 2007 in Edmonton. However, other practitioner-scholars who are actively engaged in scholarship in the area, such as David Layton[91] and Gavin MacKenzie, should also be considered part of this group of New Legal Ethics Scholars in Canada.

The New Legal Ethics Scholars includes established scholars who have turned their attention to the discipline with some regularity, such as Richard Devlin (Dalhousie University (Dalhousie))[92] and Allan Hutchinson (Osgoode).[93] Additionally, newer scholars,

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(2000) 45 McGill L.J. 645; and Margaret Ann Wilkinson, Peter Mercer & Terra Strong, "Mentor, Mercenary or Melding: An Empirical Inquiry into the Role of the Lawyer" (1996) 28 Loy. U. Chicago L.J. 373.

[89] In this vein see David M. Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 Dal. L.J. 267 (Tanovich teaches The Legal Profession at Windsor); Devlin, Downie & Lane, *supra* note 11; Jocelyn Downie, "A Case for Compulsory Legal Ethics Education in Canadian Law Schools" (1997) 20 Dal. L.J. 224 (Downie teaches The Legal Profession and Professional Responsibility at Dalhousie); Anne McGillivray, "He Would Have Made a Wonderful Solicitor: Law, Modernity and Professionalism in Bram Stoker's *Dracula"* in W. Wesley Pue & David Sugarman, eds., *Lawyers and Vampires: Cultural Histories of Legal Professions* (Oxford: Hart Publishing, 2003) 225 [Pue & Sugarman, *Lawyers and Vampires*]; and Anne McGillivray, "'A moral vacuity in her which is difficult if not impossible to explain': Law, psychiatry and the remaking of Karla Homolka" (1998) 5 Int'l J. Legal Prof. 255 [McGillivary, "A moral vacuity"] (McGillivray teaches The Legal Profession and Professional Responsibility at Manitoba).

[90] Devlin, Downie & Lane*, ibid.* at 767.

[91] For publications by David Layton see *e.g.* Proulx & Layton, *supra* note 22; "Defence Counsel's Ethical Duties and Frivolous *Charter* Applications" *The Verdict* 110 (October 2006) 25; "The Public Safety Exception: Confusing Confidentiality, Privilege and Ethics" (2001) 6 Can. Crim. L. Rev. 217; and "The Pre-Trial Removal of Counsel for Conflict of Interest: Appealability and Remedies on Appeal" (1999) 4 Can. Crim. L. Rev. 25.

[92] For publications by Richard Devlin see *e.g.* "Self-Regulation," *supra* note 71; Devlin, Downie & Lane, *supra* note 11; "Conflicts of Interest: Where Are We Since *R. v. Neil*?" *The Society Record* 30:6 (2005) 113; "Of Legends and Pro Bono" *Lawyers' Weekly* 25:32 (23 December 2005); with Jocelyn Downie, "Self Regulation in the Shire" *Society Record* 22:1 (2004) 18; "Jurisprudence for Judges: Or, Why Legal Theory Matters for Social Context Education" (2001) 27 Queen's L.J. 161, translated and republished as "la théorie générale du droit pour les juges" (2002) 4 R.C.L.F. 197; with Natasha Kim & A. Wayne MacKay, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary" (2000) 38 Alta. L. Rev. 734; "Judging and Diversity: Justice or Just Us?/Les Décisions Judicaires et la Diversité: La Justice des Justiciables ou de justiciers?" (1996) 20:3 Prov. Judges J. 4; Book Reviews of *Judicial Conduct and Accountability* by David Marshall and *A Place Apart:*

such as Michael Code (Toronto),[94] Trevor Farrow (Osgoode Hall Law School), Randal Graham (University of Western Ontario (Western)),[95] Paul Paton (Queen's University (Queen's)),[96] and Alice Woolley (University of Calgary (Calgary)),[97] devote a significant portion of their research to issues of legal ethics, which is a truly "new" development in Canadian legal ethics.[98] These scholars were strongly influenced by comparative legal

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Judicial Independence and Accountability in Canada by Martin Friedland, (1996) 75 Can. Bar Rev. 398; "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective" (1995) 18 Dal. L.J. 408; and "Reflections," *supra* note 88 at 924.

[93] For publications by Allan Hutchison see *e.g. Legal Ethics*, *supra* note 3; "Who are 'Clients'? (And Why it Matters)" (2006) 84 Can. Bar Rev. 411; "Taking it Personally: Legal Ethics and Client Selection" (1998) 1 Legal Ethics 168; "Legal Ethics for a Fragmented Society: Between Professional and Personal" (1998) 5 Int'l J. Legal Prof. 175; and Hutchinson, "Calgary and Everything After," *supra* note 88.

[94] For publications by Michael Code see *e.g.* "Crown Counsel's Responsibilities when advising the Police at the Pre-Charge Stage" (1998) 40 Crim. L.Q. 326; with Kent Roach, "The Role of the Independent Lawyer and Security Certificates" (2006) 52 Crim. L.Q. 85; "Counsel's Duty of Civility: an Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L. Rev. 97; and with Kent Roach, "The Independence of the Bar and the public interest imperative: lawyers as gatekeepers, whistleblowers, or instruments of state enforcement" in *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Irwin Law, 2007) 151.

[95] For publications by Randal N.M. Graham see *e.g.* "In Defence of Ethinomics" (2005) 8 Legal Ethics 160; "Morality v. Markets: An Economic Account of Legal Ethics" (2005) 8 Legal Ethics 87; *Legal Ethics: Theories, Cases and Professional Regulation* (Toronto: Emond Montgomery Publications, 2004); and "Moral Contexts" (2001) 50 U.N.B.L.J. 77.

[96] For publications by Paul D. Paton see *e.g.* "Accountants, Privilege and the Problem of Working Papers" (2005) 28 Dal. L.J. 353; "Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era" (2006) 84 Can. Bar Rev. 533; and with Deborah L. Rhode, "Lawyers, Ethics and Enron" (2002) 8 Stan. J.L. Bus. & Fin. 9. Professor Paton has left Canada to take up a position at McGeorge University of the Pacific in Sacramento, California in the summer of 2008.

[97] For publications by Alice Woolley see *e.g.* "Imperfect Duty: Lawyers' Obligation to Foster Access to Justice" (Paper presented at the Law Society of Alberta's 100th Year Anniversary Conference, "Canadian Lawyers in the 21st Century," Edmonton, Alberta, 27 October 2007), (2008) 46 Alta. L. Rev. [forthcoming] [Woolley, "Imperfect Duty"]; "Tending the Bar: The Good Character Requirement for Law Society Admission" (2008) 31 Dal. L.J. [forthcoming] [Woolley, "Tending the Bar"]; with Sara L. Bagg, "*Ethics* Teaching in *Law* School" (2007) 1 Can. Legal Educ. Ann. Rev. 85; "Evaluating Value: A Historical Case Study of the Capacity of Alternative Billing Methods to Reform Unethical Hourly Billing" (2005) 12 Int'l J. Legal Prof. 339; "Can the Dismal Science Save the 'Dog of the Curriculum'?" (2005) 8 Legal Ethics 148 (Review Essay of Randal N. Graham's *Legal Ethics, supra* note 95); "Time for Change: Unethical Hourly Billing in the Canadian Profession and What Should be Done About It" (2004) 83 Can. Bar Rev. 859; and "Zealousness," *supra* note 88 at 61.

[98] I would place myself in this category of devoting a significant portion of my research to issues of legal ethics. See Adam M. Dodek & Jeffrey G. Hoskins, eds., *Canadian Legal Practice: A Guide for the 21st Century* (Toronto: LexisNexis, 2009); "Constitutional Legitimacy," *supra* note 52; "Forsaking the Public Interest: *Law Society of New Brunswick v. Ryan*" (2002) 25 Advocates' Q. 230; "Doing our Duty: The Case for a Duty of Disclosure to Prevent Death or Serious Harm" (2001) 50 U.N.B.L.J. 215; "The Public Safety Exception to Solicitor-Client Privilege: *Smith v. Jones*" (2001) 34 U.B.C. L. Rev. 293; "A Subject in Search of Scholarship," *supra* note 1; and "Comparative Confidentiality: Lessons From Canada" (1995) 20 J. Legal Prof. 51 [Dodek, "Comparative Confidentiality"].

ethics, whether through doing graduate work in the United States with some of the leading figures of American legal ethics,[99] or through research leave in the United Kingdom.[100] It should be noted that the late Rose Voyvodic of University of Windsor's Faculty of Law (Windsor) greatly enriched the scholarship of Canadian legal ethics before she passed away in April 2007.[101] The group also encompasses Wesley Pue (University of British Columbia (UBC)), who has been producing penetrating accounts of legal education, the profession, and its culture and history for the last two decades.[102] In addition, some excellent sociological and historical work has been done on the sociology of the profession and on women in the profession by Constance Backhouse (Ottawa),[103] Joan Brockman (Simon

[99] Paul Paton studied and collaborated with Deborah Rhode at Stanford Law School. Alice Woolley did her LL.M. at Yale and studied with David Luban. Trevor Farrow worked with Andrew Kaufman at Harvard Law School while obtaining his LL.M. and visiting on a fellowship. In my case, I obtained my J.D. at Harvard Law School and took the mandatory course in The Legal Profession with Professor Daniel Coquillette, who inspired my interest in the subject and also encouraged me to publish my first law review article. See Dodek, "Comparative Confidentiality," *ibid.*

[100] Allan Hutchinson was the Inns of Court Fellow in the Legal Profession at Lincoln's Inn and the Institute for Advanced Legal Studies in London, England. See Hutchinson, *Legal Ethics*, *supra* note 3 at xviii.

[101] See *e.g.* Rose Voyvodic, "Lawyers Meet Social Context: Understanding Cultural Competence" (2006) 84 Can. Bar Rev. 563; "'Change is Pain': Ethical Legal Discourse and Cultural Competence" (2005) 8 Legal Ethics 55.

[102] See especially Pue & Sugarman, *Lawyers and Vampires*, *supra* note 89; "Globalization and Legal Education: Views from the Outside-In" (2001) 8 Int'l J. Legal Prof. 87; with Annie Rochette, "Back to Basics? University Legal Education and 21st Century Professionalism" (2001) 20 Windsor Y.B. Access Just. 167; with Ruth Buchanan & Marilyn MacCrimmon, "Legal Knowledge for Our Times: Introduction to a Symposium on Education and Legal Knowledge" (2001) 20 Windsor Y.B. Access Just. xiii; with Dawna Tong "The Best and the Brightest? Canadian Law School Admissions" (1999) 37 Osgoode Hall L.J. 843; "British Masculinities, Canadian Lawyers: Canadian legal education, 1900-1930" (1999) 16 Law in Context 80; "Lawyering for a Fragmented World: Professionalism after God" (1998) 5 Int'l J. Legal Prof. 125; "Common Law Legal Education in Canada's Age of Light, Soap and Water"(1995) 23 Man. L.J. 654; "In Pursuit of Better Myth," *supra* note 88; "A Profession in Defense of Capital?" (1992) 7:2 C.J.L.S. 267; "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada" (1991) 20 Man. L.J. 227; "Moral Panic at the English Bar: Paternal vs. Commercial Ideologies of Legal Practice in the 1860s" (1990) 15 Law & Soc. Inquiry 49; "Rethinking 'Professionalism': Taking *The Professions in Early Modern England* Seriously" (1989) 4 C.J.L.S. 175; and "Guild Training vs. Professional Education: The Committee on Legal Education and the Law Department of Queen's College, Birmingham in the 1850s" (1989) 33 Am. J. Legal Hist. 241. For a list of Professor Pue's publications see online: University of British Columbia, Faculty of Law <http://faculty.law.ubc.ca/Pue/index-pub.html>.

[103] For publications by Constance Backhouse see *e.g.* "What is Access to Justice?" in Bass, Bogart & Zemans, *Access to Justice for a New Century, supra* note 72; "The Chilly Climate for Women Judges: Reflections on the Ewanchuk Decision" (2003) 15 C.J.W.L. 167; "The Changing Landscape of Canadian Legal Education" (2001) 20 Windsor Y.B. Access Just. 25; "Bias in Canadian Law: A Lopsided Precipice" (1998) 10 C.J.W.L. 170; and *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press for the Osgoode Society, 1991). For a complete list of Professor Backhouse's publications, see online: <http://www.constance backhouse.ca/publications/other-publications.html>.

Fraser University),[104] Fiona Kay (Queen's),[105] Jean McKenzie Leiper (Western),[106] and Mary Jane Mossman (Osgoode).[107]

The individual members of the New Legal Ethics Scholars are focusing on different subject areas, such as criminal (Layton, Code), corporate (Paton), clinical (Voyvodic), and civil (Farrow). They encompass and employ different schools of legal thought, including economic analysis of the law (Graham), law and society (Pue), feminist legal analysis (Voydovic, Mossman, and others), and sociological analysis (Kay). Some are looking at micro-issues in the profession, while others are examining macro-issues, such as the good character requirement or civility.[108] Together, they have begun to build the foundations of an identifiable scholarly discipline of legal ethics in Canada.

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[104] For publications by Joan Brockman see *e.g.* "An Update on Self-Regulation in the Legal Profession (1989-2000): Funnel In and Funnel Out" (2004) 19:1 C.J.L.S. 55; "Aspirations and Appointments to the Judiciary" (2003) 15 C.J.W.L. 138; with Caroline Murdoch, "Who's On First? Disciplinary Proceedings by Self-Regulating Professions and other Agencies for 'Criminal' Behaviour" (2001) 64 Sask. L. Rev. 29; "A Wild Feminist at Her Raving Best: Reflections on Studying Gender Bias in the Legal Profession" (2000) 28:1 Resources for Feminist Research 61; with Fiona M. Kay, "Barriers to Gender Equality in the Canadian Legal Establishment" (2000) 8 Fem. Legal Stud. 169; "'A Cold-Blooded Effort to Bolster Up the Legal Profession': The Battle Between Lawyers and Notaries in British Columbia, 1871-1930" (1999) 32 Social History 209; and *Gender in the Legal Profession: Fitting or Breaking the Mould* (Vancouver: UBC Press, 2001).

[105] For publications by Fiona M. Kay see *e.g.* "The Social Significance of the First Women Lawyers" (2007) 45 Osgoode Hall L.J. 397; with Jean E. Wallace, "The Professionalism of Practicing Law: A Comparison Across Two Work Contexts" (Paper presented at the AGM of the American Sociological Association, Montreal, Quebec, Canada, 11 August 2006) [unpublished]; with John Hagan, "Even Lawyers Get the Blues: Gender, Depression and Job Satisfaction in Legal Practice" (2007) 41 Law & Soc'y Rev. 51; "Professionalism and Exclusionary Practices: Shifting the Terrain of Privilege and Professional Monopoly" (2004) 11 Int'l J. Legal Prof. 3; with John Hagan, "Building Trust: Social Capital, Distributive Justice and Loyalty to the Firm" (2003) 28 Law & Soc. Inquiry 483; "Crossroads to Innovation and Diversity: The Careers of Women Lawyers in Quebec" (2002) 47 McGill L.J. 699; with Joan Brockman, "Barriers to Gender Equality in the Canadian Legal Establishment" (2000) 8 Fem. Legal Stud. 169; with John Hagan, "Cultivating Clients in the Competition for Partnership: Gender and Organizational Restructuring of Law Firms in the 1990s" (1999) 33 Law & Soc'y Rev. 517; and with John Hagan, *Gender in Practice: A Study of Lawyers' Lives* (New York: Oxford University Press, 1995). For a complete list of Professor Kay's publications, see online: Queen's University, Department of Sociology <http://queensu.ca/sociology/files/Recent%20Publications.pdf>.

[106] See Jean McKenzie Leiper, *Bar Codes: Women in the Legal Profession* (Vancouver: UBC Press, 2006).

[107] For publications by Mary Jane Mossman see *e.g. The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Oxford: Hart Publishing, 2006); "Legal Education as a Strategy for Change in the Legal Profession" in E. Sheehy & S. McIntyre, eds., *Calling for Change* (Ottawa: University of Ottawa Press, 2006) 179; "Defining Moments for Women as Lawyers: Reflections on the Impact of Numerical Gender Equality" (2005) 17 C.J.W.L. 15; and "Gender Bias and the Legal Profession: Challenges and Choices" in J. Brockman & D. Chunn, eds., *Investigating Gender Bias: Law, Courts, and the Legal Profession* (Toronto: Thompson Educational Publishing, 1993) 147. For a complete list of Professor Mossman's publications, see online: Osgoode Hall Law School <http://osgoode.yorku.ca/osgmedia.nsf/research/mossman_mary_jane>.

[108] See Woolley, "Tending the Bar," *supra* note 97.

One of the projects that the Legal Ethics Curriculum Network is working on is a national legal ethics casebook[109] to be used in the growing number of legal ethics courses offered in Canadian law schools, described in Part D. Another member of this group, Western's Randal Graham, produced a casebook in 2004 that has been adopted by several law schools. Graham has produced a coherent theory of legal ethics based on rational choice theory which he calls "ethinomics." Graham's provocative and path-breaking theory has rightly attracted much attention and debate internationally, though not yet in Canada.[110]
In the civil justice area, the greatest strides in terms of ethics have been made in the alternative dispute resolution (ADR) field.[111] Ethical issues concern significant sections of three new books on ADR. The University of Saskatchewan's Marjorie Benson conducted an important study involving lawyers in Alberta and Saskatchewan, first reported in the *Canadian Bar Review* in 2006,[112] and now completed in a 2008 monograph.[113] Although Benson's study found that ethical issues pervade the practice of negotiation, her study was unable to demarcate a clear line between "ethical" and "best practice" issues. This is an important point which can be expanded across the practice of law. In many cases, discipline issues arise because of the failure or refusal of a lawyer to address a practice issue which then leads the lawyer to make clear ethical missteps.[114] In the second book,

[109] Alice Woolley *et al.*, *Legal Ethics and Professional Responsibility* (Toronto: LexisNexis Canada) [forthcoming in 2008].

[110] Graham's theory was the subject of an entire edition of the English journal, *Legal Ethics.* See W. Bradley Wendel, "Review Symposium: Introduction: Economic Rationality vs. Ethical Reasonableness: The Relevance of Law and Economics for Legal Ethics" (2005) 8 Legal Ethics 107; Kim Economides & Julian Webb, "Ethinomics and the Determinants of Legal Professionalism" (2005) 8 Legal Ethics 1; David McGowan, "Some Realism about Parochialism: The Economic Analysis of Legal Ethics" (2005) 8 Legal Ethics 117; Duncan Webb, "The Boundaries of Economic Analysis—Is Ethinomics Possible?" (2005) 8 Legal Ethics 138; and Alice Woolley, "Can the Dismal Science Save the 'Dog of the Curriculum'?" (2005) 8 Legal Ethics 148.

[111] For selected articles before the rise of the new scholarship of legal ethics see *e.g.* Connie Reeve, "The Quandary of Setting Standards for Mediators: Where Are We Headed?" (1998) 23 Queen's L.J. 441; Owen V. Gray, "Protecting the Confidentiality of Communications in Mediation" (1998) 36 Osgoode Hall L.J. 667; and Michael Coyle, "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?" (1998) 36 Osgoode Hall L.J. 625.

[112] See Marjorie L. Benson, "A Negotiating Ethics Study" (2006) 84 Can. Bar Rev. 593.

[113] Marjorie L. Benson, *The Skills and Ethics of Negotiation: Wisdom and Reflections of Western Canadian Civil Practitioners* (Saskatoon: College of Law, University of Saskatchewan, 2007).

[114] *Ryan*, *supra* note 45, is a clear example of this. See especially paras. 3-10. The lawyer took a small cash retainer from two clients to initiate a wrongful dismissal case. Ryan never filed suit, and after missing the limitations period he "spun an elaborate web of deceit" for five and a half years, including inventing tales of imaginary motions, taking his clients to the site of a non-existent discovery, and forging a judgment of the New Brunswick Court of Appeal. Finally, Ryan admitted to his clients that the "whole thing was a lie" and was disbarred by the Law Society of New Brunswick.

The Theory and Practice of Representative Negotiation,[115] Osgoode's Colleen Hanycz, Trevor Farrow, and Frederick Zemans devote a specific chapter to ethics, and ethical issues run through the entire book, with chapters devoted to each of gender, culture, and power. The final book, reviewed in this issue,[116] is the broadest of the three. In *The New Lawyer*,[117] Julie Macfarlane of the University of Windsor's Faculty of Law examines how structural changes within the profession and the legal system, namely a movement away from protracted litigation and towards conflict resolution, are changing the dominant legal norms and creating new ethical complexities across different areas of the law. While Macfarlane has been writing about ethical issues in ADR for some years,[118] this book expands the analysis into a much broader field.

E. Reinvigorating Legal Education

The growth of legal ethics within the academy can be attributed, in part, to larger changes within Canadian law schools. This past decade has been a period of reform and renewal at many of the country's law faculties. With many of the baby boomers retiring, law schools like Osgoode and UBC will see approximately 40 per cent of their faculty replaced by 2010. Stable or increased budgets have allowed some law schools to increase their faculty complements. Calgary is expanding its law school entering class by a quarter and will have to add new faculty accordingly. Many law schools have completed (UBC, Calgary, Osgoode, Ottawa, Western, Windsor, McGill) or are undergoing (Toronto, University of New Brunswick (UNB)) curricular reforms. In almost every case, legal ethics has been the beneficiary of such reforms. There are a number of proposals for new law faculties in Ontario.[119] There has not been a new law school in Ontario in almost four decades (Windsor, 1969) or in Canada for three decades (Moncton, 1978). The sudden interest in

[115] See Colleen M. Hanycz, Trevor C.W. Farrow & Frederick H. Zemans, *The Theory and Practice of Representative Negotiation* (Toronto: Emond Montgomery, 2008). See also Trevor C.W. Farrow, "The Negotiator-as-Professional: Understanding the Competing Interests of a Representative Negotiator" (2007) 7 Pepp. Disp. Resol. L.J. 373.

[116] See Andrew Pirie, Book Review of *The New Lawyer: How Settlement is Transforming the Practice of Law* by Julie Macfarlane, (2006) 46 Osgoode Hall L.J. 203.

[117] Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008).

[118] See Julie Macfarlane, "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model" (2002) 40 Osgoode Hall L.J. 49; Julie Macfarlane, "Culture Change: A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) J. Disp. Resol. 242.

[119] See Helen Burnett, "Wilfrid Laurier throws hat in for law school; two universities in the hunt" *The Law Times* (24 September 2007) 4; Louise Brown & Tracey Tyler, "4 universities vie for law school; Lakehead, Laurier, Waterloo among institutions seeking Law Society's approval to start programs" *The Toronto Star* (24 April 2008) A2; and "Another Law School?" *Toronto Star* (27 April 2008) A16 (noting Law Society of Upper Canada's approval in principle of new law school at Lakehead University in Thunder Bay).

opening new law faculties for the first time in decades has coincided with the establishment of a task force by the LSUC to examine licensing and accreditation issues, including the review of criteria for approving law degrees for the first time in thirty-five years.[120] The Federation of Law Societies is undertaking a similar review of the basis for accrediting foreign law degrees as equivalent to a Canadian law degree. Both reviews will be forced to consider the question of what legal education should consist of in the twenty-first century. An interim report by the LSUC task force already identifies professional responsibility as a component of legal education.[121] It is highly likely that such reviews will include recognition that legal ethics and professional responsibility should be a component of Canadian legal education in the twenty-first century.

For years, legal ethics was a victim of academic inertia.[122] The openness to reform and the ability to implement proposed changes has assisted the rise of legal ethics within Canadian law schools. Whereas in 1999 it was reported that only four of the country's sixteen common law schools required their students to take a course in legal ethics,[123] now no less than nine have some mandatory legal ethics course or component in their curriculum (UBC, University of Alberta, Calgary, Manitoba, Osgoode, Toronto, Western, Dalhousie and UNB), while two others (Ottawa and Windsor) integrate ethics into aspects of the first year curriculum. I predict that there will be more course offerings in the coming years. In addition, in the coming decades we will see the impact of paralegal regulation in Ontario and perhaps in other provinces as well. Might we see a law faculty offering degrees in paralegal studies as well as law? Might some twenty-first century Caesar Wright[124] propose that first-year law students and first-year paralegal students

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[120] See Law Society of Upper Canada, *Ontario Lawyers' Gazette* (Spring 2007) 34, online: <http://www.lsuc.on.ca/media/olg_spring07_task_force.pdf>. In addition to the passage of time, one of the precipitating factors in launching this review was the Government of Ontario's passage of the *Fair Access to Regulated Professions Act*, 2006 S.O. 2006, c. 31. The task force provided an interim report to Convocation in September 2007. See Law Society of Upper Canada, Licensing and Accreditation Task Force, Report to Convocation (20 September 2007), online: http://www.lsuc.on.ca/media/convsept07_licensing_accreditation.pdf [LSUC, Task Force]. Reference to the Federation's Task Force is found at para. 13. See also Law Society of Upper Canada, Consultation Report (January 2008), online: <http://www.lsuc.on.ca/ media/licensing.pdf>.

[121] See LSUC, Task Force, *ibid*. at para. 8.

[122] See Devlin, Downie, & Lane, *supra* note 11 at 762-65 (describing institutional resistance, faculty resistance, and student resistance). On leadership in reforming the law school curriculum see Stephen G.A. Pitel, "Charting New Courses: Leadership in Curriculum Reform" (Paper Presented at the Eighth Colloquium on the Legal Profession at the University of Western Ontario, London, Ontario, 25 May 2007), online: <http://www.lsuc.on.ca/media/ eighth_colloquium_charting_new_courses.pdf>.

[123] Hutchinson, *Legal Ethics and Professional Responsibility,* 1st ed., *supra* note 3 at 4.

[124] Cecil ("Caesar") Wright founded the modern University of Toronto Faculty of Law. See C. Ian Kyer & Jerome E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers and Legal Education in Ontario 1923-1957* (Toronto: The Osgoode Society, 1987); Martin L. Friedland, *The University of Toronto: A History* (Toronto: University of Toronto Press, 2002).

sit side by side in some classes? These cultural, conceptual, pedagogical, and ethical challenges remain in the distance.

In the teaching of legal ethics, the lack of consistency is particularly noteworthy. As Sossin has explained,[125] there are at least five ways to teach legal ethics: (1) the "integrated" or "pervasive" method, where there is no dedicated ethics course, but rather ethical issues are integrated throughout the curriculum's offerings; (2) the clinical method, whereby all students have some exposure to the real-world issues of working with clients through the clinical setting; (3) the combined method, where legal ethics and professionalism is integrated into another course, such as legal research and writing or civil litigation; (4) the dedicated course method, either mandatory or elective; and (5) not at all, on the assumption that the bar admission course will contain an ethics component. Even within this list, there is a multiplicity of approaches to the "dedicated course" method. Some schools (Calgary, Alberta, and UNB) offer the traditional course in upper years; others have a dedicated first-year week (Toronto and UBC) or course (Western). Osgoode has embarked on an ambitious non-traditional program of teaching legal ethics through a three-week intensive course for first-year students, delivered in the first week of law school in September and the first two weeks in January. What is different today, compared to even a decade ago, is that there is now some precedent for teaching legal ethics in Canada, and a diversity of approaches for doing so. There is a basis for discussion of a variety of questions: Should the course be mandatory or voluntary? First year or upper year? Integrated, clinical, combined, or dedicated approach? The New Legal Ethics Scholars have written a number of articles, and there now exists enough interest and experience to justify a conference on the subject this year.[126]

The expansion of legal ethics in the academy has been supported by and has led to the establishment of several centres and symposia. In Ontario, former Chief Justice Roy McMurtry established an Advisory Committee on Professionalism in September 2000.[127] This initiative—composed of and targeting members of the judiciary, the Law Society, the legal academy, and the bar—has provided a strong injection of ideas and participants to the academic consideration of legal ethics in Ontario; its influence has been felt in other provinces as well. The Advisory Committee's first priority was to establish a definition of professionalism which eventually resulted in a ten-page document on the "Elements of

[125] Lorne Sossin, "Can ethics be taught?" *The Lawyers Weekly* 26:45 (6 April 2007) 5. See also Woolley & Bagg, *supra* note 97; and Devlin, Downie, & Lane, *supra* note 11. See also the relevant articles by Pue, *supra* note 102.

[126] See articles cited *ibid.* The new Centre for Professionalism, Ethics and Public Service (PEPS) is to hold its inaugural symposium in April 2008 on the subject of how to teach legal ethics. See The Centre for Professionalism, Ethics and Public Service (PEPS), online: University of Toronto <http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/9/12/0/0&contentId=1602&cType=webpages>.

[127] See Law Society of Upper Canada, Advisory Committee on Professionalism, online: <http://www.lsuc.on.ca/news/a/hottopics/committee-on-professionalism/>.

