

Reforming Approaches to Educating Transnational Lawyers: Observations from America

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The Changing Profession

The American legal profession confronts dual challenges as it enters the second decade of the 21st century. The first is how to respond to the paradigmatic changes related to legal practice itself, brought about largely by the revolution in electronic communication and information technologies, the rapid integration and globalization of national economies, recessionary economic times, shifting demographics, and a growing standardization of professional requirements involving legal services. As Tom Morgan, in a lecture¹ based on his recently published book, *The Vanishing American Lawyer*,² noted, “[American] lawyers are facing fundamental changes in both what they will be asked to do and how much work that lawyers once did will continue to be done by them.”³

Richard Susskind, a British scholar who has written provocatively about the transforming legal profession,⁴ states,

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1. Thomas D. Morgan, *The Last Days of the American Lawyer*, Oct. 1, 2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1543301.
2. Thomas D. Morgan, *The Vanishing American Lawyer* (Oxford Univ. Press 2010).
3. See *supra* note 1, at 1.
4. Richard Susskind, *The End of Lawyers?: Rethinking the Nature of Legal Services* (Oxford Univ. Press 2008) [hereinafter *End of Lawyers*]. Other books about the legal profession authored by Richard Susskind include: *The Future of Law: Facing the Challenges of Information Technology* (Oxford Univ. Press 1996) and *Transforming the Law: Essays on Technology, Justice and the Legal Marketplace* (Oxford Univ. Press 2000).

[T]he market is increasingly unlikely to tolerate expensive lawyers for tasks (guiding, advising, drafting, researching, problem-solving, and more) that can equally or better be discharged by less expert people, supported by sophisticated systems and processes.... [T]he jobs of many traditional lawyers will be substantially eroded and often eliminated.⁵

And finally, the American Bar Association—alert to these changes and to its special role as the national representative of the American legal profession to signal and propose guidance to the profession—undertook analyses of the impacts of technology and globalization on the practice of law.⁶ In particular, the ABA’s Commission on Ethics is pursuing three overlapping areas of inquiry, demonstrating the nature and complexity of forces affecting legal practice today:

- Issues that arise because U.S. lawyers are regulated by states but work increasingly across state and international borders;
- Issues that arise in light of current and future advances in technology that enhance virtual cross-border access; and
- Particular issues raised by changing technology.⁷

The second—and equally formidable—challenge is for U.S. legal educators to find the proper response to these paradigmatic changes in law practice. As legal practice demands greater understanding of the interrelated nature of legal systems and the subjects they address, law schools can play an important—even essential—role in preparing students for what they will face in practice. As always, legal education can lead, follow, or lead in some areas and follow in others.

Responses of U.S. Legal Profession

U.S. Legal Education Reform: In Brief

American legal educators have long used a variety of methodologies to encourage interactive learning. In the U.S., the lecture method—still prevalent in university education in many countries—was replaced early on by the case method, often delivered via a Socratic-type professor-student dialogue. The goal was for students to develop analytical skills enabling them to “think like a lawyer” and “write like a lawyer.”

New courses and curricular design responded to some extent to the needs of the practicing profession. Courses like administrative law were created in the 1940s to provide students with an understanding of the role of administrative agencies as governmental activity grew and became central to many kinds of

5. End of Lawyers, *supra* note 4, at 2.

6. See www.americanbar.org/Ethics2020.

7. See ABA Commission on Ethics 20/20, Preliminary Issues Outline, Nov. 19, 2009, at 2, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf.

practice. During the early 1970s, environmental law was not considered by many to constitute a subject worthy of treatment as a cohesive law school course. But with the spate of national and state legislation during that decade, and the successful introduction of economic analysis to such subjects as land-use, pollution control, resource allocation, energy regulation and others, it quickly became a subject that responded to student interest and practitioner demands.

Educators responded as well to concerns about the perceived lack of a moral core of the legal profession, awakened by the Watergate scandal where many of the prime actors were lawyers. Professional responsibility courses were born from that experience, as was the separate national exam on that subject now required of bar applicants in most jurisdictions. At the same time, many bars quickly sharpened their focus on lawyer discipline and enlarged their regulatory efforts. One could recite multiple similar instances where legal education took the lead in preparing students for various aspects of practice by creating courses and programs.⁸

Resurgence of Practice Concerns

While legal education, at least in the first year, emphasizes the development of analytical skills, practitioners have pushed for law schools to show greater concern for developing skill-sets related more directly to practice. Thus, the MacCrate Report⁹ complained about the gap between practice and legal education, and recommended mandatory externships with governmental agencies, judges and pro bono legal assistance organizations to expose students to practice realities. Hoping that the bar exam might encourage greater educational programming and focus that rely on practice skills, it also prescribed “performance” exercises as part of bar exams to test such skills as the

8. Prominent additional examples might include: dispute resolution, where most law schools today have at least one course on the subject; many schools offer multiple courses (*e.g.*, arbitration, mediation, negotiation, international arbitration and dispute resolution, international mediation, and so on). Law schools also offer programs, such as institutes connected with U.S. law schools, some offering certificates indicating specialization, and competitions, for example arbitration moots involving domestic arbitration, negotiation, as well as international arbitration and mediation competitions. International law is also an area where there has been great curricular growth in the last several decades. Many law schools have an international law journal, and additional courses have emanated from the core courses of public international law, international business transactions, and comparative/foreign law. It is not uncommon for a law school to have, in addition to the above, such courses as: international human rights, international criminal law, international trade law, international litigation and arbitration, and some particular foreign legal system, such as Islamic law or Chinese law.
9. ABA Section of Legal Education and Admissions to the Bar, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (ABA 1992) [hereinafter MacCrate Report].

ability to draft complaints, motions, memoranda to clients, etc. The Carnegie Report¹⁰ followed more than