Professionalism."[128] The most enduring and vitalizing contribution of the Advisory Committee has been the establishment of an annual or semi-annual Colloquium on the Legal Profession, which rotates among Ontario's six law schools. The First Colloquium took place at Western in October 2003, and the Tenth Colloquium at Ottawa in March 2008. The Eleventh Colloquium is scheduled for Windsor in October 2008. Each colloquium has been organized around a theme, such as Legal Ethics in Action (Osgoode, October 2007); Professionalism: Ideals, Challenges, Myths and Realities (Ottawa, March 2008); and Professionalism and Serving Communities (Windsor, October 2008). These colloquia have brought together leading members of the bar, the bench, and academia, and have featured papers generally of very high quality, all of which are available on the LSUC website.[129]

The Advisory Committee also established a Task Force on advancement of the ideal of professionalism, which held a conference in 2004 on teaching professionalism. Following the conference, the Task Force created two sub-groups for teaching professionalism in law schools and in the first five years of practice. The sub-group on law school teaching led by Stephen Pitel (Western) created a database in CD-ROM format containing national legal ethics syllabi, course problems, and articles used in legal ethics courses.[130] They are now exploring moving the database to a web-based format.

Two centres for legal ethics are planned. The Legal Ethics Curriculum Network is establishing a Virtual Centre for Legal Ethics & Professional Responsibility to connect those working in the field from across the country. The Virtual Centre intends to work on the creation and dissemination of teaching materials and to hold meetings and conferences on the subject. In January 2008, the University of Toronto launched the Centre for Professionalism, Ethics, and Public Service (PEPS) under the directorship of Lorne Sossin.[131] The goal of PEPS is to broaden and deepen our understanding of professionalism, ethics, and public service, and the relationship between them. It is designed to bring together academic programming, career and professional development, and public service and student leadership. It will feature a working paper series, ethics and public interest fellowships, a judge-in-residence program, a law, ethics, and film initiative, and a student leadership forum. In April 2008, it hosted a symposium on ethics and legal education

[128] See Chief Justice of Ontario Advisory Committee on Professionalism, Working Group on the Definition of Professionalism, "Elements of Professionalism" (October 2001, rev. December 2001, June 2002), online: <http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf>.

[129] See Law Society of Upper Canada, "Papers from Past Colloquia," online: <http://www.lsuc.on.ca/latest-news/a/hottopics/committee-on-professionalism/papers-from-past-colloquia/>.

[130] See Stephen G.A. Pitel, Peter Buza & Michael Beeforth, "Legal Ethics and Professionalism Teaching Materials Database" CD-ROM: (Faculty of Law, University of Western Ontario, Chief Justice of Ontario's Advisory Committee on Professionalism, September 2007).

[131] See University of Toronto, Centre for Professionalism, Ethics and Public Service (PEPS), online: <http://www.law.utoronto.ca/visitors_content.asp?itemPath=5/12/0/0/0&contentId=1602>.

entitled: "Can Ethics be Taught?"

F. A Research Agenda for Canadian Legal Ethics in the Twenty-First Century

In Part A of this article, I identified both the collective and the individual components of Canadian legal ethics, as well as the challenge of attempting to situate any analysis within a distinctly Canadian legal culture and legal system. There, I noted the existence of gaps between different accounts of Canadian legal ethics: the popular account, the legal profession's account, and the scholarly account. In this Part, I take stock of where Canadian legal ethics is currently situated and present some issues to pursue as the scholarship moves forward, in part addressing some of the gaps between those accounts as well as the issue of the existence of such gaps.

First, there is a continued need to expand and revise the work of the first wave of Canadian legal ethics, the treatises, and other works that provide doctrinal description and analysis. First wave materials provide the most frequently consulted sources for practitioners, students, and scholars interested in Canadian legal ethics, and offer important source materials for those researching and writing in the area. Fruitful areas for ethical inquiry and analysis would include family law, immigration law, corporate law, public law, and civil litigation, to name a few. Here, there can be no better model than Proulx & Layton's *Ethics and Canadian Criminal Law*.[132] Second, there is a pressing need to expand the critical work begun by the New Legal Ethics Scholars into previously unexplored terrain. If the existing work in legal ethics in Canada could be seen as a map, we would have a much distorted picture of the ethical world; it would be distorted both in the sense of the ethical issues that lawyers face, as well as the ethical challenges for the profession and the legal system.

This gap between various accounts of ethical issues is a starting point for macro-ethical inquiry. In Part B, above, I described the key ethical moments and issues for the Canadian legal profession. If we were to compare these with where law societies and bar associations have focused their energies over the last decade, we would find a significant "ethical gap." We would find that a few issues have taken up a tremendous proportion of their "ethical energy" during this period to the diminishment or exclusion of many other issues. Thus, law societies and bar associations have been focused on issues like conflicts of interest, independence of the bar, and money laundering. Codes of conduct are similarly distorted.[133] As Harry Arthurs and others have forcefully demonstrated, they contain many provisions that should be considered purely aspirational and have virtually no regulatory

[132] Proulx & Layton, *supra* note 22.

[133] See Hutchinson, *Legal Ethics, supra* note 3 at 13-17.

impact: competency, lawyers' duty to the administration of justice, and civility, among others. On the other hand, they are largely silent when it comes to some of the most important and pressing ethical issues of the new century: lawyers' duties respecting the physical evidence of crime, the challenges of corporate counsel in the wake of numerous corporate scandals, and lawyers' responsibilities regarding access to justice.

I devoted an entire part to the issue of change in legal education because it is closely tied to legal ethics in a number of ways. The obvious ones are curriculum offerings and scholarship, but legal education is itself a subject for ethical inquiry. The plethora of proposals and possibilities for new law schools (part-time, distance learning, foreign law programs catering to Canadian students, et cetera) raise additional ethical issues. Restricting access to legal education is difficult to justify on access to justice grounds, but whether there is an ethical imperative for more lawyers is a more difficult question which implicates larger public policy questions, including the legitimacy of spending public funds on the training of more lawyers at the expense of other career options. To some degree, these are issues that provincial ministries of education, as opposed to law societies, will have to deal with. However, they will require law societies to consider their nebulous but critically important "public interest" mandate.

Continuing with macro-ethical issues, the leading ethical challenge for the profession and for the legal system is access to justice. Until recently, the access to justice "crisis" had succeeded in flying below the public radar. It was one of the worst kept secrets among lawyers that "the system" had, for the most part, priced all but the very poor (in the case of legal-aid-qualifying criminal defendants) and the relatively wealthy (individuals and companies) out of the market for justice in many provinces. A simple but poignant headline in the Toronto Star tells the tale: "A 3-day trial likely to cost you $60,000."[134] While the crisis in access to justice has received increased mainstream media attention, it has yet to register on the public radar as a political issue. The problem is that middle class Canadians, with whom political power arguably resides, do not experience the law the way that they do health care. The legal issues that most Canadians are likely to deal with involve residential real estate transactions and drawing up wills, both areas which continue to be hotly competitive and eminently affordable. It is only in the rare instances when ordinary Canadians go to court or are named in a lawsuit that they get a rude awakening. Ethical inquiries into the access to justice crisis would involve attempting to determine responsibility for the rising costs of both civil and criminal litigation. All players in the legal system—courts, lawyers, government, litigants—share some responsibility for these problems and, therefore, they must share some responsibility to work towards a solution. The extent of this responsibility and the types of potential solutions are subjects of fruitful

[134] See Tyler, "A 3-day trial likely to cost you $60,000," *supra* note 59 and additional articles from the *Toronto Star* cited therein.

ethical inquiries.[135] Ethical inquiries into access to justice issues would also scrutinize whether the profession is asking the right questions. The profession and the courts have tended to see access to justice in many of the wrong places; over the last decade, the Supreme Court of Canada, with support from the bar, has constitutionalized solicitor-client privilege, justifying it, in part, in terms of access to justice.[136] Extending the access to justice rhetoric to such subjects is, at the least, misplaced and, at worst, misleading and counterproductive.

Access to justice will be the ethical issue for our generation because it has reached the point where it challenges the fundamental premise of our profession as existing in the public interest. The access to justice crisis exposes the fundamental gap between the promise of the legal profession and its delivery. As the Court has recognized, "[t]he privilege of self-government is granted to professional organizations only in exchange for, and to assist in, protecting the public interest with respect to the services concerned."[137] In their path-breaking study, *Lawyers in Canada*, which the Supreme Court was quoting, David Stager and Harry Arthurs listed "access to professional services, by all members of the public in need of services" as the first element of the obligation of the legal profession.[138] When access to a lawyer is out of reach to a large segment of the public, it becomes harder to justify that self-regulation is "in the public interest." It may be in the interest of those that can afford the services of a lawyer and in the interest of the legal profession, but if law has largely become a service industry to a new aristocracy composed of corporations, governments, and wealthy individuals, claims to be in the public interest become much easier to challenge.

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[135] On this issue see Woolley, "Imperfect Duty," *supra* note 97; Richard Devlin, "Breach of Contract? The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002) 25 Dal. L.J. 335; and Zino I. Macaluso, "That's Okay, This One's On Me: A Discussion of the Responsibilities and Duties Owed by the Profession to do *Pro Bono Publico* Work" (1992) 26 U.B.C. L. Rev. 65. I consider the specific issue of self-represented litigants under the larger one of access to justice. On self-regulated litigants see *e.g.* Philip Slayton, "The self-representation problem" *Canadian Lawyer* (November/December 2007) 30; Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings and Recommendations* (November 2007) at 3, 44-52, online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf>; Canadian Forum on Civil Justice, *Alberta Self-Represented Litigants Mapping Project Final Report* (January 2007), online: <http://cfcj-fcjc.org/docs/2007/mapping-en.pdf>; and Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused Persons* (September 2006), online: <http://www.cjc-ccm.gc.ca/cmslib/general/Final-Statement-of-Principles-SRL.pdf>.

[136] See *e.g. Maranda v. Richer,* [2003] 3 S.C.R. 193 at para. 40, where Justice Deschamps explains:

> [t]he privilege performs the social function of preserving the quality, freedom and confidentiality of information exchanged between a client and his or her lawyer in the context of a legal consultation. It enables all individuals to participate in society with the benefit of the information and advice needed in order to exercise their rights. It is closely associated with access to justice.

[137] Stager & Arthurs , *Lawyers in Canada, supra* note 87 at 31.

[138] Bryan Williams, "Abuse of power by self-governing bodies" in *Law Society of Upper Canada Special Lectures* (Toronto: IrwinLaw, 1979) 345.

Along these lines, the second area of prospective inquiry involves what might be considered the *grundnorm* of the Canadian legal profession: self-regulation.[139] Over the past decade, the bar has been engaged in a sustained effort to defend itself from possible government encroachment through a combination of zealous litigation and more modest public advocacy.[140] Much of the existing case for self-regulation of the legal profession is built on assumptions about the profession that have been increasingly called into question over the past few decades.[141] As some of these assumptions are weakened or discredited, and as conceptions of the lawyer's role change, articulating new bases for self-regulation becomes necessary. In addition, while Graham has applied economic analysis to how lawyers behave as individuals,[142] we have not seen an attempt at an empirical analysis of self-regulation of lawyers in Canada.[143] In the words of the Competition Bureau of Canada, regulatory decisions must be evaluated "through a balanced, evidence-based assessment, taking into account the numerous channels through which regulation can be beneficial or harmful to consumers."[144] History and tradition cannot substitute for a searching inquiry.[145]

A third important collective ethical issue is diversity, broadly conceived. It has been fifteen

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[139] For efforts in this respect see William H. Hurlburt, *The Self-Regulation of the Legal Profession in Canada and in England and Wales* (Edmonton: Law Society of Alberta, 2000). Much of the work of Harry Arthurs involves the sustained criticism of self-regulation. See especially Arthurs, "The Dead Parrot," *supra* note 87. Similarly, much of Wesley Pue's work has criticized aspects of self-regulation. See *e.g.* Pue, "Becoming 'Ethical,'" *supra* note 6; and Pue, "In Pursuit of Better Myth," *supra* note 88.

[140] *Supra* note 94. See also Paul Douglas Paton, *In the Public Interest: Threats to Self-Regulation of the Legal Profession in Ontario* (S.J.D. Thesis, Stanford Law School, 1998-2006) [unpublished].

[141] See *e.g.* Pue, "In Pursuit of Better Myth," *supra* note 88.

[142] See *supra* note 95.

[143] Competition Bureau, *Self-Regulated Professions*, *supra* note 67, could have provided such an opportunity but the report accepted self-regulation of the legal profession as a given. For an inquiry into the general issue of self-regulation see Andrew Green & Roy Hrab, "Self-Regulation and the Protection of the Public Interest" (Research Paper no. 26, Prepared for the Panel of the Role of the Government in Ontario, June 2003), online: University of Toronto <http://www.law-lib.utoronto.ca/investing/reports/rp26.pdf>. Findings included that self-regulation required some check on self-interested behaviour and that the public's power to check self-regulation has its limits. For economic analyses of different aspects of the regulation of lawyers in Canada, see Michael Trebilcock & Lilla Csorgo, "Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective" (2001) 24 Dal. L.J. 1 [Trebilcock & Csorgo, "Multi-Disciplinary Professional Practices"]; Michael Trebilcock, "Regulating Legal Competence" (2001) 34 Can. Bus. L.J. 444 [Trebilcock, "Regulating Legal Competence"]; and Gillian Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98 Mich. L. Rev. 953 [Hadfield, "The Price of Law"].

[144] Competition Bureau, *Self-Regulated Professions*, *ibid.* at viii.

[145] Thanks to Alice Woolley for discussing the issues in this paragraph, among many others.

years since the publication of Bertha Wilson's landmark report, *Touchstones for Change: Equality, Diversity and Accountability*.[146] Much has been accomplished—women and racialized minorities are now members of law schools and bar associations generally proportionate to their numbers in the general population—but significant challenges remain. While there is less overt discrimination, in many cases the situs of discrimination have simply moved. In the case of women in the legal profession, discrimination has been transferred from entry to law schools and law firms to treatment and retention in the profession. In recognition of the severity of the issue, the LSUC struck a Working Group on the Retention of Women in Private Practice and issued a consultation paper in February 2008.[147] At a conference at the University of Toronto in May 2007 on Gender and Diversity in the Law, one of the panelists spoke about the phenomenon of "the New Closet" in which women keep their families and family status hidden in order to avoid adverse job consequences.[148] The link between gender and other grounds for discrimination and legal ethics is overt, and it is now explicitly recognized in ethical codes.[149] Further, the broader link between issues of diversity, professionalism, and legal ethics has been explored by Constance Backhouse[150] and Fiona Kay.[151] The issue of diversity within the profession is

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[146] Bertha Wilson, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993). See also Elizabeth Sheehy & Sheila McIntyre, *Calling for Change: Women, Law, and the Legal Profession* (Ottawa: University of Ottawa Press, 2006).

[147] See Law Society of Upper Canada, *Report for the Retention of Women in Private Practice Working Group* (21 February 2008), online: <http://www.lsuc.on.ca/latest-news/a/

hottopics/retention-of-women-in-private-practice-working-group/>.

[148] See comments by Darlene Johnston, "Identifying the Landscape: The challenges confronting women and equity-seeking groups in the legal profession" (A Summit on Diversity in the Law: Moving Forward as a Profession, presented at the Faculty of Law, University of Toronto, 1 May 2007), online: <http://www.law.utoronto.ca/visitors_content.asp?

itemPath=5/7/3/0/0&contentId=1506> [A Summit on Diversity in the Law]. This phenomenon was reflected in a neologism reported in the *New York Times* and reprinted by the *The Globe and Mail*: "*maternal profiling,* n. Employment discrimination against a woman who has, or will have, children. The term has been popularized by members of MomsRising, a group promoting the rights of mothers in the workplace." See also Grant Barrett, "Of lolcats, mobisodes and gorno: a look at some of the words that went mainstream this year" *The Globe and Mail* (28 December 2007) A2.

[149] See *e.g.* CBA, *Code of Professional Conduct*, *supra* note 12, c. XX (Non-Discrimination); LSUC Rules, *supra* note 39, r. 5.03 (Sexual Harassment), r. 5.04 (Discrimination); Law Society of British Columbia, *Professional Conduct Handbook*, *supra* note 39, c. 2, r. 3 (Discrimination); Law Society of Alberta, *Code of Professional Conduct*, *supra* note 22, c. 1, r. 9 (discrimination), r. 10 (sexual harassment); and Nova Scotia Barristers' Society, *Legal Ethics Handbook*, *supra* note 39, c. 24 (Discrimination).

[150] See Constance Backhouse, "Gender and Race in the Construction of 'Legal Professionalism,'" *supra* note 10.

[151] See Fiona M. Kay, "Integrity in a Changing Profession: Issues of Diversity and Inclusion" (Paper presented at the Fifth Colloquium on the Legal Profession, Faculty of Law, Queen's University, 28 November 2005), online: <http://www.lsuc.on.ca/media/kaydiversityintegrity.pdf>.

wide and deep, with serious ethical ramifications for the profession and the legal system. As with access to justice, it goes to the heart of the legitimacy of the legal profession and the legal system. Michael Tulloch of the Ontario Court of Justice explained that we live in a multi-cultural, multi-ethnic, and multi-racial society, and every segment of our society should be represented in the composition of our law schools and law firms; if this diversity is not represented, we risk a "crisis of legitimacy within the legal profession and correspondingly within the administration of justice."[152] Former Governor General Adrienne Clarkson has expressed similar concerns about whether the legal profession is serving "the new Canada."[153] On a micro-ethical level, we also need to start thinking more about the lawyer's ethical responsibilities and challenges in dealing with an increasingly diverse client population in Canadian society.[154] Issues of diversity, broadly conceived, will continue to attract attention, scrutiny, and, hopefully, more scholarship.

A final macro-ethical challenge that also has micro-ethical implications is the impact of globalization on the legal profession and the practice of law. We have already seen how lawyer mobility has made conflicts of interest the top ethical priority for the profession over the past decade. Issues such as conflicts,[155] outsourcing legal work,[156] dealing with repressive foreign governments,[157] and the ethical jurisdiction over lawyers' conduct abroad[158] will take on increased importance in the future.

Moving from macro-ethical issues to micro-ones, we need to take seriously Allan Hutchinson's point about lawyering in a fragmented society.[159] Neither the legal

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[152] A Summit on Diversity in the Law, *supra* note 148. (Comments at approximately 50-51 minutes into the web cast).

[153] See Her Excellency the Right Honourable Adrienne Clarkson, "Speech on the Occasion of an Honorary Doctorate of Laws Degree from The Law Society of Upper Canada" (27 February 2003), online: Governor General of Canada <http://www.gg.ca/media/doc.asp?

lang=e&DocID=1091>.

[154] See articles by Voydovic, *supra* note 101.

[155] See *e.g.* Nancy J. Moore, "Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the 'Mega Firm'" (2005) 18 Geo. J. Legal Ethics 521.

[156] See *e.g.* Alison M. Kadzik, "The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices" (2006) 19 Geo. J. Legal Ethics 731.

[157] See James Heffernan, "An American in Beijing: An Attorney's Ethical Considerations Abroad with a Client Doing Business with a Repressive Government" (2006) 19 Geo. J. Legal Ethics 721.

[158] See *e.g.* Law Society of Alberta, *Code of Professional Conduct*, *supra* note 22, Preface ("A member of the Law Society remains subject to this Code no matter where the member practices law"); Jamie Y. Whitaker, "Remedying Ethical Conflicts in a Global Legal Market" (2006) 19 Geo. J. Legal Ethics 1079. See also Chi Carmody, "Talisman Energy, Sudan and Corporate Social Responsibility" (2000) 38 Can. Y.B. Int'l Law 237.

[159] See Hutchinson*, Legal Ethics, supra* note 3 at 37-41.

profession nor the clientele that it serves is monolithic. More work needs to be done to analyze the specific issues that lawyers face in different practice contexts: government lawyers,[160] Crown prosecutors, corporate lawyers (both in-house and external counsel),[161] family lawyers, immigration lawyers, and others. The model here should be the excellent work on criminal defence practice that has dominated the field of legal ethics and has had the effect of creating a leading paradigm for Canadian legal ethics based on the criminal justice system.[162] Canadian legal ethics needs to examine whether issues such as confidentiality and conflicts of interest are really rules of general application across practice areas or whether a more contextual application is in order.

In the introduction, I defined legal ethics as encompassing all of the actors in the legal system: lawyers, judges, clients, self-represented litigants, witnesses, jurors, court administrators, mediators, arbitrators, the media, and others who provide legal services like notaries, immigration consultants, Aboriginal caseworkers, and paralegals. Even the ethical analysis of law professors, inside as well as outside the classroom, should not escape scrutiny.[163] Ethical inquiries of legal academics have tended to focus on lawyers, to the exclusion of most other actors in the legal system. The sub-field of judicial ethics is even more barren than that of legal ethics in Canada, with minimal first or second wave materials. The scholarly treatment of the rest of the actors in the legal system diminishes from there. To the extent that they are recognized, it is usually done in terms of the objects of lawyers' or judges' interactions rather than as independent participants in the justice system.

Connected to the access to justice agenda, there are a number of civil justice issues that have generally not been adequately addressed by Canadian legal ethics scholars. Class actions are a relatively new and still controversial phenomenon in Canada[164] and are

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[160] For some beginnings in this area see Allan C. Hutchinson, "'In the Public Interest': The Responsibilities and Rights of Government Lawyers" (2008) 46 Osgoode Hall L.J. 105; Deborah MacNair, "In the Service of the Crown: Are Ethical Obligations Different for Government Counsel?" (2005) 84 Can. Bar Rev. 501; and Deborah MacNair, "The Role of the Federal Public Sector Lawyer: From Polyester to Silk" (2001) 50 U.N.B.L.J. 125.

[161] See *e.g.* Philip Anisman, "Regulation of Lawyers by Securities Commissions: Sarbanes-Oxley in Canada," Policy Comment (Toronto: Capital Markets Institute, 2003), online: <http://www.rotman.utoronto.ca/cmi/news/LSUCpaper.pdf>.

[162] The sources are too numerous to mention but references contained in Proulx & Layton, *supra* note 22 are a good start. In addition, many issues are canvassed in Edward L. Greenspan & George Jonas, *Greenspan: The Case for the Defence* (Toronto: Macmillan, 1987); Edward L. Greenspan, ed., *Counsel for the Defence: The Bernard Cohn Memorial Lectures in Criminal Law* (Toronto: Irwin Law, 2005).

[163] For a recent provocative article in this respect see William H. Simon, "The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example" (2008) 60 Stan. L. Rev. [forthcoming], online: Social Science Research Network <http://ssrn.com/abstract=1025984>.

[164] A recent profile of class action king Tony Merchant raises numerous ethical issues. See Timothy Taylor, "The Merchant of Menace," *supra* note 34. It claims that Merchant billed 5,300 hours in a recent year ("many in the

either an ethical minefield or goldmine, depending on one's perspective.[165] Regardless, class actions are an under-developed area of legal ethics scholarship.[166] Similarly, there is much ethical exploration to be done about contingency fees and self-represented litigants, to name just a few issues.

Various social phenomena affect the practice of law and create ethical challenges for lawyers. Technology, for example, has a significant impact on various aspects of the practice, from discovery, to client service, to confidentiality, to lawyer advertising, and to social networking sites and blogging.[167] While the legal profession and legal scholars have become more aware of diversity, we have not yet begun to grapple with issues that we face as a profession in an aging society, both in terms of issues that aging lawyers will face as well as issues that lawyers face in dealing with older clients. These include issues of competency (to practice law in the case of lawyers and to give instructions in the case of

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legal community are frankly amazed that anyone could have billed" that amount (at 29)) and notes that Merchant's firm placed a Yellow Pages ad for "the seemingly impartial 'Lawyer Referral Service' which in fact" links directly to one of the firm's lawyers (at 30). The article also raises some of the ethical issues with national and international class actions. Merchant's firm also engages in domain name relaying, a practice whereby one erroneously typed webpage (*e.g.* <http://www.mcdonaldsclassaction.com>) links to Merchant's webpage (<http://www.merchantlaw.com>) instead of the webpage that the user is actually seeking (<http://www.mcdonaldscontestclassaction.com> which links to the homepage of the law firm actually representing the plaintiff class, Toronto's Paliare Roland at <http://www.paliareroland.com/mcdonalds.asp>).

[165] For an example of American scholarship on the subject see David J. Kahne, "Curbing the Abuser, Not the Abuse: A Call for Greater Professional Accountability and Stricter Ethical Guidelines for Class Action Lawyers" (2006) 19 Geo. J. Legal Ethics 741. The Georgetown Journal of Legal Ethics devoted an entire issue to a symposium on ethical issues in class actions ((2005) 18 Geo. J. Legal Ethics 1161-1476). Some of the titles include "The Use of Coupon Compensation and Other Non-Pecuniary Redress"; "Tools for Ensuring that Settlements Are 'Fair, Reasonable, and Adequate'"; "Special Ethics Concerns in Class Action Litigation"; "Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform"; and "The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About 'Reasonable Percentage' Fees in Common Fund Cases."

[166] For exceptions in this respect see Benjamin Alarie, "Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions" (2007) 4 Can. Class Action Rev. 15; Shaun Finn, "Summoning Leviathan: A Critical Analysis of Class Action Theory and the Ethics of Group Litigation" (2007) 4 Can. Class Action Rev. 199; Michael P.A. Carabash, "Ethical Conduct for Class Counsel in Ontario" (2006) 3 Can. Class Action Rev. 617; J.J. Camp, "Avoiding Pitfalls and Potential Conflicts in Negotiating Class Counsel Fees and Obtaining Court Approval" (2006) 3 Can. Class Action Rev. 277; Kevin Rusli, "The Collusion Crisis: Problems and Proposals" (2005) 2 Can. Class Action Rev. 249; and Cara Faith Zweibel, "Settling for Less? Problems and Proposals in the Settlement of Class Actions" (2004) 1 Can. Class Action Rev. 165. It is notable that all of these articles are contained in a specialized journal on class actions rather than in general law reviews. See also Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003) at 91-95, 143-50 (collusion), 240-46 (counsel fees).

[167] See generally Melissa Blades & Sarah Vermylen, "Virtual Ethics for a New Age: The Internet and the Ethical Lawyer" (2004) 17 Geo. J. Legal Ethics 637; Christopher Hurld, "Untangling the Wicked Web: The Marketing of Legal Services on the Internet and the Model Rules" (2004) 17 Geo. J. Legal Ethics 827.

clients), and cognitive and physical disability.[168]

On particular issues, we have not begun to critically examine the role of lawyers and law firms in the Conrad Black and Hollinger Inc. meltdown. The work of one of Canada's most esteemed law firms, Torys, was centre stage during the trial of Conrad Black and his associates, which included two lawyers, one of whom, Peter Atkinson, is still a member of the Ontario bar but likely to face disbarment due to his criminal conviction for fraud. And what of Torys and its lawyers? Are they being investigated by the Law Society? Should they be?[169] The Black case highlights many ethical issues and is ripe for serious critical commentary.

Finally, on the issue of method, there is a dearth of empirical, interdisciplinary, and comparative research on the legal profession in Canada. In the 1990s, a team at the University of Western Ontario's Faculty of Law led by Margaret Ann Wilkinson and Peter Mercer undertook an excellent study of lawyers in Ontario, but such work has been rare.[170] Similarly, interdisciplinary approaches are rarely brought to bear on legal ethics. The exception of Randal Graham's provocative economic analysis of legal ethics has already been mentioned.[171] On comparisons, the links between the Canadian legal professions and those of America and Britain are well established, and comparison of aspects of these systems to ours would provide fruitful inquiry. In acknowledgement of the needs in this area, the Ontario Law Deans have promoted the idea of creating a research institution, modeled on the highly respected American Foundation, to undertake high quality, interdisciplinary research on the legal profession and on legal ethics.[172] As Dean Bruce

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[168] See Robert Dowers, "Duties Invoked Under the Model Rules of Professional Conduct by a Mentally Impaired Lawyer" (2006) 19 Geo. J. Legal Ethics 681.

[169] See Jim Middlemiss, "Torys Teflon coat deflects hazards; Minimal fallout from Hollinger legal wrangles" *National Post* (12 December 2007) FP11.

[170] The University of Western Ontario's major research initiative was entitled "Professionalism or Profit: The Changing Nature of Legal Ethics" and had both empirical and theoretical aspects. See Peter Mercer, Margaret Ann Wilkinson & Terra Strong, "The Practice of Ethical Precepts: Dissecting Decision-Making by Lawyers" (1996) 9 Can. J.L. & Juris. 141; and articles by Wilkinson *et al.* cited in *supra* note 88. Other notable exceptions include the work of sociologists Fiona Kay of Queen's University and Joan Brockman of Simon Fraser University, who have been embarked on this type of research for more than a decade; see *supra* note 104 and 105. Stager and Arthurs' landmark book on Canadian lawyers is now almost two decades old and in need of replacement. See Stager & Arthurs, *Lawyers in Canada, supra* note 87. On the relationship between law and psychiatry see McGillivary, "A moral vacuity," *supra* note 89.

[171] Other notable Canadian law and economic analyses of issues of legal ethics include Trebilcock & Csorgo, "Multi-Disciplinary Professional Practices," *supra* note 142; Trebilcock, "Regulating Legal Competence," *supra* note 142; Hadfield, "The Price of Law," *supra* note 142; Ronald J. Daniels, "The Law Firm as an Efficient Community" (1991) 37 McGill L.J. 801; and Robert G. Evans & Michael J. Trebilcock, eds., *Lawyers and the Consumer Interest: Regulating the Market for Legal Services* (Toronto: Butterworths, 1982).

[172] See Bruce P. Elman, "Creating a Culture of Professional Responsibility and Ethics: A Leadership Role for Law Schools" (Paper presented at the Eighth Colloquium on the Legal Profession: The Challenges of Leadership,

Elman of Windsor has stated, "[o]ne thing is clear: we know very little about the legal profession in Ontario."[173] Elman has suggested that empirical research be undertaken to examine the correlation (if any) between teaching legal ethics and subsequent discipline problems among lawyers. Empirical research is also necessary to test some of our assumptions about the legal profession—about things that we claim to know, but remain completely matters of faith in the legal profession—such as the function of the lawyer's duty of confidentiality and solicitor-client privilege in promoting full and frank disclosure between lawyers and clients.[174] A research institution dedicated to studying the legal profession would be a welcome addition to Canadian legal ethics and is perhaps the most pressing item on the agenda for Canadian legal ethics in the twenty-first century.

G. Conclusion

In this article, I introduced the concept of multiple accounts of legal ethics in Canada and argued that significant disparities exist between them. In reviewing the major events in Canadian legal ethics over the past decade, largely through the lens of the public account and of the legal profession's account, I endeavoured to show some of the gaps between them, and between these accounts and the scholarly account of Canadian legal ethics. Despite the existence of many high-profile ethical scandals within the profession over the last decade, none has succeeded in capturing the public agenda and driving change within the profession. Perhaps somewhat surprisingly, the level of trust in lawyers remained constant over the decade and, in fact, increased during the period in which there was arguably the most negative attention focused on lawyers' actions. There is no question that such events have had an effect within the legal profession and the academy, and have helped to motivate many significant changes in recent years. Yet the fact remains that we have precious little empirical data about what actually goes on in the practice of law; the Ontario Law Deans' proposal for the creation of a high-quality research institution to conduct such empirical and interdisciplinary work is timely. Legal ethics has grown as an academic discipline in terms of both scholarship and course offerings, as reflected by a group of New Legal Ethics Scholars who are beginning to tackle some of these issues.

University of Western Ontario, 25 May 2007), online: <http://www.lsuc.on.ca/media/eighth_colloquium_professional_responsibility_ethics.pdf>.

[173] *Ibid.* at 20.

[174] This is an issue that I take up in a forthcoming paper, Adam Dodek, "Theoretical Foundations of Solicitor-Client Privilege" [forthcoming in 2008].

However, with these developments, we can also recognize that the ethical terrain yet to be explored is vast. Canadian legal ethics now looks very different than it did twenty-five or even ten years ago. At last, Canadian legal ethics appears ready to tackle the issues before it in the twenty-first century.

SPECIAL ISSUE: TRANSNATIONALIZING LEGAL EDUCATION

Nurturing Commitment in the Legal Profession: Student Experiences with the Osgoode Public Interest Requirement

By Janet Leiper[*]

A. Introduction

"Eye-opening," "disheartening," and "inspiring" are some of the words used by law students who met in 2008-2009 to discuss their mosaic of experience in the field doing public interest work.[1] These students had returned from placements under the first mandatory public interest requirement to be introduced in a Canadian law school (the Osgoode Public Interest Requirement, OPIR).[2] OPIR arose from questions about the relationship between what is learned in law school and what is required to be a professional. Academics have challenged each other to do more to instill an "ethos of professionalism" during law school.[3] Others have suggested that law students who do not receive exposure to the world outside the walls of the law school carry an "idealized conception of the profession" and are often unaware of the many practice contexts available to them.[4] Others have warned that if ethical and professional responsibilities are not modeled and articulated for students, that teaching only the "law of lawyering" does

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[1] Student Discussion Session, 30 March 2009.

[2] The Osgoode Public Interest Requirement (OPIR) was implemented in September 2007. The first Canadian program of its kind, OPIR requires all graduating law students to complete 40 hours of public interest, law related, uncompensated work and participate in a reflection of notions of professionalism, access to justice and the public interest after completing their hours. The student discussion sessions are moderated discussions which continue working with concepts introduced to students during their first year of law school during the Ethical Lawyering in a Global Community Course.

[3] John E. Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students* 30 UNIVERSITY OF TOLEDO LAW REVIEW 323. Professor Montgomery, former Dean of University of S. Carolina School of Law proposes a continuum of professional education beginning in law school which intentionally incorporates a stronger "Ethos of Professionalism."

[4] Lois R. Lupica, *Professional Responsibility Redesigned: Sparking a Dialogue Between Students and the Bar*, 29 JOURNAL OF THE LEGAL PROFESSION 71, 74.

not prepare students for becoming ethical lawyers.[5] Teacher-educator Lee Shulman has bluntly accused law schools of "failing miserably" at connecting its lessons in how to "think like a lawyer" with how to "act like a lawyer."[6] For years, there have been similar concerns raised about the decline of professionalism among lawyers, both in Canada and in the U.S.[7] A survey of Osgoode graduates revealed that students wanted more opportunities to engage with the community and to experience non-traditional forms of law practice. Osgoode Hall Law School grappled with many of these questions, and in 2007 it approved changes to the curriculum, including a new first year Ethics course (Ethical Lawyering in a Global Community, ELGC) and OPIR. In addition to the more traditional first year mandatory course load, Osgoode Hall law students must also complete ELGC, a minimum of 40 hours of public interest work and then engage in a discussion or written exercise reflecting on their experiences. These reflections are a valuable lens for seeing the profession and the administration of justice through the eyes of first and second year law students. Their experiences remind us in the profession that learning can flow in both directions.

B. The Nature of Public Interest Placements

In the two years since Osgoode's public interest program began, law students have completed their public interest work in a broad spectrum of placements. Students have worked in stock market regulation, advocacy for low-income HIV+ clients, sexual assault information sessions in high schools, and immigration information for detainees at the Metro West Detention Centre in Toronto. They have served low-income mental health survivors, policy advocacy associations, rape crisis organizations, and shadowed litigators in criminal cases. Their placements took them into high schools, jails, family court, community legal clinics, government offices, criminal court, judge's chambers, law offices and small claims court. Some went overseas, working with tenant advocacy organizations in South Africa or providing legislative and policy analysis for draft legislation to protect

[5] Liz Curran, Judith Dickson & Mary Anne Noone, *Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice*, 8 INTERNATIONAL JOURNAL OF CLINICAL LEGAL EDUCATION 104, 105.

[6] Lee Shulman, *The Signature Pedagogies of the Professions of Law, Medicine, Engineering and the Clergy: Potential Lessons for the Education of Teachers* paper delivered at the MATH SCIENCES WORKSHOP: "TEACHER EDUCATION FOR EFFECTIVE TEACHING AND LEARNING". National Research Council and Centre for Education, Irvine, California, 2005.

[7] See for example*: "In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243 (1986), available at: <http://www.abanet.org/cpr/professionalism/Stanley_Commission_Report.pdf> last accessed 14 June 2009; cited in *supra* note 3. at 324.; Justice Rosalie Abella, *Speech to Law Society of Upper Canada Bencher's Retreat, "Professionalism Revisited"* 14 October 1999; Justice Coulter Osborne, *Civil Justice Reform Project*, November 2007; Justice Stephen Goudge*, Goodman Lecture at the Chief Justice of Ontario's Symposium of Lifelong Learning in Professionalism*, 20 February 2009, Toronto.

children in the Philippines from pornography and the sex trade. They received a range of training, orientation and sometimes, security clearance. While a large percentage of students who have finished the program to date report improving their knowledge of substantive law (89%), an even greater percentage, 92%, reported that they had obtained a better understanding of the role of lawyer as a result of their placements.

The curriculum reforms were a natural progression for the Osgoode culture of blending classroom academics with clinical teaching. In addition to Osgoode's many clinical programs which qualify for OPIR, the on-site student legal aid clinic (CLASP) and the Parkdale Legal Services Clinic (PCLS) have served low-income communities for decades. These clinics provide services in diverse matters including elder law, law reform, mental health, landlord tenant, criminal law, victim's rights, human rights and alternative dispute resolution. One student marveled at the range of legal experience available at the Parkdale clinic, describing it as a "fantastic opportunity" to be exposed to poverty issues and administrative law. The student organization, Pro Bono Students Canada, was already well integrated at the law school, offering diverse volunteer opportunities for law students interested in experiencing public interest work and community lawyering. With these foundations in place, when the mandatory public interest requirement began, students began to work towards fulfilling their public interest requirement in first year. Many students provided their organizations with many more hours than the minimum as their interest became engaged. In some cases, individual students provided literally hundreds of hours of public interest work. As community organizations and firms became aware of the program, new placements and partnerships were created for law students. Faculty members brought new placement opportunities forward and supervised students interested in community outreach. In some cases, students created their own OPIR placements or developed new qualifying clinical programs, such as the Mediation Intensive program at Osgoode. With each point of contact, the students added to their store of information about the nature of the profession and shared their reflections with each other.

C. Student Reflections

In the language of the Osgoode Strategic Plan which led to the adoption of a mandatory public interest graduation requirement, one of the goals for the program was for students to appreciate how, "the study of law as a systematic and dynamic process has social consequences, affects power relations, encompasses interacting behaviours, serves as a ritual and symbol and is a reflection of interest group politics."[8] Yet as pedagogical

[8] Osgoode Hall Law School, *Making a Difference* in PLAN FOR THE LAW SCHOOL, 22 (2006), available at: http://www.osgoode.yorku.ca/about/documents/plan_for_the_law_school_2006-2010.pdf last accessed June 14, 2009.

research has demonstrated, highly successful learning opportunities stimulate students to construct their own knowledge rather than passively receive the existing mental models of others.[9] In debriefing with their peers after the public interest experiences, Osgoode's law students have begun to demonstrate their own frameworks for understanding the legal profession, not necessarily in the language that we imagined for them. The first such reflection from this year's students has been the value they have found in taking the time to talk about their experiences with each other. One student described the law school experience as being all about the immediate concerns of courses, marks and jobs: the discussion session was an unusual and positive contrast from the casual conversations among law students about work and school. Students have begun to tell each other what has troubled or engaged them about the profession during their placements and to find in each other, an understanding audience. They discovered repeatedly that their experiences in one sector of public interest work were often similar to what students learned from other kinds of law, in other organizations or in other countries.

In the context of the "professionalism debate" within the profession, such a discovery should not be dismissed as obvious. Engaged lawyers and students will take the time to reflect on their actions and can contribute to a greater public good, but many may not take the time to reflect until they are persuaded of its value. The route to that understanding is not in the telling, but in the doing. The experience of the discussion demonstrated its worth to students and to the facilitators.

A second significant student-driven observation was in the appreciation of how professionalism becomes intertwined with serving the public interest. Students connected the way in which lawyers related to one another to better processes and outcomes, whether in informal negotiations or before courts or tribunals. They described for each other how a lawyer's reputation is on display and known within the culture of the courthouse. They noticed lawyers who seemed oblivious to the impact of their advocacy style on decision makers: in one case, a particularly aggressive style adopted by counsel opposing an unrepresented applicant did nothing to assist counsel's client. In another case, a law student watched an appeal with significant constitutional issues at stake. In this case, the student was impressed by the collegiality among opposing counsel, right up to the courtroom door of this case. The value of watching how successful counsel go about their work in such a way became clear to the student who was there and to the others who heard about this style of advocacy. In other situations, students saw the limits on what lawyers can accomplish using strictly legal means, and often felt frustration when those limits were tangible in the face of human need and suffering. At the same time, students began to understand the possibilities of making a difference without resort to "black letter" law. Some found they could ease a difficult situation by listening to a client and giving the client a better understanding of the situation. They were inspired by those

[9] KEN BAIN, WHAT THE BEST COLLEGE TEACHERS DO, 26-27 (2004).

professionals who were living models of justice, professionalism, and integrity. In their hunger to understand "how" lawyers do their work, these law students were able to describe the positive and negative attributes to guide their own future choices as professionals. They are also a useful reminder of how the profession continues to be invaluable in modeling the "habits of mind, heart and hands" for law students.[10]

The third unexpected learning from this year's students concerned awareness: their own and others. They talked about the importance of self-awareness as part of being an ethical professional. The students repeatedly made the connection between improved self-awareness and the capacity to serve clients. Students who worked with unrepresented clients in what might be seen as relatively minor disputes discovered the extent to which emotion drives litigation. Other students who advocated for difficult clients realized how encounters with government representatives can become easily personalized, to the detriment of a fair outcome. These students learned that their ability to "navigate personalities" could be as important as the factual equities in a given case. They learned to draw on a broader set of skills in having conversations on behalf of their clients. Even in organizations with a shared community of interest in social justice, students learned that there is not necessarily immunity from internal politics. By identifying assumptions or simplistic ideas of what lawyers actually do at this stage of their education, these law students have begun the work of setting those assumptions aside and to develop more comprehensive ideas of the nature of their roles. One student who had observed a serious criminal trial later saw the accused in the case during a tour of the jail. The accused acknowledged the student and in that instant, the student experienced a flash of insight into the humanity of those who are prosecuted for criminal offences and how that might play into role of prosecutor.

Students returning from public interest placements demonstrated a willingness to move beyond what Montgomery has described as the more "cerebral understandings" of law (and) into notions of the "empathetic understanding of the interests of others, in addition to competency."[11] It may be that part of this capacity for empathy is created by the unique dynamic of being a law student, and being dependent upon their supervising lawyers and/or faculty. These students described the enormous gratitude they felt when a senior practitioner took the time to explain what had happened on a file, or to share their worry, fear or disappointment at a development in a case. They are aware of the limits on their knowledge and how experience and knowledge will enhance their skills in the future, because they have seen it in others. Although students sometimes hesitated to ask too many questions, when they did ask questions, they found lawyers were extremely generous with their time for students. In the busy family court setting, law students quickly learned to appreciate how important a combination of emotional and substantive

[10] Lee Shulman, *Pedagogies of Uncertainty* LIBERAL EDUCATION 18, 22 (Spring 2005).

[11] *Supra*, note 3 at 331, 349.

support was from their supervising duty counsel lawyers in intense circumstances. Those law students, and others, have been exposed to the "grief and joy, the emotional and rational aspects of lawyers work."[12] One student, who took on multiple successive statements said that "social justice was far off my radar of goals" at the beginning of law school, but now this student has entered second year law school feeling "inspired" by the possibilities.

D. Lawyers as Role Models

Some of the most rewarding discussions took place when students brought back vivid accounts of the competent and ethical counsel they saw whose "theory of the job" was on display. One student who sat in on multiple resolution meetings in criminal cases with Crown counsel noticed that people-skills like eye contact, friendliness and openness contributed to an atmosphere conducive to resolving cases. This student linked the personable style of one prosecutor directly to the public interest in the negotiation and resolution of criminal cases. Even where the substantive positions taken were not markedly different from those of other prosecutors, the particular style of one prosecutor created such an atmosphere of trust and collegiality that defence counsel would wait in line to meet with that prosecutor.

Another student observed a murder trial and connected integrity with the way the lead Crown counsel on the file conducted herself toward the accused, her prosecution team and the court. This student saw how this particular Crown Attorney embodied the notion of being an "officer of the court" with the responsibilities of a "minister of justice". Another student spoke of the warm collegiality in the legal department of a government ministry. This collegiality translated into leadership when the student realized extra time spent by her supervisor in sitting down to provide the student with the context to the project which the student had been assigned. This meant that the student avoided asking 'basic' questions, could problem-solve as the project unfolded and rewardingly, could understand her piece in a larger more coherent whole. Not surprisingly, this leadership extended to the attitude within that government department to go above and beyond the bare requirements of the project at hand. For the law student placed there it was invaluable to see fellow professionals focus directly on how to accomplish something tangibly helpful to an identified sector of the public.

This is not to say that students learned only from the good. Students spoke candidly of seeing varying degrees of commitment within the legal profession to notions of professionalism and the public interest in the practice of law. They spotted the hypocrisy

[12] Ann Juergens, *Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching* 11 CLINICAL LAW REVIEW 413.

of those firms who publicly proclaimed the importance of pro bono work in their firm information materials but accorded low priority to pro bono projects. Lack of interest by lawyers who had volunteered to supervise students was disappointing to other students, although it did lead to the unexpected challenge of how to work without the expected level of practitioner support. All of these students persevered and discovered for themselves the rewards of helping community groups and clients. They also expressed a resolve to include some measure of pro bono work in the future.

By watching these lawyers, students were able to appraise the positive attributes of the skilled counsel in large and small ways. The details of *how* lawyers took on challenging cases and *how* they do their work underscores the accuracy of Patrick Schlitz's metaphor on the making of an ethical profession:

> The moral fabric of an attorney is stitched out of the dozens-hundreds-of decisions that she makes each day. It is stitched in the tone of voice she uses in talking to others, out of her choice of adjectives while writing a letter, out of the care she takes in describing what she represents to be the truth of a matter. It is stitched out of one decision after another, each of which may be mundane in itself, but all of which combine to form the moral fabric of the attorney and combine with like decisions of other attorneys to form the moral fabric of law firms and legal communities.[13]

Schlitz effectively moves from the individual to the larger fabric created by our legal communities at large. This point was not lost on law students who have stepped into these communities for the first time. In addition to the individual to whom they were exposed, they also paid attention to the environment and the legal community in which those professionals were operating. Their observations of unmet needs for legal assistance were a refrain heard in every discussion session.

E. Limits on Access to Justice

Students who spent time in low-income legal clinics, with legal aid duty counsel, at tribunals and in community advocacy organizations found a troubling gap between the extent of the legal needs and resources. Students expressed dissatisfaction with these realities, especially once they realized that for those who could be helped, a "huge difference" could be made in the lives of those clients and their families. They saw clients who had to be referred elsewhere because of limits on what could be done. More than

[13] Patrick J. Schlitz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School & the Moral Foundation of the Novice Attorney* 82 MINNESOTA LAW REVIEW 705 (1998), cited in Patrick J. Schlitz, *Making Ethical Lawyers* 45 SOUTH TEXAS LAW REVIEW 875, 877.

one student heard from clients that "If you weren't there, there would have been nobody there to help me." Students who provided intake services for clinics became aware of a referral cycle for clients, who were sent around in a circle looking for assistance. The students told each other about examples of "desperate need" and of people who were being required to return for services over and over because of limits on publicly available services. They were reminded of the implications of turning away clients in observing unrepresented claimants before tribunals. Students described the power imbalance created for unrepresented people, and the fear of those people in "going to court." The profession may make distinctions between levels of court, tribunals and administrative bodies, but the students understand that this may represent the view of a legal insider. Students described how even in the less formal setting of a tribunal, unrepresented litigants are "intimidated and overwhelmed." The outcome of these imbalances can veer between overcompensating by the tribunal to the detriment of an opposing party, to a failure in having the best possible record available for the making of a significant decision to those affected.

In considering the gaps, the students asked whether the disparity they were seeing between publicly funded legal services and private representation is an indication of a failure on the part of our profession. Who is to blame? What can be done? Why is this tolerated? These are difficult questions and the willingness of future practitioners to grapple with them now is important. The future direction of the legal profession may depend on the answers.

F. Conclusion

The law students who have completed the public interest requirement at Osgoode Hall Law School have learned from fellow professionals within a larger context which has been simultaneously inspiring and discouraging. Students found themselves in situations that were not capable of an easy or quick fix. They confronted disappointment and fear. They were exposed to human courage in the face of difficult life circumstances. They began to appreciate that legal work and sometimes more modest efforts can address client legal needs that include feeling isolated, fearful and without control. The students also began to realize the necessity for finding their own supports, through mentors, collegial support and positive role models. In the words of one student, often the "best and the hardest part" was helping those most in need. For that student, and others, the work was "best" because of its relevance. It was "hard" because of the knowledge that many others in need are not being helped. Finally, these students benefited from the generosity of this profession to nurture the commitment of future members of the bar. For those on the verge of entering the profession, these experiences have been formative. Early results of the students who have completed the OPIR suggest that there is even greater future potential to nurture the commitment of students and the bar to a culture of commitment, to the public interest and to professionalism.

Student Participation in Legal Education in Germany and Europe

By Lisa Rieder and Hanjo Hamann[*]

A. Introduction

In Germany, the possibilities of students to participate in and contribute to legal education are generally quite limited. Compared to the legal education systems in the USA and Canada, the course of studies is rather theoretical and quite anonymous.[1] Communication between students, faculty staff and deans is rare, and classes are fairly big. As to the abstractness of the curriculum, several changes have been made to improve the situation. For example, a reform in 2003[2] was supposed to increase foreign language competence and provide for more specialization and practical relevance. However, the system can still (or again) be considered to be "under construction". Many important skills are not being taught, and the awareness of the international, social and cultural contexts is largely neglected or lacking reference to the subject matter.[3] There is an ongoing debate about further changes to the legal educational systems[4] especially about the adoption of the Bologna Process[5]. While some consider it inapplicable to the German system[6], others have

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[1] Manuel J. Hartung, *Die Klagen der Juristen*, vol. 22, DIE ZEIT ONLINE (2005).

[2] Critical opinions: Peter Ströbel, *Reform der Juristenausbildung*, in NOTES OF THE GERMAN FEDERAL BAR, BRAK-MITT. 4(2003), available at: http://www.brak-mitteilungen.de/media/brakmitt_2003_04.pdf (at 146); Konrad H. Jarausch, *Amerika -- Alptraum oder Vorbild? Transatlantische Bemerkungen zum Problem der Universitätsreform*, available at: http://geschichte-transnational.clio-online.net/forum/type=diskussionen&id=204.

[3] Ingmar Höhmann, *Sozialkompetenz als Pflichtfach – Der neue Lehrauftrag der Unis*, vol. 102, HOCHSCHULANZEIGER FRANKFURTER ALLGEMEINE ZEITUNG 76, 77 (2009).

[4] For the ongoing debate in Germany, see: JOACHIM BUDDE, INTERVIEW WITH THE SECRETARY-GENERAL OF THE BENEFACTOR ASSOCIATION FOR GERMAN SCHOLARSHIP ANDREAS SCHLÜTER, *Kein Grund zur Klage*, ZEIT ONLINE, vol. 44 (2006) (homepage of the German newspaper "*Die Zeit*"), available at: http://www.zeit.de/2006/44/C-Gefragt-Jurabachelor. Jan-Martin Wirda*, Am Ende des Sonderwegs*, vol. 05, DIE ZEIT ONLINE (2009), available at: , http://www.zeit.de/2009/05/C-Juristenreform?page=1.

[5] For more information about the Bologna Process in legal education see the homepage of *The European Law Faculties Association (ELFA)*: http://elfa-afde.eu/aboutelfa.aspx.

already started transferring it at their university.[7] Several federal states have meanwhile started endorsing a basic reform. However the next rulings will not be until 2011.[8] Presently scholars, policy-makers in the field of education and economists face the challenge of devising strategies for legal education that meet the needs and interests of all "stakeholders" while being compatible with the traditional German system.[9] Students are curious and concerned about the future of their curriculum. Their means of participation include a) passively evaluating teachings[10], b) actively engaging in a student parliament[11] or self-governed student councils of a special field (so-called *Fachschaften*[12]) and c) actively involving in student organizations.

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[6] CHRISTIAN SEIDLER, JURA STUDIENREFORM: EINE GUTE AUSBILDUNG IST DA AUSGESCHLOSSEN, INTERVIEW WITH THE DEPUTY GENERAL MANAGER OF THE GERMAN LAWYER´S ASSOCIATION (*DEUTSCHER ANWALTVEREIN*) CORD BRÜGMANN, SPIEGEL ONLINE (2007), available at: http://www.spiegel.de/unispiegel/studium/0,1518,475299,00.html. Christian Lauenstein, *Staatsexamen, adé*, DIE ZEIT ONLINE (2007) available at: http://www.zeit.de/campus/online/2007/19/jura-studienreform..

[7] Universities that have adopted the Bachelor system are the University of Mannheim; the Technical College of Dresden and the Bucerius Law School in Hamburg; see also:(Jochen Schönmann, *Angriff auf den Dinosaurier*, SPIEGEL ONLINE – UNISPIEGEL (2008), available at: http://www.spiegel.de/unispiegel/studium/ 0,1518, 542687,00.html.

[8] Soehring, Maren, *Fachbeschriebung Jura/ Wirtschaftsrecht*, DIE ZEIT ONLINE (2008), available at: http://ranking.zeit.de/che10/CHE?module=WasIst&do=show&esb=5.

[9] Currently there is a discussion on a concept for adopting the Bologna Process through of a four leveled model (the so-called "Bologna Model") promoted by the minister of justice of the *Bundesland* (federal state) Schleswig-Holstein and other supporters, The "Bologna Model" is illustrated at: http://www.neue-juristenausbildung.de; to see the discussion: Hanna-Lotte Mikuteit, *Jura Reform: Hamburger Notar behauptet - Kieler Justizminister hat bei mir abgeschrieben*, DAS HAMBURGER ABENDBLATT (NEWSPAPER OF THE CITY OF HAMBURG), available at: http://www.abendblatt.de/region/norddeutschland/article558438/Kieler-Justizminister-hat-bei-mir-abgeschrieben.html; The Ministry of Justice, Labor and Europe of the Federal State of Schleswig-Holstein, Germany, available at: http://www.schleswig-holstein.de/MJAE/DE/Service/Presse/PI/2008/080730mjaeJuristenausbildung.html; Statement of the German Lawyers´ Association (*Deutscher Anwaltverein* of 28 May 2008: http://www.anwaltverein.de/downloads/Stellungnahmen-08/SN24.pdf.

[10] This participation and quality varies however in intensity among the respective faculties. This is shown by the survey on student participation in evaluation on teaching, which was part of the ranking of German law schools made by the Center for the development of universities (CHE), published by the German newspaper "*Die Zeit*". Available at: http://ranking.zeit.de/che10/CHE?module=Hitliste&do=show_l1&esb=5&hstyp=1. (To see the ratings on participation in evaluations chose a university and go to "student ratings").

[11] There are various forms of organized student bodies in Germany due to the existence of Federal States (*Bundeslaender*). Examples for the different organized forms of student bodies are the *AStA* (*Allgemeiner Studentenausschuss* – general student board), *UStA* (*Unabhängiger Studentenausschuss* – independent student board); *Studentischer Konvent* (student council), *StuRa* (*Studentenrat* – student organization) *StuPa* (*Studierendenparlament*- student parliament). They all constitute the collective body of students which has an elected council or board and which is supposed to represent student interests. In this article I will speak of student parliament meaning student body, as the HRG is also generally speaking of the student bodies.

[12] The *Fachschaft* is the collective body of students belonging to a special field of study. The *Fachschaft* is run by the *Fachschaftsrat*, which constitutes its elected representative body.

B. Student Participation in European Legal Education, illustrated by Germany

The most common way for students to play an active part in Germany's legal education is to join an organized student body or the council for law students (*Fachschaft Jura).* Both organizations are linked with the university. The responsibilities and duties of the student parliaments are set out in the German Framework on Higher Education (HRG: *Hochschulrahmengesetz*). According to the HRG, their duty is to serve social and cultural needs of the students and to represent them in matters of higher education. Additionally, the student parliament is supposed to foster the national and international relationship between students and realize the needs of the students concerning the different tasks of the university.[13] The student parliaments and *Fachschaften* are, however, traditionally filling the role of a council. The work is focused on taking care of important student needs like the procurement of subject related information and providing support and advisory service. This engagement is extremely important and needed for a functioning educational system; however there is barely any contribution to legal education and international and cultural exchange. Even if the HRG sets out these tasks, the role of the student parliaments and *Fachschaften* is a different one. Their structures are not designed in a way that is suitable to fulfill the task of providing European and international aspects and fostering cultural exchange. The *Fachschaft* of law students, for instance, exists locally only. Its function and activities are limited to the faculty or university it belongs to. Since both organizations do not have an international umbrella organization, association or network or any noteworthy co-operation with other law faculties abroad or similar organizations, they can hardly provide for the international aspect set out in Sec. 41 (1), Sec. 2 HRG.[14] This situation is akin to most European law schools. While there are many interdisciplinary international student organizations that engage in higher education, their work is not focused on the special needs of law students and the procurement of higher education in the legal field, but broadly addresses general student needs.[15] There are either educational, legal or international aspects missing in most student organizations – the only notable exception being ELSA, the European Law Students´ Association.

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[13] Regulated in Sec. 41 (1), Sec. 2 HRG.

[14] According to the information listed at the homepage of the German national student addresses reader, there is no national or international governing body, umbrella organization or co-operation with the *Fachschaft* of law students nor an international form of the *Fachschaft* and the student parliaments, student addresses reader available at: http://www.adressreader.de.

[15] In Europe the ESU (European Students´ Union) engages in higher education for all fields of study, available at: http://www.esib.org/index.php/About%20ESU/what-is-esu; besides there is AEGEE, which is engaged in promoting cultural exchange, peace and stability, active citizenship and higher education in Europe, available at: http://www.karl.aegee.org. On an international level, AIESEC as the world's largest interdisciplinary student association is engaged in higher education for all areas of studies is AIESEC, available at: http://www.aiesec.ca/en; besides there is WISE (World Initiative of Students for Exchange) which focuses on promoting understanding and interaction among students of all subjects on an international and local level, information available at: http://www.wise-global.org.

C. The European Law Students´ Association (ELSA)

Twenty-eight years ago in Vienna students from Poland, Austria, Hungary and West Germany founded ELSA to take an initiative in shaping and supplementing the legal education in Europe by joint commitment of students from all over Europe.[16]

I. The Philosophy of ELSA

The idea of ELSA from its inception was to promote international contacts and mutual understanding among law students on both sides of the iron curtain. The vision of ELSA is to promote "a just world in which there is respect for human dignity and cultural diversity". This vision has played a major role in all of ELSA's activities ever since.[17] Furthermore, the goal of ELSA is to contribute to legal education, to foster mutual understanding and to promote social responsibility of law students and young lawyers.[18] In order to achieve this goal, ELSA strives to enable law students and young lawyers to learn about other cultures and legal systems in a spirit of critical dialogue and scientific co-operation, to assist law students and young lawyers in being internationally minded, professionally skilled and encouraged to act for the good of society.[19]

II. The International Structure of ELSA

ELSA was set up with a permanent executive body, called the International Board (IB), and a main decision body, called the International Council Meeting (ICM), which convenes twice a year and consists of delegates from all national groups. In order to coordinate the activities of the association in Germany[20] all local ELSA groups are united under an umbrella organization with a permanent executive body, the *Bundesvorstand* (the federal board - *Buvo*). Each of the national groups reiterates the structure of ELSA International. Local groups implement ELSA at the law faculties, while national groups are mainly supposed to give assistance and advice, and to be the link to the International network. The aim is to provide for cosmopolitan education through practical work as well as teaching social and professional skills at local law faculties, to administer the network and most importantly to organize national and international meetings, seminars and conferences.[21] On the International level the board of ELSA International (IB) consists of

[16] *Wolfgang W. Mickel /Jan Bergmann*, in HANDLEXIKON DER EUROPÄISCHEN UNION, VOL. 3, (2005).

[17] Available at: http://www.elsa.org/about/history.html.

[18] Available at: http://www.elsa.org/about/#anchor1.

[19] Available at: http://www.elsa.org/about/index.html#anchor2.

[20] ELSA Germany together with ELSA Poland are the only groups that have a federal board.

[21] Available at: http://www.elsa-germany.org/de.

seven members who work full-time at the international headquarters in Brussels on a voluntary basis. The International Board is responsible for the overall coordination of the organization as a whole; including the support of member groups both locally and nationally, the collection and redistribution of information throughout the network to ensure the fullest participation possible at all events. Furthermore, the IB co-ordinates and develops ELSA's collaboration with various international organizations and institutions, governments, law firms and companies across Europe.[22] They are assisted by appointed directors who are responsible for specific areas of activity. These are students who work several hours a day from their homes, also on a voluntary basis. All members of the International Team gather several times a year in Brussels, to plan and co-ordinate their work with the International Board.[23]

III. The Development of ELSA: A Brief Historical Outline

Soon after its foundation in 1981 ELSA grew rapidly and expanded to the northern part of Europe. In 1984 the first international office of ELSA was situated in Oslo and soon the association received its multileveled structure. In 1986 the major activities (so-called key areas) of ELSA were defined, being Seminars and Conferences (S&C), Academic Activities (AA) and the Student Trainee Exchange Program (STEP).[24] 1994 saw the construction of an international board situated in Brussels.[25] ELSA soon launched its homepage.[26] The network was expanding quickly: while in 1988 there had been 15 national groups,[27] by 1995 around 250 representatives from over 30 countries had joined the association.[28] The council meetings started to grow in size and the association went from a European to an International network in co-operating with law schools in Arusha and Tanzania[29] and law student organizations in North America, Japan, Australia, South Africa and in Ivory Coast.[30] In 1998 ELSA committed itself to Human Rights by incorporating the Human Rights

[22] Information about the International Board available at: http://www.elsa.org/members/elsaint.html.

[23] Information about the appointed directors of ELSA International available at: http://www.elsa.org/members/elsaint.html#appointed.

[24] Available at: http://www.elsa.org/about/history.html.

[25] Available at: http://www.elsa.org/about/history.html.

[26] See http://www.elsa.org/ for more information.

[27] Available at: http://www.elsa-germany.org/ueber_uns/geschichte/en

[28] Available at: http://www.elsa.org/about/history.html; Article about the stage of development of ELSA in Christoph Teichmann, *Neue Wege in Europa – Die Europäische Jurastudentenvereinigung (ELSA)*, vol. 9, JURISTISCHE SCHULUNG (JUS) 776, 776 (1990).

[29] Available at: www.elsa.org/about/history.html.

[30] Available at: http://www.elsa.org/about/index.html#anchor2.

Program (HRP) as a permanent program into the ELSA work.[31] A major step was taken when ELSA started its co-operations with the international organizations. It was granted Consultative Status (Category C) with UN UNESCO in 1994, followed by Special Consultative Status with UN ECOSOC (United Nations Economic and Social Council) and the UNCITRAL (UN Commission on International Trade Law) in 1997. In 2000 the Association had been granted participatory status with the Council of Europe and in October 2005 obtained Observer Status with the WIPO (World Intellectual Property Organization). In addition a co-operation agreement with UNHCR (UN High Commissioner for Refugees) was concluded recently[32]

Apart from these co-operation agreements ELSA gained support by other patrons and partners, including the International and European Young Bar Association, and several renowned law firms and companies who in part provide for the teaching of professionals and support in auditing, administration etc.[33] In addition, ELSA has started co-operation agreements with media partners..[34] With the entry of the newspaper, "The European Voice"[35], which constitutes the essential reading for the EU regulatory and political affairs communities, ELSA has gained another valuable supporter.

The association has just had marked its twenty-eight anniversary, coming a long way since its inception. It continues to grow and connect law students from all over Europe. Four new countries recently joined the network which now includes Armenia, Bosnia and Herzegovina, Luxembourg and the United Kingdom.[36] ELSA constitutes the world's largest independent law students association with forty[37] member countries with approximately 30.000 members.[38] Our broad base on participants ensures that new ideas and momentum are brought to the network.

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[31] About the Human Rights Program: http://www.elsa-germany.org/ueber_uns/struktur/hr/warum/en.

[32] Available at: http://www.elsa.org/about/index.html#anchor2.

[33] Available at: http://www.elsa.org/partners/index.asp.

[34] Avalable at: http://www.thelawyer.com; about ELSA´s media partners: http://www.elsa.org/news/index.asp?external=yes.

[35] The mission of European´s Voice is to promote informed debate, openness and progress in the EU and the newspaper has become essential reading for the EU regulatory and political affairs communities – Europe's most important decision-makers. Available at: http://www.europeanvoice.com.

[36] Available at: http://www.elsa.org/news/newsitem.asp?newsID=4735.

[37] Map of all ELSA groups available at:: http://www.elsa-germany.org/network/de; list of all groups available at: http://www.elsa-germany.org/network/liste/en.

[38] Available at: http://www.elsa.org/news/newsitem.asp?NewsID=4736.

IV. The future of ELSA

The rapid growth of the association has, however, not only brought advantages. The administrative complexity has become difficult to manage. Too much time and energy is dedicated to administrative tasks such as membership administration, IT services and attendance, communicating with and assisting members etc.

Taking into consideration the fact that the term of office of ELSA board members is only one year, ELSA resources should be used in a more effective way so that these members have the opportunity, during their short tenure, to effect more changes that improve ELSA substantively. The current structure, for all of its benefits, prevents ELSA from developing more rapidly. The large, and mostly passive, number of ELSA members has furthermore come to affect its efficiency and freedom of action. These new challenges are calling for structural reforms in the future if ELSA wants to strive to continually innovative along with the changing international landscape.

D. The Value of ELSA for transnational legal education

The official stated purposes of ELSA are to contribute to legal education, to foster mutual understanding and to promote social responsibility of law students and young lawyers.[39] These aims are realized through providing opportunities for law students and young lawyers to learn about other cultures and legal systems in a spirit of critical dialogue and scientific cooperation, in assisting them to be internationally minded and professionally skilled, and in encouraging them to act for the good of society.[40] ELSA has found new and innovative ways to meet its goals. As a model for the legal education at universities, ELSA provides practice-orientated extracurricular experience and activities, including international (work) experience abroad, international communication, the organization of various projects and the teaching of soft skills. [41] ELSA is following up on each of the three purposes set out in its purpose statement through different means.

I. Contributing to legal education

ELSA has faced the challenge to contribute to legal education in the fields of writing, research, professional education by giving students the possibility to apply their knowledge by putting theory into practice. This application occurs through several means including writing articles, research, professional education and mooting competitions.

[39] The Philosophy statement of ELSA, available at: http://www.elsa-germany.org/ueber_uns/philosophy/de.

[40] The Means of ELSA: http://www.elsa.org/about/index.html#anchor1.

[41] *Wolfgang W. Mickel/ Jan Bergmann*, in HANDLEXIKON DER EUROPÄISCHEN UNION, VOL. 3 (2005).

1. Writing, as the primary medium of jurisprudence

ELSA produces several high quality publications that are read by law students, lawyers, universities and institutions across the world. The aim and scope of the different publications is to give law students and young lawyers a possibility to publish their articles and academic work, as well as provide them with information about other legal systems and cultures. Furthermore, some publications aim at gathering information in order to help law students with their choice of legal studies across Europe and to gather information about past and present projects of ELSA and ELSA's involvements in different international organizations.[42]

ELSA Selected Papers on European Law (ELSA SPEL) periodically provides a compilation of legal papers in the field of Private and Public European Law. ELSA SPEL is published continuously on the website of ELSA International to provide an international readership with a source of literature that rarely finds its way to the regular legal periodicals: papers of high quality written by students in the scope of their legal courses as well as academics. ELSA SPEL contributes to legal education as students throughout Europe are offered an incentive to enhance increasingly important academic and language skills. The demand for a high quality standard of the publication is ensured through the participation of the Editorial Advisory Board, which is made up of prominent European academics.[43]

ELSA also publishes a traditional members' magazine: Synergy. The magazine is a publication, regularly informing ELSA members on topics of interest to them and to the association. It also gives members an opportunity to publish articles, promote events and to share experiences. Synergy also enables ELSA International to communicate important projects and developments in ELSA to the entire network. [44] Besides Synergy, some national ELSA groups are publishing their own country-specific magazines like the German magazine *inside*. ELSA. These country specific magazines are helpful for countrywide communication with all local groups and for the documentation of national legal developments and both national and international events, meetings etc.[45]

Besides these publications, ELSA organizes essay competitions in collaboration with their co-operation partners. These competitions encourage students to develop scholarly

[42] Information on ELSA publications available at: http://www.elsa.org/publications/index.html#anchor1.

[43] Information about SPEL, including current issues and archive available at: http://www.elsa.org/publications/papers.asp.

[44] Available at: http://www.elsa.org/publications/synergy.asp.

[45] "*inside*.ELSA" (precedently Juropean) is ELSA Germany's magazine for law students and young lawyers. It is published three times per year as an interactive PDF. Available at: http://www.elsa-germany.org/publikationen/inside.ELSA/en.

writing skills in English and to become engaged in a particular field of law.[46] Last year's winning essay was published at a prestigious International Review of the subject matter.[47] In addition, every other winning essay was awarded a WIPO Academy Scholarship. The essays are judged by a high profile judges' panel, such as (as was the case for the last year's competition on Intellectual Property Law) the European Patent Office and The Max Planck Institute for Intellectual Property, Competition and Tax Law.[48] Besides the essay competition of ELSA International, several national ELSA groups organize their own essay competitions like ELSA Slovakia[49] and ELSA Germany[50].

2. Research – The ELSA Legal Research Groups (LRG)

Besides its publishing and writing activities, ELSA supplements its efforts in legal education by promoting a skill that is essential in the legal profession: conducting research. ELSA assists law students and young lawyers in performing legal research in various areas of law by giving them the chance to form Legal Research Groups. The groups work independently but report about their work to ELSA. They carry out the research according to the plan and timeframe they have set for themselves. LRGs are an important educational tool since the skill of proper scholarly legal is a prerequisite for a successful career in every legal field and for every legal profession and is already essential while studying. Universities do not always give students the necessary practice in carrying out a research. ELSA Legal Research Groups provide students with opportunities to improve their academic skills, as well as increase their knowledge and know-how.[51]

3. Professional Education

In addition to promoting writing and researching skills, ELSA is also engaged in teaching students. Apart from the establishment of an International Trainer Pool, which organizes workshops and trainings, ELSA has set up a special key area for the purpose of professional education called Seminars and Conferences (S & C). In addition ELSA is rounding its efforts

[46]The Essay Competition of ELSA International usually matches the topic of International Focus Programme (IFP), about the current essay competition: http://elsaessaycompetition.org/sponsors.html; http://www.ifpconference.pl/ index.php?Name=essay.

[47] The current topic of the essay competition is Intellectual Property Law; the winning essay will be published in the International Review of IP and Competition Law (IIC).

[48] Information about the Judges Panel available at: http://elsaessaycompetition.org/judges.html.

[49] ELSA Slovakia participates as a co-organizer in the competition for the best essay of law students on a given topic. The topics usually focus on tax questions: http://www.elsa.sk/?q=48.

[50] Information about the essay competition of ELSA Germany available at: http://www.elsa-germany.org/ueber_uns/aa/essay_competition/de.

[51] Information about the ELSA Legal Research Groups available at: http://www.elsa.org/research/.

by providing for practice-oriented aspects. For this purpose ELSA organizes so called LAW Events to enable students to learn about the practical work of a lawyer.

ELSA's S & C key area serves to complement the formal university curriculum by raising students' consciousness and understanding of global, legal, social, economic and environmental issues. The program includes seminars, conferences, law school and study visits. ELSA is organizing international seminars and conferences to deal with a legal topic of high international interest and provide additional skills and knowledge to students. While on a seminar, topics are discussed in a plenary. Because conferences entail more individual participation and scientific contribution, topics are discussed in workshops, with a final edited and revised version to be reported in plenary. An international seminar or conference provides accommodation for the participants and normally lasts three days. More than fifty international seminars and conferences are held each year.

ELSA Law Schools, on the other hand, aim to be annual and have a scientific program with a legal topic. Law Schools are organized in close co-operation with the academic or institutional partner(s), with the law faculty, law institutes etc. The scientific program includes lectures followed by workshops, which deepen and emphasize different areas of the lecture. An example is the Law School on Mergers & Acquisitions organized by Istanbul, Turkey. The one week long programme focuses especially on International Commercial Arbitration Law and Competition Law. Lecturers and professors who are specialized on their own areas from both Europe and Turkey lead these courses. .[52]

Furthermore S&C also includes Study Visits. These events are organized by at least one local group. They may be single, bilateral, multilateral, or institutional. During an institutional Study Visit students tour an international governmental or non-governmental organizations, public administrations or private institutions.[53]

Another mode of teaching that ELSA employs is the organization of LAW (Lawyers @ Work) Events. The events are a complement to the theoretical education of law students. It gives students and young lawyers an impression of what the various jobs of a lawyer can look like. The professionals taking part in Lawyers at Work events range from classical legal professions to much less considered options. The aim of organizing Lawyers at Work events is to provide students and young graduates with the opportunity to understand the different career opportunities that are open to them. LAW events thus create a direct link between students and the professional world, which benefits both sides. The participants of such an event have the possibility to interact and receive career information from experts in the various professions. The professions may not be directly related to law, but

[52] Information about the Law School on Mergers & Acquisitions available at: http://www.elsa.org/events/EventDetail.asp?eventid=434.

[53] Information about study visits available at: http://www.elsa.org/about/activities.html#anchor1.

may simply be open and attract to law graduates. These events are a major aide for students in finding the legal profession most suitable for them. Furthermore, they prevent the otherwise lack of information on existing opportunities from being an obstacle to finding the right type of job.[54]

4. Putting Theory into Practice – The ELSA Moot Court Competitions

The educational contribution of ELSA to legal education offered by universities is rounded by ELSA´s involvement in Moot Court Competitions. The aim of a moot court is to improve the legal knowledge of students. It is of primary importance to prepare and train students in the art of speaking in front of a court. Training in the use of rhetoric gestures, speaking without notes, self-confidence and intellectual flexibility are seldom taught in the standard legal curriculum. A moot court will teach the kind of knowledge that is important for the practical aspects of a lawyer's life - to create links between theory and practice. Students can put the academic knowledge acquired at the universities to practice while enhancing their presentation and public speaking skills.[55] ELSA has been involved in several Moot Court Competitions for a number of years. However the most important one is the "EMC²"- The ELSA Moot Court Competition on WTO Law. The EMC² was created because the association considered it to be more beneficial to develop the mooting experience into an international moot court competition aimed at contributing towards the development of law students worldwide. The Competition is a simulated hearing in the World Trade Organization (WTO)[56] dispute settlement system. The oral submissions of the competing teams are held in front of a Panel, which consists of WTO law experts. The Competition´s aim is to encourage further development on the subject matter in the curriculum of academic institutions and to contribute to the ongoing discussion about globalization in the contexts of the WTO Agreements.[57] Since teams from all over the world meet to participate in this competition it also plays an important role for the international cultural exchange between law students.

II. Fostering Mutual Understanding

The second official purpose of ELSA is to foster mutual understanding between law students and young lawyers in Europe.[58] ELSA is realizing international cultural exchanges

[54] About Lawyers at Work Events: http://www.elsa.org/about/lawyers.asp.

[55] About the concept of Moot Courts: http://www.elsa-germany.org/ueber_uns/aa/moot_court/en.

[56] Homepage of the World Trade Organization available at: http://www.wto.org/.

[57] More Information about the EMC² available at: http://www.elsamootcourt.org/?id=66.

[58] The Philosophy Statement of ELSA, available at: http://www.elsa.org/about/index.html#anchor1.

and communication between students by holding several institutionalized international meetings and study visits[59] and through STEP – The Student Trainee Exchange Programme.

The network of ELSA currently comprises forty countries and over two-hundred and twenty universities[60] reaching from Arhus in Denmark to Zurich in Switzerland, from Lisbon in Portugal to Rovaniemi in Finland and even to Turkey and the western parts of Russia.[61] The members are brought together twice a year at the International Council Meetings (ICMs) of ELSA. The International Council Meetings (ICMs) take one week, yet their programme of interwoven workshop and plenary work is similar – aimed at deciding on important issues concerning the association, making plans and defining goals for its further contribution to European legal education and the European community.[62] Guests from countries such as Japan, Australia, USA, Canada, South Africa, and Ivory Coast have repeatedly attended the council work of ELSA. On the national level there are ELSA national meetings, such as the two National Council Meetings (NCM) and two Officers' Meetings are held each year lasting three days with the purpose to elect the federal board (*BuVo*). Students from local groups all over the country (plus international guests) participate in various workshops and training sessions, which teach skills either related to the exercise of an office within the association (president, vice president, treasurer, vice president for marketing STEP etc.) or so-called soft skills (communication, presentation, team working, conflict management, organization, planning skills). The meetings are of great importance for the communication, collaboration and the coherence of the network.

Apart from International meetings the best way for students to understand different cultures is to go abroad. This is the function of ELSA study visits. They are visits of one group to another ELSA group or institution abroad.[63] Another way to realize this purpose is the Student Trainee Exchange Programme (STEP). While study visits only last for a couple of days, STEP enables law students and young lawyers to spend a period of time working abroad in a law related area, thus introducing them to a different legal system and enabling them to gain valuable professional experience. ELSA supplements the traineeship schemes of law firms, companies, banks, universities, public and private institutions, and provides suitable trainees for both short and long-term placements. The students are assisted by ELSA before and during the traineeship with finding accommodation, applying for visas, when necessary, and organizing social events to involve the trainee in the daily

[59] See prior at D I 3 bb).

[60] Information about the ELSA network available at: http://www.elsa.org/about/index.html#anchor2.

[61] List of all ELSA groups available at: http://www.elsa-germany.org/network/liste/de.

[62] See homepage for further information, available at: http://www.elsa.org/.

[63] About ELSA study visits see prior D I 3 bb).

life of the local community.[64] The aim of the programme is not to just bring one university student or graduate from one country to another and to place them in a job, it is also to include that person in the community and in different ELSA activities.[65] The benefits of a STEP traineeship are immeasurable as students are given increased knowledge of a particular legal system or area of law, thus strengthening the professional skills of the trainee. As important as the academic and professional skills are, the improved language abilities and the experience of another culture that the trainee gains while abroad are invaluable. STEP is a creating a powerful opportunity to learn by interacting with new situations and perspectives. It enables the trainee to acquire valuable contacts, personal as well as professional, and future employment prospects. Consequently the students and young lawyers are better prepared for becoming lawyers of tomorrow, working in an international environment.[66]

III. Promoting Social Responsibility

The third purpose of ELSA is to promote social responsibility. According to the official Philosophy Statement, the vision of ELSA is "A just world in which there is respect for human dignity and cultural diversity"[67]. For this purpose, ELSA has developed three different areas: a special commitment to human rights through the Human Rights Programme (HRG), Institutional Relations through the cooperation with international institutions, and the International Focus Programme (IFP).

Human rights and topics related to human rights have become one main focus of the ELSA work. ELSA considers human rights as the grounds that modern legal systems are based on. Thus, they are indispensable in a detailed legal education.[68] Since 1998 ELSA has had a "Special Commitment to Human Rights":

> "ELSA shall be continuously committed to Human Rights awareness, Human Rights education, the respect of the rule of law and the scientific analysis of the development of Human Rights Law. ELSA shall strive to be recognized for a strictly legal, academic, impartial approach to Human Rights. The above mentioned shall be strictly in line with the guidelines regarding ELSA's non-political status."[69]

[64] About STEP: http://www.elsa.org/stepdesc/index.asp.

[65] http://www.elsa.org/about/activities.html#anchor1.

[66] http://www.elsa.org/stepdesc/index.asp.

[67] About the vision of ELSA: http://www.elsa.org/about/index.html#anchor1.

[68] About ELSA´s engagement in Human Rights: http://www.elsa-germany.org/ueber_uns/struktur/hr/warum/en.

[69] About the Commitment Statement: http://www.elsa-germany.org/ueber_uns/struktur/hr/warum/en.

Human rights have come to be omnipresent in the work of ELSA as it is realized through all of its activities. On the international level the commitment to human rights is being realized by co-operation with several institutions and organizations, such as the UN and its sub-organizations, the Council of Europe and the European Commission. On the local level the observance of human rights is lobbied through education. ELSA provides an academic platform for discussion within the network in order to create human rights awareness. Furthermore ELSA lobbies for the general promotion and development of the law of human rights, thereby using all features available in the three key areas (AA, S&C and STEP) and essay competitions, legal debates and moot courts. Furthermore, other academic means like lectures, penal discussions, law schools and institutional visits and the academic part of study visits are used to create awareness and promote social responsibility among students. The Student Trainee Exchange Programme is also contributing to this purpose as traineeships are offered at organizations that work in the human rights field, thus giving students the possibility to contribute to realization of human rights.[70]

Another aspect of ELSA's cooperation with international institutions is the sending of delegations. ELSA sends delegations to the ECOSOC, to the Assembly of State Parties of the International Criminal Court, to the UNCITRAL and to the WIPO. Within the ECOSOC, ELSA delegations take part in the sessions of the Commission on the Status of Women, the sub-commission on Human Rights, the Commission for Social Development and of the Permanent Forum on Indigenous Issues. Concerning the UNCITRAL, ELSA delegations are attending the sessions of the UNCITRAL itself as well as to the sessions of its working groups (I, II, III, VI). Delegations sent to the WIPO have so far taken part in the sessions of the Standing Committee on the Law of Patents and of the Provisional Committee on Proposals Related to the WIPO Development Agenda.

Student delegates have to professionally represent ELSA at the session. Thus they have to conduct research to prepare for the session as well as to take part in the sessions of the body and possible side or parallel events. Furthermore, students establish contacts with delegations of other NGOs or states, experts as well as any other participants. The student delegates forward these contacts to the international board. The contacts made are available for the whole network. After the session, the delegation has to produce a report, which is also forwarded to the international board and subsequently published in the ELSA online archive. Additionally, delegation members have to give presentations in their country if requested.[71]

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[70] About the realization of Human Rights within the work of ELSA: http://www.elsa-germany.org/ueber_uns/struktur/hr/wie/en.

[71] About ELSA delegations at the international organizations: http://www.elsa-germany.org/ueber_uns/struktur/hr/delegationen/en; to see current delegation: http://www.elsa-germany.org/events/detail/de?v_id=deutschland-delegation5-20090121.

In addition to its commitment in Human Rights and in the community, ELSA fosters social responsibility through its International Focus Programme (IFP). The idea of the IFP is to have a wide variety of local, national and international events, such as seminars, conferences, legal research groups, debates, moot court competitions, publications and traineeships that delve into a "hot legal topic" concluded after one year by a final IFP conference.[72] The main objectives of the IFP are to create awareness amongst today's law students and tomorrow's lawyers, and to create a forum where law students and young lawyers can gather and discuss a contemporary theme. The IFP enables law students and young professionals to work with major law-related institutions and non-governmental organizations (NGOs) around the world.[73] The themes of the IFP pick up on current legal topics that are of great importance for the development and use of law and for the society. For example the theme of 1997-1999 “Law of Peace in the Year 2000 - current violations and effective enforcement of international law; the reform of international organizations" dealt with the areas of international law and international humanitarian and criminal law.[74] The IFP is encouraging the whole network to intensively look into a subject important to the society and to make valuable contributions.

E. The Future of Student participation in legal education in Europe

The value of ELSA to legal education in Europe is considerable, just as much as its activities are essential for the cultural exchange between law students and the development of personal skills. Active engagement contributes to the personality development of students as they learn how to take initiative, how to think and work in a self-reliant and entrepreneurial way, how to communicate, organize, manage conflicts, take on responsibility and act as a role model for others. These aspects are highly important for the legal profession in a globalised world. They are beneficial to international understanding as well as the personal development of students. In many ways, having this experience can be considered a job qualification.[75] To foster cultural and professional exchange between law students, young lawyers and alumni from all over the world, ELSA has devised instruments for European legal education that are urgently needed in a world that grows ever closer together.

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[72]Updated information on the International Focus Programme available at: http://www.ifpconference.org/. The current IFP is going to end 31st July 2010. The theme from 2007 – 2009 is Intellectual Property Law, information about the theme available at: http://www.elsa.org/InterFocusProg.asp#anchor3.

[73] Available at: http://www.elsa.org/InterFocusProg.asp.

[74] Previous themes are available at: http://www.elsa.org/InterFocusProg.asp#anchor2.

[75] *Die Soziale Ader ist gefragt*, available at: http://www.e-fellows.net/show/detail.php/16775; Ingmar Höhmann, *Sozialkompetenz als Pflichtfach- Der neue Lehrauftrag der Uni*, VOL. 102, HOCHSCHULANZEIGER FRANKFURTER ALLGEMEINE ZEITUNG, 76,77 (2009).

The mission to educate, however, still belongs to the universities. Since students have independently taken initiative in creating additional educational options no longer limited to professional education, a dilemma situation has emerged: while voluntary engagement is the only way for students to receive the personal and professional experience and education they want and need, it is time-consuming and frequently clashes with duties set out by the universities.[76] Therefore, students often have to engage half-heartedly, or limit their engagement to a certain period of time to avoid neglecting their studies and scoring badly on their exams. The most striking example is the national board of ELSA Germany: the office of a board member, who manages and administers more than forty local groups and represents ELSA Germany internationally, is too labor-intensive to continue studying at the same time. Thus, the national board of ELSA Germany has to take one year off to exclusively work for ELSA.[77] Since ELSA board members receive neither financial aid by the university nor any other recognition or relief for their engagement, both the financial burden for parents and students and the loss of time figure as enormous deterrents. To atone for that, the six biggest student organizations in Germany have united to fight for having the universities reward honorary work.[78]

To help accommodate these concerns, ELSA offers education that fits into the curriculum of an idealized modern law faculty. Two pillars of ELSA's activities in particular can be easily incorporated into legal curriculums: soft skill teaching and practical orientation. While many universities recognize the significance of both elements as parts of a modern holistic education, their main emphasis still lies on research and its teaching. Thus, they can often afford little attention to promoting soft skills or practical context. In both areas, ELSA has already established promising structures (trainings or L@W events, respectively) and has direct access to professionals (lawyers, mediators, etc.). For instance, law firms supporting ELSA quite commonly express a wish to become better integrated into the educational programmes that the association offers. ELSA could, therefore, support and relieve universities by providing such elements of legal education as supplements to existing programmes.

[76]Ingmar Höhmann, *Sozialkompetenz als Pflichtfach - Der neue Lehrauftrag der Unis*, VOL. 102, HOCHSCHULANZEIGER FRANKFURTER ALLGEMEINE ZEITUNG, 76, 77 (2009); JULIA BÜTTNER, STUDENTISCHES EHRENAMT – KEINE ZEIT MEHR FÜRS ENGAGEMENT?, available at: http://www.e-fellows.net/show/detail.php/16282.

[77] The same is true for the International board of ELSA as all seven board members are working full time. To see more information about the International Board: http://www.elsa.org/members/elsaint.html.

[78]Die Kölner Runde, homepage available at: http://www.koelner-runde.de.

Hopefully universities will soon realize what politicians, scholars and economists have already identified a long time ago: it is important to have engaged, active student participation for the benefit of the future legal community at large, and for the benefit of the personal development of students and for legal education more generally in Europe and internationally.[79]

[79] Thomas Henne, *Deutsches Recht und Juristenausbildung in Ungarn*, JURISTISCHE SCHULUNG (JuS) 1037, 1039 (2000); *Wolfgang W. Mickel / Jan Bergmann*, in HANDLEXIKON DER EUROPÄISCHEN UNION, VOL. 3 (2005).

The Five Lessons I Learned Through Clinical Education

By Nadia Chiesa[*]

In his 1935 indictment of legal education, Karl Llewellyn denounces the law schools of his time as factories pulling in immature, unprepared young men and, three years later, churning out young lawyers who are not significantly better prepared to deal with the realities of the legal profession.[1] Llewellyn's critique touches upon every aspect of the North American legal education experience: the admission of students who lack the necessary critical research and writing skills, the rules-based "casebook" curriculum that ignores policy or practice questions and the release of graduates into the profession, without any follow-up on their experience that could be used to improve the education of the next generation of lawyers. In short, these graduates may have studied law, but they are not ready to practice law.

Writing almost 75 years ago, Llewellyn's critique can still be applied to contemporary legal education. This approach to learning, still so common in many law schools, is ingrained in future law students before our first day of law school as we cram for the dreaded LSAT admissions exams and struggle to distil a lifetime of experiences and expectations into the succinct statement of interest required for every law school application. Once accepted, we are immediately thrown into a large lecture hall where the professor will expound on property or torts or criminal law, rambling off long lists of cases and precedents, only to send us home to read hundreds of pages from our brick-like casebooks. We repeat this process for about three months, and then spend a frantic few weeks preparing the legendary "summaries" that we have heard will make or break us. Finally, we sit the final, three-hour, 100% exam and hope for the best. We will do this for three years, proudly accept our degrees in front of beaming family and friends and then realize that we are actually lawyers now. While this description may oversimplify the experience, it is an accurate representation. What would Llewellyn say if he saw that, more than seven decades, law school really has not changed very much?

Llewellyn offered a prescription for legal education which included, very briefly: looking to the demands on a practicing lawyer to inform what is taught to law students – and how it

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[1] *On What Is Wrong With So-Called Legal Education*, 35 COLUMBIA LAW REVIEW 651-678 (1935).

is taught;[2] integrating social fact and policy with legal rules;[3] and, ensuring students graduate with the critical and practical tools they need.[4] Change depends, however, even more so on Llewellyn's "proposition that the health of any university, and more particularly of any law school, rests in departure from normality and deadly sanity. Freak persons and freak policies are needed; needed in very considerable measure."[5] For Llewellyn, these freaks were those who were willing to challenge the status quo in order to affect change but change, it seems, would be a very long time coming since these freaks were few and far between. Rather than despairing over everything that has *not* changed in legal education since the 1930s, Llewellyn could take heart in knowing that while the freaks have not yet won, they have been waging the war on one of the most significant battlegrounds: clinical education.

Law schools across Canada offer clinical education programs, which, to varying degrees, allow students to put the skills they have learned in the classroom into practice in different "real world" settings, from storefront legal clinics to courthouse duty counsel to placements with private firms or NGOs. This article will focus on my experiences in clinical education, exploring how my work at a student-run poverty law clinic has subverted the traditional law school experience and, I argue, answered Llewellyn's call for change more than 70 years later by challenging mainstream legal education and, by extension, the mainstream legal profession.

Many of Llewellyn's critiques of legal education are being echoed in relation to contemporary legal education. In this article, I will explore these criticisms and discuss how clinical legal education has the potential to address and perhaps even remedy these concerns. Throughout, I will share reflections on how my personal experiences working at CLASP have shaped my time at law school and will, I believe, influence my future practice as a lawyer.

A. CLASP

CLASP is one of several clinical education programs offered by Osgoode Hall Law School. Dalhousie Law School in Halifax in the Canadian Maritimes claims to have the oldest clinical

[2] See, *supra*, note 1, 667, 668.

[3] Llewellyn, *supra* note 1, 669.

[4] *Ibid.,* at 673, 674.

[5] *Ibid.,* at 651.

program, started in 1970,[6] but since 1969, CLASP has offered legal services to low-income people and communities in Toronto. The clinic is located within Osgoode Hall Law School and while clients come from across the city, a majority of clients come from the surrounding neighbourhood of Jane-Finch, which is one of the highest-density and poorest communities in Canada. Currently, CLASP provides representation in four areas: criminal law; immigration and refugee law; community support (represents clients living with mental health issues in housing matters, social assistance appeals and human rights complaints); and, youth and education. Potential clients must meet the financial eligibility requirements set by Legal Aid Ontario, which funds the clinic in part. Priority is given to clients who fall within the groups identified as most in need of assistance: those living in Jane-Finch, newcomers to Canada, women survivors of domestic violence, youth and individuals living with mental health differences.

Every year, 15 second- or third-year students are selected to participate in the 12-month program. Students are paid to work at CLASP full-time during the summer (May-August) and continue working there during the school year (September-April) for academic credit, while also taking courses. Supervised by three full-time lawyers, students work on all aspects of a client's case, including representing clients at criminal and small claims court as well as at a variety of administrative tribunals. Students gain a year of practical experience before they even graduate. In addition to traditional legal representation, students are involved in a variety of community outreach programs, facilitating legal education workshops, participating in grassroots community organizations, organizing law reform projects and more.

Criticism of traditional legal education is often tied to criticism of the traditional legal profession. In contrast to regnant lawyering[7] is rebellious lawyering, a term coined by American lawyer Gerald Lopez. Where a regnant lawyer individualizes legal problems,[8] a rebellious lawyer sees her clients as belonging to a larger community.[9] Where a regnant lawyer sees a client's issue only in terms of legal issues and solutions, a rebellious lawyer considers the various societal forces and pressures in a client's life that may be contributing to or even causing the issue. Where a regnant lawyer relies only upon his or her own expertise, a rebellious lawyer seeks to empower the client.

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[6] Rose Voyvodic & Mary Medcalf, *Advancing Social Justice Through an Interdisciplinary Approach to Clinical Legal Education: The Case of Legal Assistance of Windsor*, 14 WASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY 101-132 (2004).

[7] Paul R. Trembaly, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS LAW JOURNAL 947-970 (1991).

[8] Janet E. Mosher, *Legal Education: Nemesis or Ally of Social Movements?*, 35 OSGOODE HALL LAW JOURNAL 613-635 (1997).

[9] Tremblay, *supra,* note 7.

Just as rebellious lawyering challenges the traditional model of legal practice, clinical education programs like CLASP challenge the traditional model of legal education, pushing students to rebellious learning, in which they can develop a critical consciousness of the role and limits of law. These rebellious learners develop not only the strong analytical and advocacy skills that are required to practice any area of the law but they also develop a real understanding of the impact of the legal system on a section of society that is largely ignored. Bridging the gap between regnant and rebellious lawyering – and between regnant and rebellious learning at law school – has been one of the challenges I have grappled with during my time at CLASP and one that I am certain to be confronted with in the course of my career.

While it would be impossible to fully capture what I have learned from this experience, five important themes or lessons have emerged from my work with clients and in the community as well as from my discussions with colleagues.

B. Lesson 1: You're a (student) lawyer – so what?

In the classroom, the students listen to the professor and in practice, the clients listen to the lawyer; traditional legal education and practice depend on this expert-layperson relationship. Shin Imai, a professor at Osgoode Hall Law School,[10] writes that law school teaches you how to be an instant authority. After all, we spend three years learning to synthesize lengthy cases into succinct ratios and apply those rules to facts to determine the likely outcome. Law plus facts – that is the equation that matters at law school – and we learn to cook the books to make the law work in favour of the facts of a particular case. As he says, we learn "to reconstruct events, to restate the law and to package a new reality."[11] As law students, we learn that the lawyer provides the solution to the client.[12]

One of the hardest lessons I learned at CLASP was that this formula does not always work. With little background in employment law I happened to inherit a wrongful dismissal case at the time of joining CLASP. The client had been terminated from a menial, low-wage job without cause, without notice and without adequate termination pay. The facts of the case looked strong: a new Canadian working a low-paying job to make ends meet while she tried to start a new life for herself and her family in Canada faces racial discrimination and sexual harassment in the workplace, only to be fired. The case law also seemed to support our case. The previous student caseworker had prepared the client's statement of claim

[10] Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL LAW REVIEW 196 (2002).

[11] *Ibid.*

[12] Voyvodic & Medcalf, *supra* note 6.

and gone through a settlement conference, where the client turned down a settlement offer in favour of going to trial.

I took over the case a few months before the trial and I dutifully pored over the file, read up on employment law and developed a theory of the case. I soon realized that a recent ruling by the Supreme Court of Canada had drastically changed the claim and effectively barred us from making many of our claims. Working with my supervisor, we decided to advance those claims anyway, figuring that a judge at Small Claims Court might be more willing to overlook the law in favour of the sympathetic facts in the case. A few weeks before the trial, I started to meet with the client to prepare her. We went through the examination-in-chief as well as the cross-examination so she would be ready. I explained to her several times how the trial would work and what her role would be. I also stressed that we were not guaranteed success and that she would not necessarily be walking away with money in her pocket. She reassured me that she understood and that despite my warnings, she was confident the judge would believe her.

At the trial, the case went off the rails. The client, who had always been very forthcoming with the details of her experience, suddenly would not answer any questions related to her claim. She would not discuss the alleged harassment or discrimination. She could not remember dates or particular events that just days before, we had gone over in detail. She was, however, more than willing to shout abuse at the defendant's witness, her former manager. Even once she was off the stand, she continued to yell at the witness. In cross-examination, she changed her own story drastically, thereby undermining her entire claim. It was no surprise when the judge did not award the client the damages she had claimed. Outside the courtroom, the client approached me, visibly upset. She did not understand why she had been offered more at the settlement than she had been awarded at trial. But what really seemed to upset my client is that she could not understand why the judge would not let her tell her story, the way she wanted to tell it.

At the time of the trial, I had been working at CLASP for a little over four months. It is only recently, after almost a year at CLASP, that I have come to realize how I could have handled the situation differently. I had approached this case the way I had been taught, applying the rules to the fact to establish that my client should be awarded monetary compensation for the harm she had suffered. What I failed to consider at the time was that monetary compensation was not necessarily what my client ultimately wanted.

The expert-layperson relationship raises particular challenges for a student working in a legal clinic. First, clients often arrive at the clinic with mistaken beliefs about the law. During an intake interview, a potential client confided in me that since the police never found the "other" drugs in his car, we could use that to clear the possession charge he was currently facing. Another client was certain that his wife would be granted the necessary immigration papers because he had been granted his papers and their cases were very similar. In these cases, where I have to explain to a client that they are wrong about how

the system works, I often ask myself: who am I to be telling the client he or she is wrong? As a law student, I have been very uncomfortable with taking on the role of expert. I may have taken an immigration law class, but my clients have actually had years of interactions with the Canadian immigration system. While I may be able to tell them what should happen in theory, they understand what actually happens to a claimant going through the system.

Another aspect of the expert-layperson relationship that has been difficult to overcome is the age difference that often exists with my clients. As a student in my twenties, many of my clients are twice my age. It can be disconcerting to have a client who is often the same age as my parents trust me with such an important life event as a hearing or trial. It becomes even more challenging in a situation where I have to confront an older client because she has repeatedly missed meetings or he has neglected to provide me with documents that are crucial to the case. In a society where we associate authority with age, the student caseworker-client relationship so often turns that dynamic on its head.

Finally, during my time at CLASP, I have become very aware of the power relationship that is created between lawyer and client. Just as some clients walk in with a definite idea about how law works, many others expect that I will have all the answers for them. Recently, when I was at the immigration detention centre where CLASP students provide legal information to detainees, I was explaining the detention system to two detainees when they asked me – point blank – whether they should apply for refugee status. An immigration officer had told them they could apply for refugee status if they feared returning to their country. I knew nothing about these detainees other than very basic details about how long they had been in Canada and how they had been picked up by immigration. After I explained what it meant to be a refugee, they again asked me whether they should claim refugee status. I told them that as a law student, I could not give legal advice and that they would have to make the decision on their own. It was a situation that made me acutely aware of the power – and responsibility - that we hold as lawyers (and even as law students).

I have experienced first-hand the different approaches to lawyering, whether labelled "regnant" and "rebellious" or "traditional" and "community-based", and the benefits or drawback of each during my time at CLASP. According to Janet Mosher, an Osgoode Professor and Associate Dean, clinical legal education can lead to a new vision of the legal profession. It can work to "shift from lawyering that truncates, to lawyering that empowers, [which] occurs when the emphasis of lawyering practices shifts from outcome to process; from getting to becoming; from instrumentalism to empowerment."[13] This is a lesson that I hope to carry with me during the transition from school to practice and beyond.

[13] Mosher, *supra* note 8.

C. Lesson 2: Learning clinic or legal clinic?

The approach to learning the law at CLASP has been vastly different to law school classes. In law school, we learn by reading, not by doing; we absorb "knowledge that" rather than developing "knowledge how". This approach to learning is then applied in practice. This application begins law school exams, which are usually based on fact-patterns that require to students to identify the issues and then apply the law to the facts provided and determine the likelihood of success for each party in the matter. Once students graduate and start dealing with clients, the same approach is used. Students are expected to transform their "knowledge that" into "knowledge how". The assumption is that a client arrives at a lawyer's office with a problem that is legal in nature and seen as "predictable, controllable and standardized."[14] Since the possible solutions are also legal, the lawyer then applies the law to the facts.

The pedagogical structure of law school not only affects what we learn, but also what we do with our education. Law school still focuses, for the most part, on business and corporate law as well as litigation, with little discussion, at least in first year, of other options. Traditionalists would argue, of course, that it is necessary to learn the basics – tort, criminal, contracts, property – first, however, this can create an alienating learning environment for students who may not have their sights set on large, traditional law firms. Further, the curriculum which focuses almost exclusively on substantive law and procedure can dissuade students from following a path in social justice, even when that is one of the motivations that first brought them to law school.[15]

Students participating in clinical legal education can pursue a commitment of social justice and develop "knowledge how" but during the course of this opportunity, will confront some of the ethical concerns associated with these types of programs.

Many of our clients arrive at CLASP as a last resort. They cannot afford a lawyer and cannot get a legal aid certificate, which entitles clients to free legal services. They retain CLASP precisely because they do *not* have a choice. While we provide free legal services, clients provide us with real-life case studies. In the most literal sense, we practice law on these clients. A question that has been raised several times this year during discussions with colleagues at CLASP is "Are we just learning off the backs of the poor?" and after a year at CLASP, this is still a question that we are asking ourselves.

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[14] Julie Macfarlane, *A Feminist Perspective on Experience-Based Learning and Curriculum Change*, 26 OTTAWA LAW REVIEW 357 (1994).

[15] William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL JOURNAL FOR SOCIAL JUSTICE 6-28 (2007).

Constantly asking ourselves this question will not lead us to a definitive answer, but rather a critical awareness of the dichotomous nature of this work which will help us to recognize the power and privilege we have as lawyers and to challenge the hegemonic assumptions of our profession.

We must begin by considering our role as lawyers and what that can mean. Shelley Gavigan of Osgoode and former director of Osgoode's other legal clinic downtown, Parkdale Community Legal Services, has written about the "white knight" syndrome that can afflict lawyers working in social justice. There can be a tendency to believe that with law as our sword and shield, we can save the oppressed. This reflects the over-emphasis that is traditionally placed on the role and efficacy of law. Working at CLASP, this illusion was shattered for me very quickly. For example, Small Claims Court is often lauded as the solution to improving access to justice because claimants can self-represent and court fees are significantly reduced. This year, I spent too many hours trying to interpret the convoluted court rules, only to be told that I could not file a document because I had missed a small technicality. Each judge seems to apply his own interpretation of the rules, so there is no consistency between steps that must be taken throughout the life of a case. Finally, the court fees may be significantly reduced as compared to those in Superior Court, but for a client who makes less than minimum wage or lives on social assistance, having to pay a $100 filing fee is nearly impossible. In law school, we discuss how to remove barriers and improve access to justice. In my experience at CLASP, as illustrated through this example of Small Claims Court, I learned how we often fail to even recognize the barriers that exist. If we cannot recognize the barriers, how can we move toward removing them and opening the justice system to all citizens? This was one of the hardest, but most valuable, lessons I learned in my time at CLASP and one that I would not have learned by sitting in a classroom.

What then is the alternative to the legal white knight? Well, the danger is that students can become mere tourists in a community that is new to them.[16] At CLASP, the emphasis on community outreach work, such as getting involved with community groups and presenting legal education workshops, in addition to legal casework may help us avoid becoming tourists. We work with established community organizations and groups not as the "expert" coming in to fix the problem but as another member of the team, willing to put our skill set to use in the way that the community feels would help. While we offer a service to the community, we must learn to refrain from imposing a vision of how clients should use that service.

[16] Imai, *supra* note 10.

D. Lesson 3: The outsider looking in – or the insider looking out?

Working at CLASP, I have become aware of the role that "social" plays in social justice. I was fortunate enough in my first year of law school to have a couple of teachers who introduced critical perspectives such as feminist and critical race theories into the course material, pushing us to analyse the social and political undercurrents in decisions. This is not, however, the norm in law school. "The tendency of law school to ignore political, economic, and social values and perpetuate has been blamed for helping to perpetuate idealized notions of fairness that fails to accord with the realities of poverty and discrimination."[17] Even the mandatory first-year ethics class, where the prevailing theme is access to justice, fails to go beyond readily apparent financial reasons why so many Canadians cannot afford to access justice.

My year at CLASP, however, has enabled me to develop an awareness of the multidimensional social, political and economic factors which influence law and, more significantly, the lives of those people who are most frequently embroiled in the legal system. I have developed this awareness through my work with clients and the community, and through taking the time to reflect on and discuss these experiences with my colleagues. During our two-week training session last May, I attended a protest against temporary employment agencies in the Jane-Finch community with the other students from CLASP. My use of the word "attended" is intentional. That afternoon, I did not feel that my presence at the protest was at all helpful or supportive. I had no connection to the issue and, quite frankly, at that point, little connection to the community. I felt, to use Imai's words, like a tourist. Flash forward to February, when I participated in a march against police brutality in Jane-Finch, organized by members of the community after three separate incidents of youth being beaten by police. I was still highly aware of my status as an outsider at the event, no more so than when I was approaching people on the street and at the bus stop to collect signatures for an open letter to the local police department. The difference this time, however, was that through my work, I had developed a deeper understanding of the dynamics in the neighbourhood. Jane-Finch was no longer the guns-and-gangs war zone I read about on the front page of the newspaper; it was a community and a neighbourhood where many of my clients lived and worked and where we were involved.[18]

[17] Voyvodic & Medcalf, *supra* note 6.

[18] For an account of a teacher's experiences in the Jane-Finch community, see PETER MCLAREN, *CRIES FROM THE CORRIDOR* (1980).

E. Lesson 4: Law is rational, not emotional – or is it?

In law school, we learn to think rationally, not emotionally. In formal advocacy training, we are taught to replace "I feel" and "I believe" with "I submit". In torts class, we read about the reasonable person against whom standards are measured. People are even missing from the cases we read since the appellate cases taught in law school focus on judicial reasoning rather than the facts of the case. Julie Macfarlane describes this as "knowledge that", rather than "knowledge how".[19] The curriculum and pedagogical styles are focused on getting knowledge,[20] which is illustrated in the notoriously heavy reading loads in most courses. Both the form and substance of a legal education reflects an underlying rationalist model of knowledge that law can be "objective, certain and universal."[21] The relationship between professor and students in the classroom is, largely, that of expert and novice; the professor imparts his knowledge to the student, who is the "theoretical spectator".[22] That student must then, at the end of the term, apply that knowledge to a 100-percent exam.

While in traditional law classes, knowledge is conceived as a commodity which can be acquired, clinical education approaches knowledge as always evolving from experiences, both as we live through them and later as we reflect upon them. In sharp contrast, proponents of clinical education emphasize the contribution of personal experience and reflection in the learning process. Here, emotional and intellectual learning and development are interdependent.[23] Learning is a continuous process, constantly changing and evolving based on new experiences.[24] One of the skills student caseworkers learn at CLASP is to look beyond the obvious labels ('single mom', 'youth with a criminal record', 'drug addict') that may be applied to clients and see them as individuals. In the spirit of rebellious lawyering, we must maintain an awareness of the collective issues that our clients face but we must not jump to lump our client in with that group. In doing this, it is very difficult not to become emotionally involved in the case and when working in a legal clinic, "an intense level of emotional engagement is often unavoidable."[25]

My introduction to affective learning came rather late in my placement at CLASP. While I try to maintain an awareness of the social factors underlying a case, I also keep myself

[19] Macfarlane, *supra,* note 13.

[20] See, *supra,* note 17.

[21] Macfarlane, *supra,* note 13.

[22] Mosher, *supra,* note 8.

[23] Macfarlane, *supra,* note 13.

[24] See, *supra*, note 21.

[25] Imai, *supra,* note 10, 216.

emotionally distanced from my clients and their cases. Since I have never been an outwardly emotional person, I would like to think that this is not a conscious effort to depersonalize my clients and adhere to a rationalist model of lawyering but rather a result of my personality. I do not feel that my emotional detachment has diminished the quality of my advocacy on behalf of clients although it has most likely affected the working relationships I have developed with clients.

In early spring, I took on a new case of a young mother who was facing deportation, which would separate her from her Canadian husband and her young children. Her efforts to regularize her status had been unsuccessful, in large part because she had been conned by paralegals. With no money, she had few – if any – options when she arrived at CLASP. For the first time, I became emotionally involved in a case and I am still in the process of reflecting on why this happened. The client's story was undeniably sad but working in CLASP's immigration division, many of my clients have equally heart-wrenching stories. The client had fallen through the cracks of the legal system but so too have the majority of CLASP's clients. The client had been ripped off by unscrupulous paralegals but I was representing another client in Small Claims Court in a very similar claim. In short, there was no reason why this particular client should have affected me in the way that she did.

F. **Lesson 5: Quick, get uncomfortable**

In his article "Letter to a Law Student Interested in Social Justice", Quigley advises that "the first step to any real educational or transformative experience [is] a willingness to go beyond your comfort zone and to risk being uncomfortable."[26] Generally, I would argue that law students are, for the most part, used to being comfortable. We are comfortable in the sense that we have enjoyed some degree of privilege that gave us access to the opportunities that led to law school. We are also comfortable in the sense that we are used to having control over our environment, our experiences and our interactions. Law school is a largely solitary experience, where competition is prized over collaboration and students are trained to work in an individualistic and adversarial legal system.[27] In their article about the University of Windsor's legal aid clinic, Voyvodic and Medcalf suggest that the "subject-matter of clinical legal education (i.e., poverty law), its unstructured nature and its closeness to inter-personal dynamics is unsettling to mainstream faculty accultured to 'isolationist' mode of behaviour within legal education."[28] For Quigley, social justice lawyers must learn to be uncomfortable because "those who practice social justice law are

[26] Quigley, *supra,* note 14, 15.

[27] Voyvodic & Medcalf, *supra,* note 6.

[28] See, *supra*, note 25, 106.

essentially swimming upstream while others are on their way down."[29] I would add that for a law student working in a legal clinic, the work that we do, and the places where we do that work, also forces us to go beyond our comfort zone.

Throughout my time at CLASP, I have experienced two distinct types of discomfort. The first, the sense of anxiety I have experienced when appearing in court or presenting on panels, can be attributed to my lack of experience and yet is still within my "comfort zone" to the extent that I retain some degree of control over the situation. The second is the kind of discomfort that Quigley described and has truly pushed me beyond my comfort zone, leading, I believe, to a real educational experience.

Two of my most uncomfortable experiences have occurred in the course of my work on a law reform campaign around the disclosure of mental health police records, a practice which violates the privacy of personal health information and leads to discrimination on the basis of a disability. Ironically, this is one of the projects at CLASP about which I am most passionate. Throughout this campaign, we have been working with members of the mental health consumer/survivor community. In July, we participated in Mad Pride, an event organized by various consumer/survivor groups that brings together artists and activists. We tabled our petition at the event, explaining the issue to attendees and gathering signatures. Later in the year, working on the same campaign, I attended a meeting of the Centre for Addiction and Mental Health's Empowerment Council organized in response to a discriminatory ad put out by a powerful union. At both of these events, I quickly realized just how uncomfortable I felt. In the moment, I had trouble identifying the reason for my discomfort. Looking back, I realize that I felt encumbered by my status as an outsider (similar to the experience I discussed in Lesson 3) and worse, I felt like a voyeur. I am very involved in this law reform campaign but my interest is more academic than personal. The consumer/survivor initiatives are (and this is a gross oversimplification) about taking back the labels, the experience and the power of mental illness from outsiders, including the medical and legal communities. Explaining the issue of mental health police records to Mad Pride participants and attending the Empowerment Council meeting, I felt as thought I had no right to be there.

I am still struggling with my role and my relationship to this particular project. I recognize what I can bring to this issue but I still am also very conscious of my status as an outsider, especially when I speak about this issue at conferences or public meetings. Through this experience of continuous self-inquiry and reflection, I have come to understand more fully the learning process in which I have engaged during my time at CLASP and which I can continue throughout my career.

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[29] Quigley, *supra,* note 14, 10.

G. Llewellyn's freaks: Still fighting after 75 years

While legal education may not have changed dramatically since Llewellyn's time, law students do have the opportunity to choose clinical education programs like CLASP and challenge the educational (and later professional) status quo. As I look toward the end of law school and the beginning of my career, I do not know where my career will take me but I do know that I will carry with me the lessons I learned at CLASP and proudly count myself among Llewellyn's freaks.

A Tiny Heart Beating: Student-Edited Legal Periodicals in Good Ol' Europe

By Luigi Russi and Federico Longobardi[*]

A. Introduction

From the perspective of a non-American jurist, student-edited law reviews seem to be one of the most distinctive features of the United States legal education system.[1] The development of law reviews in the United States has been particularly sustained in more recent years, with a literal proliferation of law (schools and law) reviews, both of general focus and subject-specific. With student-edited law journals making up the largest share of the legal periodical "market,"[2] publication in highly ranked student-edited law reviews has come to acquire great significance also in relation to the law faculty selection and tenure-granting mechanism.[3]

The preponderance of student-edited law reviews has, however, been accompanied by mounting criticism. Part of this criticism, and the one most relevant for this article's purpose, is that the inevitable inexperience[4] of student editors *vis-à-vis* their designated

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[*] Federico Longobardi, Email: federico.longobardi@gmail.com, authored Section B.I, and offered precious assistance and advice in the drafting of the remaining parts of the article, which were authored by Luigi Russi, Email: luigi.russi.business@gmail.com. Both authors are also indebted to Professor Attilio Guarneri of Bocconi Law School for his helpful advice.

[1] See Reinhard Zimmermann, *Law Reviews: A Foray Through a Strange World*, 47 EMORY LAW JOURNAL(EMORY L.J) 659, 660 (1998) ("[T]hey [*i.e.* law reviews] are one of the most remarkable institutions of American legal culture."). The only other place displaying a tradition of student-edited law reviews is Australia, where, however, one had to wait until the mid-fifties for the first attempt by the University of Tasmania. For further background on the history of law reviews, see Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON LAW REVIEW (AKRON L.R.) 15, 41-43 (1996).

[2] See posting by Matt Bodie on PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2006/01/project_on_peer.html (2 January 2006).

[3] James Gordley, *Mere Brilliance: The Recruitment of Law Professors in the United States*, 40 AMERICAN JOURNAL OF COMPARATIVE LAW (AM. J. COMP. L.) 367, 377 (1993) ("[I]n making a tenure decision, the faculty's entire capacity for sustained critical evaluation descends on the candidate's written work like a sort of laser directed landslide."). See also, Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE LAW JOURNAL (DUKE L.J.) 705, 752 (1990)("Many law faculties adopt in practice (though not in theory) a rule that if you publish some number of articles on clearly legal topics in well regarded law reviews, you will get tenure. Period.").

[4] See Richard A. Posner, *Law Reviews*, 46 WASHBURN LAW JOURNAL (WASBURN L.J.) 155, 155 (2006).

audience of legal academics and practitioners has translated in the adoption of questionable practices in the article selection process. For instance, the alleged use of an author's previous publishing history or his/her law school affiliation as proxies for article quality.[5] The same goes for the weight given to the length of the contribution and the wealth of footnotes included in a paper. The use of similar proxies, however, leaves room for criticism that editors fail to engage with the substantive issues which submitted articles touch upon, making the selection process ineffective and a little "opaque."

In this respect, European legal scholarship has long been a rather amused – yet distant – spectator, being dominated by the presence of peer-reviewed journals. In recent years, however, things have started to change. Since the birth of the Irish Student Law Review in 1991, student-edited law journals have started to grow in England, Ireland, Germany, the Netherlands and, most recently, in Italy.[6]

In view of the foregoing, the purpose of this Article is twofold. First of all, it attempts to try and "flesh out" what are the educational advantages of student-edited law reviews. For this purpose, particular attention is devoted to the importance of an experience as law review editors for a particular segment of legal professionals, namely academics. Secondly, a solution is proposed to try and enhance the educational value of an editorial experience for students, while simultaneously translating it into an added value for the rest of the legal community, by disclosing new opportunities for the improvement of the quality of legal scholarship.

For this purpose, Part B first of all outlines the role of law reviews as part of the legal education process and the faculty selection mechanism in the United States. Following this outline, it is then considered what repercussions the symmetric birth of student-edited publications in Europe may yield in the same areas of legal education and faculty selection. Part C presents a view on the possible new role of student-edited publications within legal scholarship, in response to recent criticism engendered by the growth of law reviews in the United States.[7]

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[5] See Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those With All the Power – Student Editors*, 59 SOUTH CAROLINA LAW REVIEW (SOUTH CAROLINA L. REV.) 175 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002640 (last visited 15 April 2008); Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results From a National Study*, 71 ALBANY LAW REVIEW (ALB. L. REV.) (forthcoming 2008), available at http://ssrn.com/abstract=988847 (last visited 15 April 2008).

[6] For a list of the existing European student-edited legal publications, useful for appraising the size of this new phenomenon, see, *infra,* Appendix.

[7] See*, e.g.,* Karen Dybis, *100 Best Law Reviews*, THE NATIONAL JURIST 22 (February 2008) (contending that the number of law reviews has become such as to enable publication of works of poorer quality, to the point that papers actually relevant to the legal debate could theoretically be found only in the best, *e.g.* top-100, law reviews).

In light of the considerations presented in the paper, we then conclude that the growth of student-edited law reviews in Europe may be regarded as a welcome new opportunity that may bring interesting changes in the education of tomorrow's European law teachers and in the quality of legal scholarship. Particularly so, if a proposed "European way" to legal periodical publication was able to gather support, in order to avoid some of the problems currently experienced in the United States. A "European way" that would take advantage of the current preponderance, in Europe, of peer-reviewed journals as opposed to student-edited ones.

More specifically, student-edited law reviews could be seen as a complementary resource to peer-reviewed journals in Europe, rather than a substitute, by offering a venue of "first publication," possibly in the form of student-edited working paper series. It would involve a first round of feedback, both formal and substantial. After this initial "chisel" work, published papers could then be submitted to peer-reviewed journals, in an attempt for authors to obtain additional substantial feedback, for the further improvement of the article at issue.

B. Law Reviews and the Ripening of Legal Scholars

I. The Birth and Role of Law Reviews in the U.S.

Law reviews were gradually introduced in the United States during the nineteenth century, as a source – mainly addressed to practitioners – of recent court decisions, local news and editorial comments in a legal writing style that made them more easily accessible, compared to "the tedious and encyclopaedic treatises of Blackstone, Kent and Story."[8]

In this context, the first student-edited law reviews appeared towards the end of the same century. Following the short-lived experiences of the *Albany Law School Journal* (1875) and the *Columbia Jurist* (1885), came the *Harvard Law Review* (1887), which "rapidly developed influence in academic and professional circles."[9] Yale (1891), Penn (1896), Columbia (1901), Michigan (1902) and Northwestern (1906) followed suit. "In 1937, there were fifty law reviews; by the middle of the 1980s, there were about 250."[10] Nowadays, the most comprehensive database of English-language legal periodicals,[11] maintained by John Doyle,

[8] Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS LAW JOURNAL (HASTINGS L. J.) 739, 741 (1985).

[9] *Id.*, 778-79.

[10] See, *supra,* note 1, 662.

[11] Available at http://lawlib.wlu.edu/LJ/index.aspx (Select "All subjects" and "US" in the scroll-down menus, tick the "Student-edited" box and press "Search" button).

librarian at Washington & Lee Law School of Lexington, Virginia, lists 614 student-edited journals, both general and specialized, in the U.S.

Such a rapid proliferation of law reviews is also partly attributable to the recognition, on the part of law schools, of "the educational benefits of such student-run operations."[12] Educational benefits which may be summarized as follows:

> [I]n writing the Note or Comment required of each law journal member, the student undertakes a research and writing responsibility unparalleled in the law school curriculum and rarely matched in the careers of most lawyers. The average student spends much of an entire year researching and writing her paper, usually with several upper-class journal members providing close supervision. As a matter of necessity, the student must master every avenue of legal research, both printed and computerized, and must quickly become proficient with the acceptable formats and citation methods found in the "Bluebook." The student must also become intimately familiar with the way lawyers structure legal arguments, in both a logical and persuasive sense. Finally, the student must condense her research into the clearest, most well-written piece she has ever produced, as this will most likely be the first time her work will be considered for publication in such a prominent forum.
>
> Not only do the law review members gain from writing their Note or Comment, but all of the other tasks that they must perform significantly sharpen their practical skills and enhance their ability to communicate at a scholarly and professional level. The process of editing works written by, and interacting with, the nation's leading legal scholars not only provides an educational benefit but instills one with a sense of confidence and legitimacy. Additionally, while cite-checking and editing these articles, students are often forced to track down obscure and ancient sources, a hassle to students, but a task that deeply indoctrinates them in advanced methods of legal research.[13]

Empirical research has also been undertaken in this respect. It is, in fact, possible to mention a survey of attorneys, law professors, and judges across the United States who were, among other things, asked to evaluate "how helpful they felt their law review experience was in several categories: enhancing the precision of their writing and editing,

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[12] See, *supra,* note 8, 779.

[13] Mark A. Godsey, *Educational Inequalities, the Myth of Meritocracy and the Silencing of Minority Voices: The Need for Diversity on America's Law Reviews*, 12 HARVARD BLACKLETTER JOURNAL (HARV. BLACKLETTER J.) 59, 65 (1995); See *supra* note 1, 20: A Note generally "analyzes a recent case that has either solved or created a legal problem."; See *supra* note 1, 19: A Comment, instead, "seeks to reveal a legal problem and then attempts to propose a solution to that problem by the end of the comment."

improving their ability to work with others, and teaching them substantive law."[14] Preferences were further scaled from zero to five, with zero meaning that the law review experience had not yielded any benefit to the interviewee, and five that it had turned out to be helpful in honing the skill in question. "Former law review members enthusiastically endorsed law reviews for their improvement of writing and editing skills. . . . [T]he mean response for judges was 4.02, for professors 3.73, and for attorneys 3.66."[15]

In sum, the role of student-edited law reviews can be synthesized as follows:

> [L]aw reviews offer an outlet for fresh and innovative ideas and provide a venue for students, professors, politicians and practitioners to discuss and debate issues of interest to legal-minded individuals. These publications unquestionably serve as the legal community's primary "marketplace of ideas."[16]

II. Law Reviews and Faculty Education in the United States

In a critical recollection[17] of the manner in which faculty recruiting takes (or used to take)[18] place in the United States, professor James Gordley of Boalt Hall Law School observed, as to the law review experience, how a newly-appointed member,

> [W]ho for over a year has had professors point out his deficiencies, can now point out theirs. He rewrites their articles, adding arguments of his own, deleting arguments he considers to be weak, criticizing the citation of authorities, and altering the style until the piece has the lawyerlike tone of a bond indenture. In his third year, if he becomes an officer of the law review, he has the final say about which articles should be published, and about how severely to treat a professor who stubbornly clings to his own arguments and style.[19]

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[14] Max Stier *et al*., *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors , and Judges*, 44 STANFORD LAW REVIEW (STAN. L. REV.) 1467, 1491 (1992).

[15] *Id.*

[16] See, *supra,* note 13, 59.

[17] See, *supra,* note 3. *Id.,* 384: The author's critical attitude towards faculty recruitment methods in the U.S. is evident in his closing evaluation: "Perhaps the best way for any of us to promote a flourishing of legal scholarship at our schools is to spend less time recruiting and more time thinking about law."

[18] Considering the referenced work was written more than a decade ago.

[19] See, *supra,* note 3*,* 370-71.

Despite the critical and analytical thinking skills which such a process may help students develop,[20] he seemed – however – to be rather sceptical in regard to the actual scholarly "fitness" of graduates educated in the law school system. In particular, his scepticism emerges from this statement regarding the way faculty recruitment takes place, criticising, "the way competition among law firms and law schools affects recruitment. To be the best, they try to hire and promote the best. Highly qualified graduates therefore command high prices but for much the same reason as thoroughbred colts: not because of what they have achieved but because of what they may achieve someday. . . . Bright people are hired before they are trained as scholars, given a status so high that they cannot get their training by working under a senior scholar, and given little time to train themselves. The same competitive forces that produced the attractive offer then demand that the law school get rid of them if they do not quickly show they can do first class scholarly work."[21]

In other words, it seems that academics hired right out of law school are simply unfit to take on the burdens of scholarly discourse. While this criticism goes to the heart of the way in which faculty recruitment is carried out, it is respectfully submitted that the picture it appears to draw of American legal education is overly dark, particularly when compared to legal education as it usually takes place in continental Europe.

True, J.D.s may need to "teach themselves" how to become true legal scholars, and need to do so fast to meet the deadlines for tenure. However, we mustn't forget to consider that faculty selection is taking place amongst students that – generally –might have spent little to no time outside law school. And yet, among the "false positives," there will inevitably also be "true positives," *i.e.* scholars that are able to find their way despite the lack of further postgraduate (*e.g.* doctoral) education. And this, we feel, is one of the merits attributable also to the law review institution, to enable at least some to "come out of their shell" early on in their academic career, gaining valuable years.

Trying to provide a more balanced reading of professor Gordley's view, it could then be said that the cause of the alleged "academic immaturity" of newly-recruited law professors in the U.S. may be found more in the abruptness and early stage at which the recruitment process takes place than in the actual ill-education that law school and – in particular – law review membership may provide candidates with.

Student-edited law reviews, instead, offer promising students a means to express themselves and be heard, learn skills which would otherwise be learned only later on in their scholarly career; as exemplified by the fact that:

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[20] See, *supra,* note 13.

[21] See, *supra* note 3*,* 380 (emphasis added).

> Similar to lead articles, student comments can be influential. Indeed, with some regularity, student comments have been so thorough and thoughtful that they have resulted in significant attention and impact. For instance, courts and scholars often cite favourably to student articles for their research and/or analytic value.[22]

In this respect, there is much to be said regarding the trend which the wave of student-edited law reviews may be bringing about in Europe.

III. Law Reviews and Faculty Education in Europe

It is a practice in European or, more accurately, Continental European[23] faculty recruitment that a particular relationship be established with a mentor, called *Doktorvater* or *Habilitationsvater* in Germany,[24] *Maestro* in Italy.[25] In Germany, in particular, this is probably due to the very time-consuming training required for a Doctorate and a further period of study called *Habilitation* that brings scholars in their late thirties ready for appointment.[26] In Italy, instead, although a Doctorate is all that is generally required to obtain a professorial appointment, it is the *maestro* who ultimately determines whether a certain "pupil" will or will not achieve tenure.[27]

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[22] See, *supra* note 1, 19. For a supporting statement, underlining how the lack of student-edited law reviews in the United Kingdom affected the faculty's publication experience, see Tony Weir, *Recruitment of Law Faculty in England*, 41 AM. J. COMP. L. 355, 359 (1993) ("First appointments being made at such a young age, it is unrealistic to expect applicants to have done much in the way of publication, perhaps a case-note or a book review. Editorial experience cannot be looked for, since the major law reviews are not run by students.").

[23] The authors' personal experience and research has been limited to Germany and Italy. Therefore, whenever the term "Continental European" is used to refer to a particular system of legal education or faculty recruitment, a reference should be read to Germany and Italy only. While, of course, this does not exclude that similar situations may arise in other contexts, the research and experience in our possession do not allow us to draw any broader conclusions.

[24] Jürgen Kohler, *Selecting Minds: The Recruitment of Law Professors in Germany*, 41 AM. J. COMP. L. 413, 419-20 (1993).

[25] Ugo Mattei & Pier Giuseppe Monateri, *Faculty Recruitment in Italy: Two Sides of the Moon*, 41 AM. J. COMP. L. 427, *passim* (1993).

[26] See, *supra,* note 24.

[27] See, *supra,* note 25, 435 ("New professors are coopted by *maestri* on the basis of gentleman's agreements. So one needs, first of all, to be the disciple of a *maestro*. A *maestro* teaches one how to write the graduation thesis or the doctoral dissertation, and how and where to publish the first papers. He suggests what to study and the topic of a book. He introduces the young scholar to editors and publishers. He entrusts the young scholar to deliver a paper at conferences where he was invited but cannot attend. The *maestro* is supposed to know the value of his disciple and the content of his writing, and he is supposed to defend him. In fact, it is the *maestro* who asks a faculty for a post for his disciple; he will vote and influence others to vote for committee members on the basis of their willingness to appoint his disciple.").

This state of, so-to-say, dependence between potential teachers and tenured professors within the faculty education and recruitment process does, in our view, also react on the general student attitude towards legal research in European Law Schools.

The professors' "hierarchical" pre-eminence over all other figures present in legal academia, in fact, often ends up putting an unintended but inevitable distance between students and teachers.[28] Continental law students are generally expected to study their textbooks and listen to lectures that do not generally require them to participate actively, but merely to listen and take notes for later study at home. The lack of student participation, in particular, is translated in very limited writing requirements: rarely do students have to write papers on particular topics and to later engage in a proper discussion thereupon. Besides writing, the conference-like nature of lectures in continental Europe also gives a more limited space for oral discussion, if any at all, than is available to American students, for instance, through the use of the Socratic method.[29]

It can then be inferred that, on a pedagogical level, the narrower space[30] for teacher-student interaction (both on a written and an oral level) likely translates in more limited development – in comparison to students educated in the U.S. - of those argumentative abilities which law students will need most: lawyers write and argue, and so do judges and professors.

With particular reference to written legal argument, the doors to its theory and practice generally open (for Continental European students interested in making legal scholarship their profession) as one undertakes a further academic degree (usually a Doctorate), under the supervision of a *maestro* or *doktorvater*.[31] While, of course, this leads to the

[28] See Oliver Unger, *ERAS-MUSS-NICHT*, Iss. 2/Art. 9, FREIBURG LAW STUDENTS JOURNAL (FREIBURG L. STUDENTS J.) 7 (2008) (remarking the higher level of interaction that a German law student on exchange at Oxford enjoys because of the lack of the *Lehrstuhlhierarchien* (German professorial hierarchy)).

[29] See*, e.g.,* Elizabeth Garrett, *The Socratic Method*, http://www.law.uchicago.edu/socrates/soc_article.html (stating how the purpose underlying the use of the Socratic method is "to learn how to analyze legal problems, to reason by analogy, to think critically about one's own arguments and those put forth by others, and to understand the effect of the law on those subject to it.").

[30] Not *all* teacher-student interaction is excluded in the Continental education system. In Italy, for instance, all students are required to produce a written dissertation – that may even amount to the length of a small book – and to later defend it in the degree-awarding ceremony. However, it is our opinion that a single big instance in which students are to complete a substantial written assignment (particularly if compared to the time students spend in conference-like lectures over the course of their education) still translates in lower writing abilities for fresh law graduates, in comparison to American ones. This, for the same reason that running a marathon once in a lifetime (and without previous training) still makes one a worse runner than someone who trains regularly, albeit on shorter distances. It is only practice that "makes perfect."

[31] See, *id.*, 435 (mentioning that the publication of a – so to say – disciple's *first papers* takes place under the supervision of a *maestro*.).

appointment of professors that have been able to benefit from the necessary time and – most importantly – guidance to become mature scholars,[32] it exacerbates the detachment of ordinary law students from legal writing and publication.

A clear symptom of this detachment is found with law practitioners in countries where such a "segregation" exists. These practitioners are generally disadvantaged in obtaining teaching positions.[33] It can be hypothesized that this happens because the education which practitioners receive (no research degrees are required to gain bar admission) does not generally afford them a chance to develop that depth in legal analysis which only a further career in the academia discloses.

Another indicator of the plausibility of the hypothesis herein sketched is the absolute preponderance of peer-reviewed journals,[34] in a manner that exacerbates the segregation between professors and "the rest" regarding participation in legal scholarship. In fact, peer-reviewed journals are the designated publication venue for professors or apprentice teachers: not as a matter of, so-to-say, a spirit of "caste," but rather as a consequence of the fact that the latter groups are usually the only ones possessing the necessary skills to publish papers that will have an impact.

In this respect, the birth of student-edited law reviews may be a sign that what has been a cultural barrier between students and active participation in legal scholarship may be starting to crumble in Continental Europe as well. The possible benefit is evident. On the one hand, the distinctively European tradition of "academic apprenticeship" which, after all, does help teachers in their intellectual ripening, may extend its reach to law students trying to publish their papers as well, providing them with a more rigorous intellectual and academic work-out early on in their educational path. This, in turn, might provide students with a better knowledge of what academic life is about, so as to confront them with a wider range of available professional choices upon graduation, thereby also increasing the pool of potential teachers and their overall "brilliance," if what one commentator said was, at least partially, true.[35]

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[32] Ugo Mattei & Pier Giuseppe Monateri, *Foreword: The Faces of Academia*, 41 AM. J. COMP. L. 351, 352 (1993) (A possible criticism "to the apprenticeship system based on the relationship between professor and pupil [is that it] could inhibit the development of new ideas.").

[33] Bernard Rudden, *Selecting Minds: An Afterword*, 41 AM. J. COMP. L. 481, 483-84 (1993) ("Not only does the bar play a small role in selecting academic professors, but there seems to be little recruitment of full-time professors from the ranks of the profession. This may be because . . . the scholars feel a certain disdain for the *pragmatici*.").

[34] See, *supra,* note 1, 660, 693 (Highlighting the international uniqueness of the American law review system, implying that peer-reviewed journals generally prevail elsewhere).

[35] See, *supra,* note 33, 486-87 ("[I]t would seem very likely that the number of able law students eager to become a law professor must be proportionately much smaller [in countries other than the U.S.] than the numbers ready to spend their lives as professors of some other field of learning. Since so many good students do not apply for law posts, one suspects that the average of the ability available in the pool of talent is lower than in those of

Additionally, the fact that more and – foremost - more experienced "pupils" might decide to undertake the path of academic apprenticeship might further increase their intellectual autonomy *vis-à-vis* the intellectual orientations of their respective *maestro* or *doktorvater*, in a manner that may help them "come out of their shell" in expressing their views (thereby favouring scholarly innovation). This way, the presence of a mentor would only serve its designated purpose: that of providing suggestions and constructive criticism, rather than the establishment of a form of cultural hegemony over tomorrow's ideas.

Last, but not least, the way students look at the law is inherently different from the way law professors do. While the latter, at least in Continental legal scholarship, are used to dealing with complexity and high doctrinal elaboration, students (and practitioners alike) generally require cleaner arguments, whose logical flow be apparent to the reader. In this respect, we believe that the onset of different student-edited publication venues where students decide who gets published, might provide a valuable alternative to the "professorial", more elaborate, yet sometimes more obscure, style of writing. Simplification does not always mean lesser scholarly quality. Instead, it may indeed help make scholarly thought accessible to wider scores of legal operators, first and foremost practitioners, making them pay attention to what Universities have to say, thereby bridging one often controversial gap between theory and practice.[36]

C. Re-Thinking the Role of Student-Edited Student Publications

I. The Limits of Law Reviews in the U.S.

While the introduction of American-style student-edited law reviews may prove beneficial for the European legal community in general, endorsement of this phenomenon cannot come without acknowledging the previous considerations of the drawbacks of the student-edited law review system and of possible alterations that may make it work more effectively for the European scholarly community.

First of all, it has been submitted that while the great educational value of law reviews for student editors may justify their maintenance, it might have done so despite the fact that offer exceeded demand.[37] This has, in turn, caused some commentators to observe how

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other subjects. It seems to follow that, by comparison with their colleagues in other faculties (and on the whole, and by and large, and present readers always excepted) law professors are stupid.").

[36] This is the spirit which animated the creation of the first law reviews in the United States; see, *supra,* note 8, 741.

[37] Harold C. Havighurst, *Law Reviews and Legal Education*, 51 NORTHWESTERN UNIVERSITY LAW REVIEW (NW. U. L. REV.) 22, 24 (1956) ("Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written.") (

the presence of too many law reviews in the U.S. might have eventually brought about an overall decrease in the quality of published scholarship.[38]

Additionally, the incredible amount of submissions top U.S. law reviews receive sometimes forces editors to consider other extrinsic data as a proxy for an article's quality.[39] In this respect, an author's previous publication history, or the law school he/she is affiliated with may sometimes doom an article to rejection at a highly ranked law review.[40] This - considering the role that publication in top-tier venues plays in the professor appointment and tenure process - does further contribute to making "the rich richer, and the poor poorer": teachers being appointed at lower-ranked law schools may find it harder to make their voices heard in the legal community, and to possibly gain recognition for the ideas they might have contributed to.

Finally, law reviews do not generally provide feedback as to the acceptance or rejection decision, so that, when faced with multiple rejections, authors are left wondering whether their long-awaited work has been rejected because the topic was not of interest, or because the volume was full or, in the worst case scenario, because it lacked academic rigour.[41]

It is this last point which, we feel, deserves the most criticism. Feedback is the very engine of scholarly creation and improvement. Leaving authors to wonder the causes of a possible rejection may, more often than not, spur them to keep seeking publication of the article somewhere else, while missing possible room for improvement.

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[38] See, *supra,* note 7, 26 (quoting professor Robert Jaris, Nova Southeastern University Law Center) ("'Nowadays, you could get anything published,' he said. 'I could publish my grocery list some law reviews are so desperate. The reality is [law school] deans should come out against so many law reviews and the number of times they publish.").

[39] See, *supra,* note 5, 5. For some sample figures, see Eugene Volokh, Questions for Law Review Articles Editors, 12 September 2005, available at http://volokh.com/posts/1126582538.shtml (last visited Apr. 15, 2008) (respondents to Professor Volokh's blog post speak of 80-100 submissions per week in the "high submission season").

[40] See Paul L. Caron, What Are Law Review Articles Editors Looking For?, 24 March 2006, available at http://taxprof.typepad.com/taxprof_blog/2006/03/what_are_law_re.html (last visited 15 April 2008) (mentioning the "prestige" of an author's employer as a possible influencing factor for law review editors).

[41] See Bernard J. Hibbits, *Last Writes? Reassessing the Law Review on the Age of Cyberspace*, 71 NEW YORK UNIVERSITY LAW REVIEW (N.Y.U.L.REV.) 615, 645 (1996) ("[T]hey [*i.e*. student editors] have increasingly refused to provide rejected law review authors with substantive written or even oral reasons for their rejection. There is little documentary evidence as to when editors began to abandon the practice of providing reasons, but anecdotes suggest that by the late 1970s it had died out at all but a few institutions, accelerated perhaps by the . . . professorial strategy of multiple submissions. Students were too pressed and too stressed to provide reasons or feedback. This deprived faculty of potential useful input and unfortunately helped to create an atmosphere in which it was easy to impute improper selection motives to student editors who no longer made even a pretense of offering evidence to the contrary.")

Eventually, the author feels she/he might have added a bullet to her/his curriculum vitae, by adding one more law review to her/his publications list. In cases, however, where a previous rejection has been caused by quality defects in the article (which later went unnoticed), a mistake hasn't been corrected and, limited though a certain a journal's circulation may be, this exposes the whole legal community to further spreading of imperfections or misconceptions which remained undetected at the lower-ranked law reviews that eventually took charge of the work's dissemination.

Namely, it is a known fact that, in writing an article, it is possible that authors may "get tunnel vision: they focus on the one situation that prompted them to write the piece, usually a situation about which they feel deeply, and ignore other scenarios to which their proposal might apply. This often leads them to make proposals that, on closer examination, prove to be unsound."[42] In this respect, one way to improve arguments about the law may be that of a critical self-reassessment of the authors' contributions, as the above-referenced paper seems to suggest.

However, another way to bring a fresh new look at somebody's argument would be that which has long been abandoned in the law review world, but cannot deserve enough praise: constructive feedback. In order to solve, at least part of, these problems, one prominent commentator proposed the substitution of law reviews with independent web publication by the authors themselves, cutting out the middle man.[43] The same author further proposed that, in order to prevent web-published works from becoming unfindable in a sea of information, "a legal academic institution . . . created, publicized, and maintained a Web site to which all law professors could submit or hypertextually 'link' their scholarly work. The site would be somewhat similar to an electronic archive insofar as scholars and others would access it to look for articles."[44] Today, this seems to us the role that has gradually been achieved by scholarship repositories such as, for instance, SSRN and Bepress.

[42] Eugene Volokh, *Test Suites: A Tool for Improving Student Articles*, 440, available at http://www.law.ucla.edu/volokh/ testsuites.pdf (last visited 15 April 2008).

[43] See, *supra,* note 41, 667-88.

[44] *Id.*, 675.

The drawback in such repositories, however, is that no substantive quality control is performed.[45] True, "the current law review system operates with minimal quality control in the generally accepted ('peer review') sense of that term."[46] In our view, however, this is not a sufficient argument to dismiss the need for "quality control" altogether.[47]

First of all, there still exist traces of quality controls in the way articles are currently selected by law journals. In particular, we are referring to the weight given to expedite requests. Lower-ranked law reviews generally receive less submissions and, therefore, it can be hypothesized that they use this "extra time" to actually read the submitted contributions. Once an author receives a publication offer from one such law review, she then "shoots" an expedite request upwards to other journals, that end up paying closer attention to manuscripts already judged to be of publishable quality. In this respect, one student editor has observed that "[t]he lower journal [sic] vet out the weaker articles and the cream rises to the top."[48]

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[45] As Hibbits himself recognizes; see, *id.,* 671-72.

[46] *Id.*

[47] In Bernard J. Hibbits, *Yesterday Once More: Skeptics, Scribes and the Demise of Law* Reviews, 30 AKRON L. REV. 267 (1996), professor Hibbits attempts to provide a counter-argument to the lack-of-quality-control criticism that has been made above in the text. In particular, he seems to argue that: 1) "quality in an electronic self-publishing system could be maintained via a system of *post hoc* reader comments . . . . Good articles would presumably receive good comments; bad articles would receive bad comments or no comments." (*Id.*, 295) (in a manner that, therefore, would not so much differ from the evaluation systems currently adopted by websites such as www.youtube.com, although with reference to different types of content); 2) "[i]n a self-publishing system, quality control would also be enforced by self-policing. . . . . [S]elf-interest would suggest that law professors post quality material lest they publicly embarrass themselves and do serious damage to their own academic reputation." (*Id.*, 297) It is respectfully submitted that such an argument might however display some criticalities. In fact, on the one hand, Hibbits correctly perceives how "[i]nstant dissemination of legal scholarship . . . has the potential of provoking instant reader responses which can reach a legal author directly, can reach her while her mind is still on her subject, and can reach her while she can still react and/or make revisions in light of comments received."(*Id.*, 280). In this respect, it is a known fact that the type of feedback that usually calls for an improvement or however a reassessment of a work's conclusions is generally a critical and – from the author's point of view – "negative" one. Yet, in a world without law reviews, authors' scholarly caliber would – *inter alia* - be derived from the relative success "in eliciting positive comments from many scholarly readers (or from a few high-profile ones)." (*Id.*, 300). Now imagine an author, particularly a relatively young one (*e.g.* a student – postgraduate or doctoral -, a young associate, a newly-hired professor), who was confronted with the option of publishing a work in progress in order to obtain feedback, but to do so with the risk of exposing himself/herself to the academic community's possibly negative judgment, which could chill her/his incentive to publish altogether (an interesting hint to the problem is done by Dan Markel, *Whither SSRN?*, 19 January 2006, available at http://prawfsblawg.blogs.com/prawfsblawg/2006/01/whither_ssrn.html (last visited 15 April 2008)). The intermediate solution consisting in the partial substitution of law reviews with student-edited working paper series (see*, infra,* p. 1140) could provide a viable intermediate ground, accommodating the needs of that (more or less conspicuous) segment of legal authorship that may demand some pre-emptive feedback, before actually "going public."

[48] See Posting by an anonymous Editor-in-Chief on The Volokh Conspiracy, http://volokh.com/posts/1126582538.shtml#19143 (13 September 2005).

D. A Proposal for the American Law Review System

In light of the above considerations, a new proposal for change can be made. Not a "drastic one" that would require doing away with law reviews but, on the contrary, one that enhances their role as disseminators of quality legal knowledge.

There is wide consensus on the fact that there are more law reviews than would actually be optimal to allow for the publication of quality scholarship alone. Additionally, it is the growing number of law reviews that may actually be the cause of the urge to "publish or perish" that hit law faculties across America in recent times, an effect (rather than a cause) of which might then be the decrease in overall quality of published articles.[49]

The usefulness of lower-tier law reviews as a vehicle of scholarship dissemination has therefore become limited, probably bringing more of an educational service to students than a benefit to the legal community. On the other hand, lower-tier journals have instead become a source of external benefits to the legal periodical "industry" on the whole, by screening out worse articles while opening the way for better ones to be accepted in more prestigious venues upon request of expedited reviews.

Why, then, not reduce the number of journals, substituting some with online working paper series? A first experiment thereof (albeit in Europe) already exists, and it is Bocconi School of Law Student-Edited Papers.[50]

These are the basic functioning rules that could govern such publication venues:[51]

> (a) substantial review of submitted contributions, as well as supplying constructive feedback to authors;[52] (b) no more bluebooking: this would enhance the time editors actually spend thinking about the intellectual merits of

[49] See, *supra,* note 41, 640.

[50] Available at www.bocconilegalpapers.org (last visited 23 June 2009). There actually exists another similar experiment, although outside the legal field: the concerned publication is WORKING PAPERS (est. 1996), available at http://www.pennworkingpapers.org/index.html. It is a journal published by graduate students in Romance Languages at the University of Pennsylvania, showcasing original works-in-progress by graduate students, giving them the opportunity to present their research in its preliminary stages and to receive feedback from colleagues

[51] All in all, we feel that direct provision of constructive feedback by the series' editors and the adoption of open submission policies - *i.e.* not restricting submission to specific groups of individuals - could become the distinguishing features of student-edited working paper series, in comparison to existing working paper series available at most law schools.

[52] *Cf.* Ronen Perry, *De Jure [sic] Park*, 39 CONNETICUT LAW REVIEW CONNTEMPLATIONS (CONN. L. REV. CONNTEMPLATIONS) 54, 58 (2007) (discussing the similar role of students in some Israeli law reviews, co-edited by students and professors), available at www.conntemplations.org/pdf/perry.pdf (last visited 8 May 2009).

> what they decide to publish, while disregarding a practice whose usefulness is, to say the least, debated;[53] (c) the possibility for authors to amend the accepted works even after publication; and (d) non-exclusive license, allowing later republication in one of the higher-ranked journals.

As to the first rule, it could be objected that students may lack the ability to offer pervasive or truly useful commentary. On the contrary, we feel it is possible that the assessment of the clarity of an article's "logical flow", or the detection of contradictory, apodictic, excessively broad or narrow statements are skills that students naturally acquire when engaging critically with their study materials in the course of preparation for any exam, trying to discover connections and uncovering contradictions.[54]

More specifically, the following stipulated definition could be adopted to clarify the meaning of "substantial" review: a scrutiny of the article's coherence, logical flow and – although limited to the capabilities of a student – academic soundness.[U1] This is a crucial aspect for two reasons: on the one hand, feedback on these issues is what is most likely to "turn around" a paper's quality. Secondly, students are not confined to the work of a copy editor, checking footnotes and proofreading for mistakes, something which hardly requires any legal knowledge. Instead, they become able to engage their specific legal knowledge in the reviewing process: pointing out potential weaknesses in an author's argument which they, as "apprentice legal professionals", are able to spot.

Of course, this may require authors to make their articles as self-contained as possible, leading authors, "in an effort to overcome the inexperience of student readers, [to] feel compelled to include large, expository sections that place their insight in the context of

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[53] See, *supra,* note 1, 675 ("The Bluebook, with its pedantic obsession with detail and zeal for regulation, has driven generations of reviewers to scorn and sarcasm, and generations of authors and (presumably) editors of law reviews to despair."); Paul Gowder, Blog Post, 12 February 2008, available at http://prawfsblawg.blogs.com /prawfsblawg/2008/02/too-many-law-re.html (last visited 15 April 2008) ("[I]t ought not to be called a worthwhile skill, for several reasons: - It's not something you need a lawyer to do. A paralegal can check to see if citations conform to the rules. . . . . - It's not objectively worthwhile . . . society does worse with the existence of a bunch of lawyers who are trained to check whether the comma is italicized than it would do if that training were not present. . . . .- It's overall bad for the poor fool who gets the training. I can't prove that, but I intuit that spending a couple years of one's life scrivening over a bunch of citations and being conditioned to enforce . . . little rules about things like citation signals will produce a person with a notable narrowness of spirit and sensibility.)" This policy is already followed by the law journal, based at Harvard Law School, UNBOUND (est. 2005), available at http://www.legalleft.org/ (last visited 31 July 2008).

[54] Henry H. Perritt Jr., *Reassessing Professor Hibbitts's Requiem for Law Reviews*, 30 AKRON L. REV. 255, 256-57 (1996) ("Respectable arguments can be made that some contributions to the literature could be appreciated better by experienced faculty members as opposed to law students, although one can make an equally persuasive argument that *good* writing can be appreciated by those without unusual levels of specialized education and experience.").

existing scholarship."[55] This, however, could only enhance the function of scholarly articles as reference material for practitioners and judges.[56]

Secondly, the lack of bluebooking could enhance, in our view, the educational usefulness of such editorial experiences. Future lawyers would in fact be given the opportunity to actually cultivate those skills of validating judgments and constructing arguments that will be most useful to them in their professional future outside law school, thereby recovering in full the educational value that originally justified the diffusion of student-edited law reviews.

Ultimately, authors, especially students and young scholars, could be given the opportunity to experiment and refine their works over time, taking the publication process "piecemeal." The fact that working paper series could already represent publication venues for curriculum purposes would in fact quench the urge to "publish or perish" that might often take over during the process of article drafting,[57] affording authors the opportunity to better focus on the merits of the works produced by them, with the possibility of re-publishing improved works in actual journals, that could then properly serve the role of providers of quality legal information.

In sum, high-quality legal scholarship is a matter of patience and meditation. What value does a mediocre article published in a "Shech-Tech Law & Truck Driving Law Review"[58] bring to the legal community? There are probably enough last-tier law reviews, which is why the proposal of a venue to publish works - with the "promise" of revising them and improving them further - might actually do the legal community a better service. Published working papers would need to make solid, internally coherent arguments, thereby entrusting working paper series editors with the preliminary quality screening that would otherwise be lacking in cases of spontaneous self-publication on the Web by authors themselves.

It is not good for the purpose of educating students and scholars to give them the illusion that they have published in a "law review" that nobody reads. Instead, they should be

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[55] See, *supra,* note 5, 4.

[56] *Id.*; see also, *supra,* note 1, 24 ("Another primary purpose of American law reviews is their function as reference material.").

[57] All the more so, if – over time –working paper series managed to differentiate from one another based on their "prestige" which would, in this case, come to depend on the relative importance of the law reviews where accepted working papers subsequently achieved publication.

[58] This fantasy name has been used in a humoristic recollection of the frustration authors often endure in the course of lengthy reviews by law journal editors; see, Brandon P. Denning & Miriam A. Cherry, The Five Stages of Law Review Submission, 1 September 2005, 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=796264#PaperDownload (last visited 15 April 2008).

directed to take the publication process step-by-step, to take their time to think and revise and, eventually, to publish in law reviews that people actually read. Having a work published in a working paper series would ultimately enable authors to decouple the "publish or perish" urge they may have, from the necessity of taking some time to give their work a second thought.

Finally, it is interesting to notice how similar experiments have already been undertaken. To our knowledge, *Unbound – Harvard Journal of the Legal Left* expressly abides by the first two of the suggested principles: "*Unbound* seeks to undo the traditional hierarchies of the student-edited legal journal. To that end, writers are responsible for their own citations, and student editors will provide substantive feedback on the arguments made. We're interested in intellectual interaction – not housekeeping for authors."[59]

E. A European way to Student–Edited Legal Publications?

The foregoing proposal with respect to the United States may actually have an even stronger impact and feasibility in the European context. Namely, the lack, until recently, of student-edited law reviews in Europe has led to a proliferation of faculty-edited journals. A concurrent factor responsible for this may be found in that not only are student-edited law journals a recent establishment, but they are also mostly online-only publications.[60]

Without student-edited publications, the sole presence of faculty-edited law journals may give way to criticism of this sort: "they can easily become hidebound, their boards can be 'captured' by particular viewpoints or schools of thought, and their editors can select articles on scholastically illegitimate or arbitrary grounds."[61]

Should the former, however, be complemented by student-edited publications, the tendency to "silence" unwanted opinions in faculty-edited law journals may decline, seeing that such opinions may nonetheless find their way to the public through other publication venues. Aside from this possible risk, it can instead be hypothesized that faculty-edited journals could turn out to be more effective in selecting papers based only on their intellectual merits, given the lower "deference" that faculty editors would be in a position to pay to extrinsic data (*e.g.* authors' affiliation, publication record, law school of graduation, *etc.*), in light of their generally more robust knowledge of topics dealt with in articles and of the usual practice of blind review in faculty-edited publications.

[59] UNBOUND – Submit at, http://www.legalleft.org/?page_id=6.

[60] Which, for a widespread and – probably – unjustified bias, may often be regarded as less influential.

[61] See, *supra,* note 41, 653.

In conclusion, it is submitted that, if coupled with student-edited publications, faculty-edited law journals could conclusively become Europe's most valuable asset.[62]

The lack, until recently, of student-edited publications in Europe has translated in the situation whereby the most regarded journals (*i.e.* journals with the highest impact factor and total cites) are peer-reviewed.[63] This, coupled with the fact that "peer-review" is often associated with a higher threshold of substantive revision,[64] make it reasonable to infer that a peer-reviewed article might, at least with respect to European legal publications, be regarded as more authoritative than an article published elsewhere.[65]
In this context, student journals should be seen as a great complementary addition rather than as a replacement of the former resources.

Not only, in fact, may they provide alternative venues for "discriminated" opinions, thereby opening up the legal marketplace for ideas. Additionally, if run with the spirit of working paper series,[66] they may further become a resource for non-academicians to refine their works for the purpose of publication in peer-reviewed journals. Working papers later passed on to faculty-edited journals could further display that clarity required in order to make students understand complex concepts, thereby also leading to a simplification of articles' structure and language, enhancing their possible use as reference material, much as it happens in the United States.

In sum, this would enable the creation of both alternative channels for the transmission of legal thought as well as powerful tools for the diversification of legal scholarship.

In particular, for European legal scholarship, this would in fact mean striking a successful balance between: (a) the maintenance of few, very authoritative and select publication venues, since a preliminary screening would be carried out by student journals, thereby

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[62] See, *supra*, note 1, 693 (In the U.S., instead, "[f]rom time to time there are suggestions to create a greater number of journals that are published by university professors rather than students, and contributions to which are thus approved by peers. Although such journals exist, they have not been able thus far to shake the traditional, and internationally unique, law review system.").

[63] See, Law Journals: Submission and Ranking, http://lawlib.wlu.edu/LJ/index.aspx (select "European Law" from the first scroll-down menu and "Non-US" from the one below it; tick "2008" in the IF and "Comb" columns on the right-hand side and press the "Submit" button) (displaying the ranking of journals publishing on European law topics: the first student-edited journal, the HANSE LAW REVIEW, is at place 17).

[64] See, Nancy McCormack, *Peer Review and Legal Publishing: What Law Librarians Need to Know about Open, Single-Blind and Double-Blind Reviewing*, 101 LAW LIBRARY JOURNAL (L. LIB. J.) 12-13, (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1339227 (last visited 8 April 2009).

[65] A hint in this direction stems from the fact that many legal academics tend to clearly highlight, in the respective publication records, whether a particular article appeared in a peer-reviewed or a student-edited journal.

[66] See, *supra* p. 1140.

allowing faculty-edited publications not to become engulfed with submissions;[67] (b) the creation of powerful educational opportunities for law students, who could really gain an insight on tomorrow's innovation in its making; (c) the introduction of "publication tools" (again, student-edited law journals) to both provide visibility to the works of authors generally left out from mainstream academia, and simultaneously provide feedback for the later improvement of such works for the purpose of later publication in more authoritative media.

Finally, the reputation of a publication venue would come to depend less on the "prestige" of the issuing law school but rather more on the number of working papers its editors managed to help successfully improve, later obtaining a slot on faculty-edited law journals.

True, Europe's student-edited law reviews are still a tiny heart beating in legal academia. Yet, in view of the foregoing, they represent one that could pulse new life into the "European way" of legal scholarship, possibly offering a model for the rest of the world.

[67] Despite the possible increase in scholarly production that may follow the onset of student-edited publications.

F. Appendix: European Student-Edited Legal Publications

Czech Republic

- COMMON LAW REVIEW (est. 2001), available at http://review.society.cz/index.php (last visited 23 June 2009)

England

- CAMBRIDGE STUDENT L. REV. (est. 2003), available at http://www.srcf.ucam.org/cslr/ (last visited 15 April 2008)

Germany (publishing in English)

- BUCERIUS LAW JOURNAL (est. 2007), available at www.law-journal.de (last visited 15 April 2008)
- FREIBURG LAW STUDENTS JOURNAL (est. 2007), available at www.freilaw.de (last visited 15 April 2008)
- GÖTTINGEN JOURNAL OF INTERNATIONAL LAW (est. 2009), available at http://gojil.uni-goettingen.de/joomla/index.php?option=com_wrapper&view=wrapper&Itemid=73 (last visited 5 April, 2009)
- HEIDELBERG STUDENT LAW REVIEW (est. 2004), available at www.studzr.de (last visited 15 April 2008)
- KONTAKT: KIELER OSTRECHTS-NOTIZEN (est. 1998), available at http://www.uni-kiel.de/eastlaw/cgi-bin/cms/front_content.php?idcat=60 (last visited 15 April 2008)
- MARBURG LAW REVIEW (est. 2008), available at http://law-review.de/ (last visited 5 April 2009)

Ireland

- CORK ONLINE LAW REVIEW (est. 2002), available at http://www.mercuryfrost.net/colr/index.php (last visited 15 April 2008)
- GALWAY STUDENT LAW REVIEW (est. 1998), available at http://www.nuigalway.ie/law/GSLR/ (last visited 15 Apr 2008)
- IRISH STUDENT LAW REVIEW (est. 1991), available at www.islr.ie (last visited 15 April 2008);
- UNIVERSITY COLLEGE DUBLIN LAW REVIEW (est. 2001), available at http://www.ucdlawreview.com/archive.htm (last visited 15 April 2008)

Italy

- BOCCONI SCHOOL OF LAW STUDENT-EDITED PAPERS (est. 2008) (a continuation of the ITALIAN LEGAL SCHOLARSHIP UNBOUND WORKING PAPER SERIES), available at http://www.bocconilegalpapers.org (last visited 5 April 2009)

Netherlands/Germany

- HANSE LAW REVIEW (est. 2005), available at www.hanselawreview.org (last visited 5 April 2009). The Hanse L. Rev. is actually published by a consortium of Universities, including Rijksuniversiteit Groningen (Netherlands), Bremen University (Germany) and Carl von Ossietzky University of Oldenburg (Germany).

'You Don't Have to Speak German to Work on the *German Law Journal*': Reflections on the Value of Being a Student Editor While Being a Law Student

By Danielle Allen & Bernadette Maheandiran[*]

Explaining the work of the *German Law Journal*[1] has become almost second nature to student editors; at one point in our legal careers we all have to justify to a colleague, a future employer, a parent, or potential student editor recruits the existence of a journal that, based on name alone, appears to centre on a civil law country in Europe at a North American law school that teaches the common law. Most of us have some version of this statement ready:

> The *German Law Journal* is a monthly, English-language, peer-reviewed, online law journal that focuses on the recent developments in German, European and International Law. The name reflects the Journal's original purpose: to create a monthly English legal periodical that would make German constitutional jurisprudence more accessible to the non-German speaking world. While the mandate of the Journal has grown over time, the name, however, has stuck.

This is often followed by an obligatory chuckle after we are asked the inevitable follow-up question: 'so you don't have to speak German to work on the *German Law Journal*?'

It comes as a surprise to many people unfamiliar with the Journal that the majority of our student editors does not speak German, have little connection with Germany and, in fact, work from locations an ocean away from Europe. It is hard to explain without an obvious sense of irony that the Journal relies on a solid contingent of native English speakers to edit the work of countless international contributors who may be writing in their second, third, or even fourth language. But this is just one example of the difficulty in trying to communicate what it means to be a student editor on the *German Law Journal*.

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[1] Or alternatively, the 'Journal' or 'GLJ' from this point forward.

What is even more difficult, and even more important to explain to colleagues, future employers, parents - but in particular - potential student editors, current law professors and aspiring academics, is the skills and exposure to material the Journal has given us, and how work on the Journal has changed the way we understand and approach law. While it is generally enough for a colleague and future employer to appreciate the obvious skills a student gains during editorial work – editing skills, language skills, footnoting skills, team-work skills etc. - in many ways, it is the intangible and hard to categorize experiences that really set journal work apart from what it is possible to learn in the classroom, and why student participation on journals is so important.

There has been many a criticism levelled at student participation on law journals, targeting everything from the way students are admitted to the staff of a law journal,[2] to the bias they show towards submissions,[3] to the conservative and homogenous journal layout and format they perpetuate,[4] to the inexperience students have with law, which has been likened to letting inmates run an asylum.[5] As part of the *German Law Journal's* special 10th anniversary issue on the *Transnationalization of Legal Education*, we want to rebut these criticisms with a closer look at what being a student editor while being a law student means from a student's perspective. The first section of this essay will be a candid and self-reflective exploration of how student editors engage with the *German Law Journal*, paying special attention to the intangible and often little discussed ways work on the Journal has complemented and pushed our legal analysis and thereby our legal education. We then situate the *German Law Journal* with the variety of forms and formats student participation on a legal publications take, noting the huge spectrum of levels of participation and degrees of student responsibility. Ultimately, despite criticisms of student involvement on journals, we argue that regardless of the kind of journal a student participates in, doing journal work during one's legal education provides a unique exposure and skill development that greatly complements classroom instruction and that, most importantly, cannot easily be replicated elsewhere.

A. Backstage at the *German Law Journal*

The *German Law Journal* began as a bi-monthly online publication, the brainchild of the current Co-Editors-in-Chief Peer Zumbansen and Russell Miller, who met as clerks at the

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[2] Criticisms of law reviews are well canvassed in Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 NEW YORK UNIVERSITY LAW REVIEW (N.Y.U.L. REV.) 615, 635 (1996).

[3] *Id.* at 641.

[4] *Id.* at 633.

[5] *Law Reviews: Do the Inmates Run the Asylum?* , STANFORD UNIVERSITY, Accessible at: http://news.stanford.edu/pr/95/950228Arc5352.html >, last viewed 8 May 2009.

Federal Constitutional Court of Germany. Over the next ten years, as the Journal's mandate grew, so did the number of members of the editorial board, recruited from among doctoral students in several countries with unique expertise in a range of domestic and comparative law fields and the willingness to collaborate in the fast production schedule of the Journal (mostly through email). Eventually complementing the editors were the student editors at the law schools in North America where the Co-Editors-in-Chief began to teach. These law schools had a large pool of English-speaking law students who could lend their language and editorial skills to improve and increase the scope of the Journal's production. At the same time, involvement on the Journal as student editors greatly complemented each law school's curriculum, and offered an additional extra-curricular activity where students could gain exposure to German, European and international law and develop the practical skills involved in putting a legal publication together. Currently, there are two teams of North American law students, one at Osgoode Hall Law School in Toronto, Ontario, Canada and one at Washington and Lee University School of Law in Lexington, Virginia, U.S.A. Each team alternates in assuming responsibility for editing and publishing the (now) monthly issue of the Journal.[6]

Placing the *German Law Journal* organization structure into the traditional flow chart is challenging. At the top, things are pretty straightforward and intuitive. Following the top level of Co-Editors-in-Chief are the Journal's editors, who are comprised of lecturers and professors from across Europe and North America. Together, the Editors and Editors-in-Chief collectively steer the direction of the Journal, solicit, receive and review articles submitted for publication, and decide which ones should be published. Below this, there are the two teams of student editors, one in Canada and one in the U.S., each one headed up by one of the Co-Editors-in-Chief. It is at the level of the student editors that a hierarchical and static view of the Journal as an organization becomes inadequate at describing how the journal works, and what the role of a student editor plays. At Osgoode, there has traditionally been less hierarchy and more flexibility in the way the student editorial team is run. This largely reflects the fact that the student editorial board is conceptualised as a unique learning experience, designed to be both responsive to student input and to the strengths and weaknesses of who is on the team at that exact moment, while also safeguarding an efficient workflow for a journal that deals with significantly more submissions than it publishes. In addition to the regular editorial positions, the Osgoode team comprises of a number of ad-hoc committee groups chaired by various students that are formed to research, plan, and coordinate symposia, special issues, and student-initiated projects based on student interest. The only tried and true division between student editors is the split between junior editors, who are students in their first year working on the Journal, and senior editors, who are in their second or third year with the Journal.

[6] It should be noted that between the 2002/03 – 2007/08 academic years, the U.S. student editorial team was based at the University of Idaho College of Law, located in Moscow, Idaho, U.S.A.

Having now introduced the Journal, this section will give a behind-the-scenes glimpse into a student editor's role and experience on the Journal, focusing on our experience at Osgoode Hall Law School. First we explain the student editors' responsibilities. Then we discuss the soft skills and experiences that being on the Journal provides a student editor, and how it enhances and adds a transnational and critical element to our legal education in ways that are not easily observable by someone outside the journal experience. From the outset, it is important to acknowledge that this is just one perspective, and that ours may not represent what other students have experienced on the Journal. Our perspective will certainly be limited to the unique nature of how the *German Law Journal* is structured as a hybrid between student and faculty-run, and the unique corporate personality it assumes each year depending on the particular group of students.

I. The Fine Details: Please Have Your Style Guides Ready

The weekly student editorial team meetings often resemble something between academic seminar and business meeting, with each week's agenda dependent on where we are in the year, what events are coming up, and what articles we have just published. Like the Journal itself, the production of the Journal takes place online without a physical office space, so our meetings are held in a seminar room at the law school. Our first meetings of the year are typically preoccupied with training new editors[7] by helping them to get a grasp of the editorial process and gaining some familiarity with German and European law and politics. The senior editors run a series of workshops on how to properly format and edit an article for publication. While all the Journal articles are peer-reviewed by the editorial board, the student editors are responsible for converting the document into the specified format so that it can be properly published in both PDF and HTML, as well as correcting grammar, making minor changes to organization and English language edits. A vital part of the editing process also involves student editors bringing the footnotes into the Journal style, which is similar but not identical to the *Harvard Bluebook of Legal Citations*. Interestingly, it is only the first month of Journal meetings that is devoted to the editorial and footnoting skills, the very skills usually assumed to make up the bulk of what a student on a law review usually learns as a student editor.

[7] The process of joining the Journal as a student editor at Osgoode has changed dramatically in the last year. In the 2006/07 and 2007/08 academic years, any student who was interested in joining simply had to attend the first meeting, sign up, and keep on coming. This meant that first meeting of the year was generally packed full of students interested in hearing more about the Journal, and that slowly over the next month numbers would shrink and students who enjoyed the meetings stayed on. With increased interest in the Journal, this year was the first year that required an application. Students were asked to submit a resume and cover letter explaining why they were interested in working on the Journal and what skills and experience they could bring with them. These applications are evaluated by the Osgoode Co-Editor-in-Chief, and Student Managing Editor, who look not at grades but rather at experience, interest, and attention to detail in the application. It would be accurate to observe that while the Journal remains more flexible and fluctuating than many similar publications, as its numbers grow participation in the Journal is becoming more formalized.

Generally, after the initial workshops by the senior editors, the majority of the editing skills of a junior editor will be gained through hands-on experience. The first assignment they will receive is to take an article in the form the contributor submitted it, edit it, and prepare it for publication. The junior editor is assigned a senior editor to review their work and give them feedback on how they have progressed before the junior editor sends the edits back to the author for approval. Regardless of how well an article is written, organized, and presented (though we often have observed that one learns the most when trying to improve a weaker article rather than a strong one), editing someone else's work gives a student editor a unique view into how different authors organize their thoughts and approach writing, and how some of these approaches can be understood as being more effective than others. This in turn hopefully improves the student editor's own writing style, and helps bolster the student's confidence in his or her own writing - useful when at the end of a first year as a junior editor, students are asked to write a book review or article for publication in order to qualify as senior editors and (if they wish) to take the journal for academic credit.

While articles are being assigned to editors to edit individually on their own time, student editorial meetings continue. The next few meetings provide an introduction to German law and politics, the European Union, and civil law more generally while the majority of the remaining Journal meetings focus on a number of different topics. Usually there is a seminar on comparative law, international law, and discussions about specific topics and articles we have just published. We also may, as a team, along with the Editor-in-Chief, substantively edit a contribution instead of it being submitted for the typical peer review process. One of the best meetings in our collective memory was where we went through an article and identified gaps and potential improvements. Although at times there was hesitation to make additions to the scholar's work, it gave us the ability to look constructively at a piece as it stands alone and step beyond understanding it as the work of an anonymous author.

As junior editors progress and become more comfortable editing pieces and communicating with authors, they are also expected to get more involved with the soft work already taking place on the Journal, such as working on one of the various ad-hoc committees (for example book review, style guide, fundraising) or helping research, plan and curate a special issue or symposium. This year the Journal, in celebration of its 10th anniversary, is planning a number of special issues that have been researched and planned by students (including this very issue on the *Transnationalization of Legal Education*). This is a decidedly creative process that allows student editors to gain knowledge on an evolving, comprehensive topic of interest and to make inroads into this newly discovered territory by formulating paper topics, structuring a table of contents and developing the narrative of the special issue. The preparation of a special issue allows the student editors to research and to identify authors on the cutting edge of a particular field and to solicit submissions. This involves the student editor engaging in negotiations, persuasions and gentle coercions with an author in order to align the editors' vision of how a particular

article would contribute to the special issue with the author's particular interest and capacity to contribute such a desired piece at that time.

II. Beyond the Footnotes, Beyond the Classroom

> All that is solid melts into air, you learned, but your four course books weigh fifteen pounds.[8]

The ability to edit, to footnote or write an article, to organize a symposium or to research a special issue are the more obvious skills gained by working on the Journal. But let's face it, no student ever burst through the doors of a law journal and declared that all they wish to do is footnote editing (if they have, please pass along their contact information to us!). Further, if conference organization or research skills are the only things to be gained by working on the Journal, there are numerous other activities at law school that would provide students with a similar skill set. There is something about the Journal and law journals in general that has added more than just those hard skills to the education of its student editors.[9] In order to decipher what that something is we shall try to describe the psyche of a law student.

The transition from undergraduate study into law school is simultaneously the most powerful and the most devastating adjustment for many law students, ourselves included. There is the pride that is associated with admission into a demanding institution where you will be trained to be dexterous, at ease, and precise within a highly technical set of rules and method of reasoning. At the same time, there is the anguish and confusion of having all of what you thought you knew (be it about the world, or about how to approach knowledge and concepts) be swept out from underneath you, and being reduced to a state much like a kindergarten student who must first begin with the ABC's of legal reasoning and legal principles before attempting to comment on or to grapple with even the simplest of everyday legal problems. Particularly in first year, what one student learned in their undergraduate post-colonial literature class seems to be about as relevant to legal studies as what another learned in introduction to computer programming. There are more options in the upper year program, but that – in first year – seems light years away. The most disorienting part of this process is that the emphasis on learning the technical and

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[8] DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, 2nd Edition, (1995) at 3. For an interesting comment on the importance of Duncan Kennedy's scholarship on legal education in the German context, and how trends have changed since the publication of Kennedy's little red book, see Victor Winkler, *Review Essay - Langdell's Prodigal Grandsons: On Duncan Kennedy's Critique of American Legal Education* 7 GERMAN LAW JOURNAL (GLJ) 717 (2006), Accessible at: <http://www.germanlawjournal.com/article.php?id=753>, last viewed 27 May 2009.

[9] It should be noted that the prestige of working on a law journal differs greatly between Canada and the U.S. In Canada, generally, participating on a journal is open to more students, and is not as determinative of employment opportunities in practice as it is in the U.S.

cognitive skills through rigorous case law and statute review in class often leaves no space to work towards a big picture understanding of what function law is trying to provide in a society and why legal models and legal principles have taken various forms and directions. This is not to say that policy or historical backgrounds are not addressed to varying degrees in the classroom, but there is no doubt that comprehending black-letter law takes priority and in many ways overshadows inquiry into why these rules are important. Carrying around fifteen pounds of textbooks everyday and competing with a classroom full of bright, well-educated and well-spoken peers to fully comprehend and apply detailed yet abstract principles, it's hard not to crave a genuine discussion of the political, cultural and historic context - or the 'why' - behind a legal framework.

GLJ editorial meetings often provided a refuge from the disorienting, disheartening, and generally overwhelming experience of the strict case and statute based teaching method in the classroom (not to mention an escape from the ever-present awareness of eventual evaluation against your peers). At GLJ meetings we were permitted, encouraged, and sometimes even ordered (!) to read legal commentary and academic analyses of the larger processes and issues at play behind and beyond cases, codes, and statutes, and to discuss and share what we thought about them. Moreover (and this is a unique feature to the Journal), as a journal dedicated to developments in German, European and International law, the types of articles and case comments we read pushed us to not only contemplate the material we covered in class in light of larger political and historical contexts, but also to understand the material as geographically and culturally specific.

For instance, at one memorable meeting in late 2006 we were all asked to have read three articles from our then hot-off-the-press special issue celebrating the republication of Martti Koskenniemi's seminal book *From Apology to Utopia: The Structure of International Legal Argument*:[10] David Kennedy's "The Last Treatise: Project and Person (Reflections on Martti Koskenniemi's From Apology to Utopia);"[11] Balakrishnan Rajagopal's "Martti Koskenniemi's From Apology to Utopia: a Reflection;"[12] and Martti Koskenniemi's response to the articles in the issue.[13] Professor Zumbansen (who heads the Osgoode student team) arrived to the meeting with a stack of all available copies of the book from the law library and chided us, for he took this as an 'obvious' indication that no one had borrowed the

[10] 2nd Edition, (2006), originally published in 1989.

[11] David Kennedy, *The Last Treatise: Project and Person (Reflections on Martti Koskenniemi's From Apology to Utopia)*, 7 GERMAN LAW JOURNAL (GLJ) 982 (2006). Accessible at: <http://www.germanlawjournal.com/article.php?id=772>, last viewed 15 May 2009.

[12] Balakrishnan Rajagopal, *Martti Koskenniemi's From Apology to Utopia: a Reflection*, 7 GERMAN LAW JOURNAL (GLJ) 1089 (2006). Accessible at: <http://www.germanlawjournal.com/article.php?id=779>, last viewed 15 May 2009.

[13] Martti Koskenniemi, *A Response*, 7 GERMAN LAW JOURNAL (GLJ) 1103 (2006). Accessible at: <http://www.germanlawjournal.com/article.php?id=781>, last viewed 15 May 2009.

actual book to read before the meeting. It was clear among us junior editors (then only four months into law school) that this was our first time reading Koskenniemi, Kennedy, or Rajagopal, let alone a treatise on international legal reasoning. In the classic Socratic style of GLJ meetings – filled with awkward silences at first and then progressing to more free flowing discussion - we started by slowly discussing each piece individually. In particular, we were asked to think about the author's background and the different perspectives that came across, be it geographic (European, South Asian, or North American), professional (practitioner, academic, diplomat, law professor), temporal (what were the formative legal events for each author?), or stylistic (self-reflective, theoretical, anecdotal). Step-by-step we began discussing how each piece related to the other, and what consideration of all three pieces in conversation said about the field of international law and the changes since the first publication of Koskenniemi's book. It forced us to reflect upon and articulate the tension created when one person approaches a set of foreign or international legal structures from a distinct and culturally specific legal education and background. The strength of this position flows from the ability make observations about a situation without being overly influenced or clouded by unspoken assumptions rooted in the situation. Often a certain degree of unfamiliarity can make room for novel or illuminating commentary. The weakness, of course, is that try as one might, it is impossible to overcome or to shed our own limits of perspective and conceptual understandings, and often observations will import their own assumptions and methodologies. In short, the exercise asked us to engage with law in a comparative and deconstructivist manner, yet without undermining the entire project of law or regulation but rather adding a new appreciation for its legacy of complexity and struggle.

And this is just one example among countless others to demonstrate how participation in the Journal added a comparative, international, and sub-textual element to our legal education, and acted as a small but important provocation to the weighty authority implicitly pronounced by the domestic sources of law we learned in the classroom. Reading, editing, and discussing articles about how a similar crime is punished and prosecuted in one State compared to another, or how private law and public law are divided in civil law and common law systems, and then reflecting on how this compares to the domestic institutions and procedure we learned in a class made it more obvious that a certain legal solution is but one choice among many in distributing obligations and entitlements between different parties and actors. Additionally, these discussions highlighted the fact that the rules and law we were being taught, while presented as rather rigid and unquestionable principles in the classroom, were neither static nor universal.[14] To gladly accept this unsettling rupture so early in an already overwhelming time in a law

[14] These discussions were often followed up by an email with references to literature on the topic for those who wanted to read more. In this case, see Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARVARD INTERNATIONAL LAW JOURNAL (HARV. INT'L L.J.) 411-455 (1985), and Peer Zumbansen, *Comparative Law's Coming of Age? Twenty Years after 'Critical Comparisons'*, 6 GERMAN LAW JOURNAL (GLJ) 1073-1084 (2005), Accessible at: <http://www.germanlawjournal.com/article.php?id=614>, last viewed 21 May 2009.

student's life may seem like a tall order, but the work on the Journal in many ways satisfied a desire to have a space to talk about law in ways that would seem downright indulgent in a first year contracts, torts, or civil procedure class. Yet, paradoxically, the provision of this space to reflect and discuss reinforced the importance of learning and mastering the detailed and technical rules we were presented with in class, and accepting that these building blocks were essential to our education - the best articles we read demonstrated that to really make an accurate and compelling argument about the big picture required a thorough understanding of the legal technicalities to begin with.

Work on the Journal not only exposed us to authors and subject matters that we had never encountered before, but it allowed us to develop hard and fast editing, citation, communication and team-work skills that went hand-in-hand with the practical requirements of journal publication and distribution. In this way, the Journal provided a rather unusual setting where it was necessary to jump back and forth between ideas, and the practical realities and skills required to present and contrast these ideas in a written publication. At the tips of everyone's tongues at a meeting were not only comments about the content of the Journal, but also the style, manner of presentation, juxtaposition of contrary interpretations, and, of course, the correct way to footnote a case or what size font the article title should be in. Student-initiated digressions into how *The New Yorker* was run during the early Harold Ross years, bets on the number of cases considered by the Supreme Court of Canada in a year versus the Federal Constitutional Court of Germany,[15] or how a novel we read last summer (for who has time to read novels during the semester!) or a film we saw last weekend is relevant to the discussion were equally as welcome as practical tips that made editing more straight forward, or smart observations about an author's thesis. Further, since there is a mix of first, second and third year students who were generally active in other specialized programs in the school (such as working at one of the two legal clinics, going on exchange, or participating in an aboriginal or criminal intensive program), the wealth of experiences brought into both the practical and theoretical problem-solving tasks, and connections made between seemingly disparate skill-sets made our meetings even more collaborative and instructional. As such, working on the Journal carried our knowledge of and appreciation for law and legal argument beyond proper citation and footnotes, and beyond the well-worn expectations of a law student in the classroom.

[15] Answer: on average the Supreme Court of Canada delivers 80 decisions per year and considers approximately 600 applications for leave to appeal, the Federal Constitutional Court of Germany considers 5 000 complaints annually. See The Supreme Court of Canada, *Answers for Teachers*, Accessible at: <http://www.scc-csc.gc.ca/education/kit-trousse/questions/ans-rep-eng.asp>, last viewed 15 May 2009; The Federal Constitutional Court, *Organization*, Accessible at: <http://www.bundesverfassungsgericht.de/en/organization/organization.html>, last viewed 15 May 2009.

B. Centre Stage in a Discussion over the Value of Student Participation in Law Journals

After a backstage look into how the *German Law Journal* runs and a discussion of the skills and exposure it can give a law student that go well beyond what they are taught in the classroom, the question that now moves to centre stage is of what value to a legal education is student participation in law journals? With this in mind, we now step back and connect what a student editor's experience on the Journal in particular can tell us about the value of student participation in law journals more generally.

I. Dual Citizenship: Locating the German Law Journal

Being a student editor on the *German Law Journal* is a rather unique experience. On the one hand, as described above, the Journal is headed and guided by faculty, and decisions on what articles to publish and what directions the Journal will take rests squarely with them. On the other hand, student editors are heavily encouraged to take on responsibility for planning special issues and soliciting articles for these issues. In this way, the Journal is a hybrid of faculty and student initiatives, making it hard to definitively categorize as 100 per cent faculty or 100 per cent student-run. In addition, the Journal meetings are run as quasi-academic seminars, where we discuss articles and ideas while also addressing the regular business of the Journal. While the *German Law Journal* resembles the experiences of other law journals, it is certainly in a category of its own. It is therefore important to situate our journal experience within the context of other student editor experiences both at Osgoode and internationally in order to better pinpoint the value of student participation in law journals. It should be noted from the outset that our research is unfortunately limited by the fact that there are very few 'backstage' details of how other journals conduct their business. Besides the occasional 'history of' article written by past and current staff members,[16] most of the information about how journals are run is only marginally addressed on publication websites. Further, some journal publications do not have information readily accessible on the Internet.

The GLJ is one of three law journals that publish out of Osgoode Hall Law School. The oldest running journal at Osgoode is the *Osgoode Hall Law Journal* (OHLJ).[17] Founded in 1958, the OHLJ is the most traditional law review at Osgoode. Released quarterly, it publishes academic articles, case commentary, book reviews and special issues in a hard copy format. It is headed by a faculty Editor-in-Chief and staffed by student editors who apply to join the journal in first year. Student editors at the OHLJ are responsible for

[16] See, for example, Emilio S. Binavince, *Introduction: The Founding of the Ottawa Law Review*, 6 OTTAWA LAW REVIEW (OTTAWA L. REV.) 12 (2006); Barry M. Singer et. al., *Reflecting on the Past 70 Years*, 69 SASKATCHEWAN LAW REVIEW (SASK. L. REV.) 277 (2006); or Malcolm MacLaren, *A History of the University of Toronto Faculty of Law Review*, 55 UNIVERSITY OF TORONTO FACULTY OF LAW REVIEW (U.T.FAC. L. REV.) 375 (1997).

[17] *Osgoode Hall Law Journal,* Accessible at: <http://www.ohlj.ca/on>, last viewed 3 May 2009.

checking all of the footnotes in articles, and also hold meetings to discuss which submissions to the journal should be published. The *Osgoode Hall Review of Law and Policy* (OHRLP) is the newest addition to legal periodicals at Osgoode.[18] It was started in 2007 by a group of Osgoode students who wanted a journal to showcase articles by student authors. Managed by students, and assisted by a faculty advisor, the OHRLP publishes online bi-annually.

In addition to the three law journals, there are two online blogs that are run out of Osgoode. First is *The Court.ca*, where a team of student and faculty editors post short comments on decisions of the Supreme Court of Canada (or invite relevant scholars to post commentary of their own) and provide timely analysis on recent decisions and discuss the legacy of past decisions.[19] Headed by one faculty member, *The Court.ca* is staffed for the most part by student editors who, after being selected as part of the editorial team through an application process at the beginning of the academic year, agree to write one post per month. Readers are able to post short responses and replies to posts in a moderated discussion forum. The second online blog is *IPLogue*, which addresses intellectual property law issues.[20]

Taken together, these publications demonstrate the continuum that exists from the more informal, flexible and quick-paced production of online legal publications such as *The Court.ca* and *IPLogue,* to the more formal, slower-paced and traditional publications such as the OHLJ. Each of the formats has different strengths and weaknesses. For instance, the OHLJ does not have the capacity to be as responsive as *The Court.ca* given that each submission takes considerably longer to publish and is not produced in a format that allows readers to interact with pieces. However the OHLJ is firmly established in the Canadian and transnational legal community by publishing well-written and thoroughly researched academic articles. The *German Law Journal* is situated somewhere in the middle of this continuum: it publishes monthly and only online, which allows the Journal to solicit pieces on events as they happen (as *The Court.ca* does) while still retaining high quality writing and research standards, similar to a traditional law journal. Presently, the Journal is ranked as the world's leading online legal periodicals,[21] it is anonymously peer-reviewed in double-blind manner and rejects about 60-65 per cent of all submissions.

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[18] *Osgoode Hall Review of Law and Policy*, Accessible at:<http://ohrlp.ca/index.php> last viewed 21 May 2009.

[19] *TheCourt.ca*, Accessible at:<http://www.thecourt.ca/>, last viewed 3 May 2009.

[20] *IPLogue*, accessible at: <http://www.iposgoode.ca/ipilogue/>, last viewed 3 May 2009.

[21] See the 2008 survey of *Law Journals: Submissions and Ranking,* Washington & Lee University School of Law, under the categories "peer-edited" and "online only", accessible at: <http://lawlib.wlu.edu/LJ/index.aspx>.

Canvassing the different types of legal publications at Osgoode Hall Law School also provides some insight into the different roles and levels of participation students can have in legal publications. Rather than picturing a spectrum, the different degrees of student participation are better mapped on a checkerboard since each publication relies on student editors for different tasks. At *The Court.ca*, for example, student editors are responsible for everything from research, to writing, to editing, and finally posting their work on a specified schedule. At OHRLP, students are responsible for everything from soliciting and accepting articles, deciding which articles to publish, and editing the work. At OHLJ there is a more formalized structure, as students have various positions in the journal and degrees of responsibility. During our time at the *German Law Journal*, beyond editing articles and communicating with authors, student responsibility has been much less formalized and very flexible; the level and type of student responsibilities in many ways depends on student initiated ideas and projects - 'the sky's the limit,' as the saying goes.

Characterizing the *German Law Journal* as a hybrid, or 'dual citizen' - as half student-run/half faculty-run, and half traditional law journal/half quick-paced online publication - translates well when we expand our comparison to legal publications across Canada and internationally. In Canada, the landscape of legal publications is rather distinct, and, until very recently, not often written about or analysed.[22] Legal scholarship in Quebec, Canada's bijural province where private law is governed by the civil legal tradition, is published mainly in *revues juridiques*. These are strictly faculty-run publications that do not involve student editors in the process. One Canadian legal scholar has suggested the lack of student participation in law journals in Quebec stems from "civilian scholars' deeply rooted conviction that… legal scholarship is the exclusive business of academics."[23] This is based on the deference judges show academics in the interpretation of legal codes and the development of the law itself in the civil legal tradition. In English-speaking Canada there is a combination of faculty-run and student-run law reviews, with the majority, however, displaying some form of student participation. Interestingly, for a significant part of the 20th Century, legal publications were dominated by national and provincial bar associations in Canada.[24] The tradition of university-based law reviews is relatively new, with the first beginning after World War II,[25] and the number of journals starting to flourish in the late 1960s.[26] What is common between both the common and civil law journals in Canada is

[22] Bruce Ryder, *The Past and Future of the Canadian Generalist Law Journal*, 39 ALBERTA LAW REVIEW (Alta L. Rev.) 625, 625 (2001). This has since changed, with a symposium on Canadian Law Review Experience held by the Alberta Law Review in 2001 (of which the above article was a product of), and by the first national conference of Canada's student-edited law reviews at Queen's university in 2005.

[23] Jean Leclair, *A Review of Law Reviews: Comments of a Contented Victim*, 31 QUEEN'S LAW JOURNAL (Queen's L.J.) 385, 391 (2005).

[24] *Supra,* Binavince (note 16) at 12.

[25] Donna Greschner, *Law Review as Cultural Narrative*, 79 ALBERTA LAW REVIEW (ALTA. L. REV.) 616, 618 (2001).

[26] *Supra* Binavince, (note 16) at 12.

that almost all are peer-reviewed.[27] This is also the case in Australia, where a disproportionate number of university law reviews are peer-reviewed, often by a double blind procedure (as is the case for the *German Law Journal* itself). The referees, who are generally academics, are responsible for the selection and content of the journal articles.[28] By contrast, in the United States there is a long-standing tradition of university-based student-run law reviews that do not engage in peer-review, where students are ultimately responsible for the selection, content and stylistic editing of the journal articles.[29] This form of law review as an institution has been the subject of a vast amount of scholarship. Furthermore, in the last thirty years there has also been a proliferation of faculty-run specialty journals. Some of the law reviews that emphasize the student-centered nature of their publication, such as the *Administrative Law Review* at the Washington College of Law,[30] or the *George Washington Law Review*, [31] do have some sort of faculty participation. Nevertheless, this participation does not eliminate the gate-keeping function of the student editors.

With few exceptions,[32] student participation in law journals outside of North America and Australia is generally limited to journals that are created with a mandate to only publish student-written articles. In the United Kingdom, the model of "by students, for students" is advocated for its student-run journals. *King's Student Law Review*,[33] *Oxford University Commonwealth Law Journal*,[34] the *University College London Jurisprudence Review*,[35] to

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[27] *Supra* Greschner (note 25) at 389.

[28] The Honourable Justice Michael Kirby, *Welcome To Law Reviews* 26 MELBOURNE UNIVERSITY LAW REVIEW 1 (2002). Accessible at: <http://www.austlii.edu.au/au/journals/MULR/2002/1.html> last viewed 26 March 2009.

[29] For example, see *Harvard Law Review,* Accessible at: <http://www.harvardlawreview.org/about.shtml>, last viewed 20 May 2009; *Supra, Administrative Law Review* (note 30); *Supra, George Washington Law Review* (note 31) *NYU Law Review,* Accessible at: <http://www.law.nyu.edu/journals/lawreview/masthead/index.htm>, last viewed 20 May 2009.

[30] *Administrative Law Review*, Accessible at: <http://www.wcl.american.edu/journal/alr/board.cfm>, last viewed 22 May 2009.

[31] *George Washington Law Review,* Accessible at: <http://docs.law.gwu.edu/stdg/gwlr/contacts.htm>, last viewed 20 May 2009.

[32] For example, the *Ateneo Law Journal* (based in the Philippines), Accessible at: < http://www.ateneolawjournal.com/>, last viewed 21 May 2009.

[33] *King's Student Law Review*, Accessible at <http://www.kslr.org.uk/editorial.html>, last viewed 8 May 2009.

[34] *Oxford University Commonwealth Law Journal,* Accessible at: <http://www.law.ox.ac.uk/ouclj >, last viewed 8 May 2009.

[35] *University College London Jurisprudence Review*, Accessible at: <http://www.ucl.ac.uk/laws/jurisprudence/ jurisprudence-review/index.shtml >, last viewed 8 May 2009.

name a few,[36] are student edited and accept only submissions by students or recent graduates. Germany appears to be one of the only continental European countries that has attempted to adopt student participation in law reviews. *The Bucerius Law Journal*,[37] the *Heidelberg Student Law Review*[38] and the *Göttingen Journal of International Law*[39] are examples of law reviews that envision student editorial teams with faculty participation. However, only the *Göttingen Journal of International Law* seeks submissions from established scholars whereas the others centre on student-written articles.[40] Beyond journals dedicated to student-written articles, there has been opposition to student-run law journals accepting articles by faculty members in Europe and the U.K., most likely owing to the fact that legal education is undertaken by students as a first entry degree, as opposed to the US and Canada, where an undergraduate degree is typically required. However, in Australia, where professional legal education consists of a four-year degree for students without a prior undergraduate degree (and a three-year degree for those that do), student-run law journals that accept faculty-written articles are the norm.[41] This is likely due to the system of peer-review Australia has adopted, as discussed above.

What this short review of student participation in legal publications worldwide suggests is that participation is by no means universal or the accepted standard. Still more, within the countries where student participation is the norm, there are diverging forms and types of participation. Some journals limit student participation to strictly editing and formatting articles under the supervision of faculty, while others are 100 per cent student-run - where students are responsible for also selecting articles to publish and coordinating the logistics of every issue. Even within the same publication, student participation and expectations will change over time depending on how the journal runs, who the members are, and the institutional traditions of the journal itself. In a history of the *University of Toronto Faculty of Law Review* (UTFLR), one past Editor-in-Chief, Malcolm MacLaren (himself a long time member of the *German Law Journal* editorial board), charts the way the UTFLR adjusted

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[36] See also, *Cambridge Student Law Review,* Accessible at: <http://www.cslr.org.uk/ >, last viewed 8 May 2009.; *the UCL Human Rights Review*, Accessible at: <http://www.uclshrp.com/review/ >, last viewed 8 May 2009; *Trinity College Law Review,* Accessible at: <http://www.trinitycollegelawreview.com/ >, last viewed 8 May 2009*.; Irish Student Law Review*., Accessible at: <http://www.islr.ie/ >, last viewed 8 May 2009.

[37] *Bucerius Law Journal*, Accessible at: <http://www.law-journal.de/About_us.171.0.html >, last viewed 8 May 2009.

[38] *Heidelberg Student Law Review*, Accessible at: <http://www.studzr.de/pagev2/index.php5?p >, last viewed 8 May 2009.

[39] *Göttingen Journal of International Law,* Accessible at: <http://gojil.uni-goettingen.de/joomla/index.php?option=com_wrapper&view=wrapper&Itemid=97 >, last viewed 8 May 2009.

[40] *Id.*

[41] Degrees in Law, *Council of Australian Law Deans,* Accessible at: http://www.cald.asn.au/slia/Legal.htm#Degrees on 26 May 2009.

with the expectations of legal education and with the changing types of articles that were being submitted.[42] For instance, from the 1960s onward, attitudes about the role law played in society and a significant increase in "law and …" writing saw many changes not only to the UTFLR, but also to law school curriculum as well. As seminars and workshops became more common in law school, the UTFLR introduced a law review seminar where faculty and students could engage in dialogue about particular topics and publish pieces that followed the discussions.

Despite such a diverging range of experiences for students on law journals across time and space, there is still enough that makes a legal publication similar to accept that there is a significant degree of crossover of skills to be gained on journals. Though every journal may not have a seminar portion, or an exposure to comparative or international material, there are still a number of intangible skills that exposure to academic material can offer a student that they will not find in the classroom. Critical thinking about the project of law as a whole and how technical rules and cases learned in the classroom relate to the big picture, essential to the legal education of any student, are often by-products of being exposed to numerous legal commentary, draft versions of manuscripts, and to the curatorial element behind each issue of a journal. With this observation we turn to a discussion of how our experience on the *German Law Journal* can be extended to an evaluation of the value of student participation in law journals more generally.

II. Allowing "the Inmates [to] Run the Asylum?"[43] *Addressing Criticisms of Student Participation in Law Journals*

Perhaps the most cited law review article on law reviews is Fred Rodell's *Goodbye to Law Reviews.*[44] Published in 1936, Rodell's infamous critique, "[t]here are two things wrong with almost all legal writing. One is its style. The other is its content,"[45] still holds true for many critics of the enterprise of law journals. Much of the blame for the follies of law reviews is laid squarely at the feet of student editors of student-run law journals. The most prominent of these criticisms is that student-run law reviews bypass the peer-review system and allow students, the least experienced members of the field of law, to be the gatekeepers for what gets published.[46] After all, students are by definition in the process of

[42] *Supra* MacLaren (note 16) at 387.

[43] *Supra, Law Reviews: Do the Inmates Run the Asylum?* (note 5).

[44] Fred Rodell, *Goodbye to Law Reviews,* 23 VIRGINIA LAW REVIEW 38 (1936). In 1962, Rodell reworked his theme in Fred Rodell, *Goodbye to Law Reviews — Revisited*, 48 VIRGINIA LAW REVIEW 279 (1962).

[45] *Id.*

[46] Michael Vitiello has divided the critique of student-run law reviews into two camps. The first critique the elitism and undemocraticness in the way in which law reviews hire new student editors; the second suggests that student editors lack the expertise to address the interdisciplinary turn in legal scholarship (the 'law and …'

learning the law; they are likely just beginning to understand the basics of law, and would not have enough knowledge to understand the intricacies of a specific field of law in order to decide whether or not a specific article has enough merit to be published. This situation is unique to the field of law whereas in other fields, the most prestigious journals are edited by specialists in that field.[47] In the publish or perish world of academia, this obviously affects emerging scholars who want and need to have their articles published. Therefore, it appears that students are given far too much control over the fates of faculty. The second main criticism posited by critics is that the system of editing by student editors promotes over-annotated articles that are homogeneous and do not challenge the prevailing wisdom.[48] This is owed to the fact that student editors are obsessive about citations "in order to create the impression that everything in the article is proven fact."[49]

These criticisms weigh heavy indeed and challenge the value of law reviews as providing academic analysis to the judiciary and the bar. Nevertheless, they must come with some caveats. From our survey, it is apparent that purely student-run law reviews without peer-review are a rarity outside of the United States, and that there are a host of other types of student participation in journals that involve higher levels of participation by faculty.[50] Further, critics tend to make the assumption that all journals are structured in the same fashion. Here, too, our survey shows otherwise. The double-blind, peer review system used on most Canadian and Australian law journals or the European "by students, for students" model shows that there are many different ways to organize a law review.

It is undoubtedly true that students are not specialists. To argue that students would be capable of editing a piece in the manner of a faculty member who has been exposed to the relevant texts so as to be able to challenge a scholar to go further with her work would be

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articles) and further perpetuate conventional writing. See Michael Vitiello, In Defense of Student Run Law Reviews, 17 CUMBERLAND LAW REVIEW (Cumb. L. R.) 859 (1986).

[47] *Supra,* Hibbitts (note 2)

[48] See *Supra,* Rodell (note 44); *Supra,* Greschner (note 25); *Supra,* Leclair (note 23); *Supra,* Hibbitts (note 2)

[49] *Against the Law Reviews: Welcome to a World Where Inexperienced Editors Make Articles About the Wrong Topics Worse,* Richard A. Posner, LEGAL AFFAIRS (2004), Accessible at: http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp on 3 May 2009. For an interesting debate about the merits of Australian law reviews, see: *Supra,* Kirby (note 32); John Gava, *Law Reviews: Good For Judges, Bad For Law Schools?,* 26 MELBOURNE UNIVERSITY LAW REVIEW 29, (2002). Accessible at: http://www.austlii.edu.au/au/journals/MULR/2002/29.html#fn1 on 26 May 2009.

[50] John G. Kester argues that even 100 per cent student-run journals seek some guidance from faculty members, and in this way have some degree of peer review, see John G. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 JOURNAL OF LEGAL EDUCATION (J. LEGAL EDUC.) 14 (1986). Kester goes on to suggest that the criticisms against the quality of student-run publications are a reflection of the fact that law faculties are now more fragmented and do not agree on what makes good legal scholarship. This makes faculty less of a resource to student-edited journals.

ludicrous. Nevertheless, an interesting parallel can be drawn here between the comparative lessons of *German Law Journal* work and the student perspective in legal writing. As noted above, student editors on the GLJ were exposed to works with ideas they had likely not encountered before and were able to make connections with other commentary, novels or events external to the four corners of law school. The strength of a student editor is, in fact, their unfamiliarity with a topic because this can make room for novel or illuminating approaches and ideas on the journal rather than promoting the homogeneity that critics claim are stifling law reviews.[51] However, this creativity can only be fostered where student editors are given license to engage with an article not only on a stylistic level but in terms of the substantive content as well. Again, here the structure of the journal comes into play. If there is sufficient interplay between the editorial process of students and faculty review such that faculty can ensure that students are on the right track in their criticisms of a particular article, this can be a mutually beneficial experience for both the author and student editor.

Most importantly, these critics, in prescribing an overhaul of the law review to provide minimal student participation or doing away with law reviews altogether, are not granting due consideration to the value of journals to legal education. As elaborated on above, law reviews provide students with the space to understand law as a whole. The silo structure of law school, which presents each field of law as a world unto itself, limits opportunities for students to make the connections that they would not otherwise make. No other mechanism of legal education provides students with the combination of hard editorial skills and soft analytical skills. Although there are seminar classes that promote discussion, these would not bring together such a disparate group of students to discuss topics that vary from one field of law to the next or the 'why' of law, as we have discussed in detail above. Further, the focus on the case method of teaching law, while valuable in and of itself, does not expose students to writing legal commentary and stifles their ability to improve their own writing by reviewing the works of others. Richard Posner (interestingly, former president of the *Harvard Law Review* when he was in law school himself) has stated that "[t]he biggest obstacle to reform is that the present [law review] system provides useful training to law students."[52] What Posner and others fail to explore in adequate detail is exactly how law reviews benefit students, and the fact that there are many different kinds of journals with different degrees of student-participation. Lumping all student participation in journals into the same category without adequate examination of the benefits it adds to a legal education, and without accounting for the vast array of differences nationally and internationally between law journals is an omission all too common among critics of student participation in legal publications.

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[51] The argument that students are more willing to take a risk and publish something that is unconventional is not new, see Phil Nichols, *A Student Defense of Student Edited Journals: in Response to Professor Roger Crampton*, Duke Law Journal (Duke L. J.) 1122 , 1125 **(**1987); and Frances Olsen, *The Role of Student-Run Law Journals in Opening North American Law*, 39 ALBERTA LAW REVIEW (ALTA. L. REV.) 678, 680-81, (2001).

[52] *Supra,* Posner (note 49).

C. Conclusion

For the past two years, student editors on the *German Law Journal*, along with student editors from the other four main legal publications at Osgoode Hall Law School (as described above) have been invited to speak to first year students during their orientation week about why they should consider joining the Journal. What is curious about the exercise is that the student editors need to not only convince bright-eyed and optimistic first years that they will benefit from working on a legal publication in general, but they also have to somehow distinguish what makes working on their specific journal the best.

For us, arguing that our experience on the *German Law Journal* is the most rewarding has often felt artificial because the choice of which publication to apply to often comes down to the topics a student wishes to be exposed to and the working climate they would prefer. Beyond aesthetics and personal preferences about the type of work and exposure one aims for, the true benefit of student participation in journals will occur regardless of the distinctions between format, content and organization.

As a theme explored throughout this article, despite the many types of publications and levels of student involvement, at the core of each student's journal experience is not only a development of hard and fast editorial and footnoting skills, but an exposure to the larger trends and ideas that drive the development of law, and connects what we learn in the classroom to the legacy of law as a project and a discipline. In many ways, trying to distinguish the Journal in the eyes of first-year students creates false distinctions about the value of working on a publication as an educational experience. Beyond the obvious editing and organizational skills, what would be more helpful to discuss is the critical analysis skills and breath of fresh air that being a student editor on any legal publication affords a student. Although there are some structures that better allow for this space to be created, journal work as a whole can offer these soft skills that are not easily observable from the outside. Instead of competing for the attention of first-year students, it would be better to instead discuss the value of working on a journal more generally, and address the distinctions between us as simply the different ways we are each organized, and the different types of work and discussions we have while on each particular journal.

This recognition of the benefit of having multiple types, formats, and levels of student participation in journals goes well beyond our first-year orientation week presentation. All too often the critics and proponents of student participation on legal publications have engaged in equally limited discussions of the benefits and drawbacks of current law review models without properly addressing the fact that there are many different kinds of legal publications. The skills a student gains on a law journal far exceed simple editorial and citation skills, but actually shape how we understand and engage with law as a discipline. Student participation on law journals significantly enhances a legal education in a way that cannot easily be replicated in a classroom setting, and form an integral part of law school life.

Taking a lesson from the *German Law Journal*, just as student editors do not have to speak German to work on the *German Law Journal*, one does not have to be law professor to edit a law journal; often the finished product is far richer and more insightful the more you involve fresh minds.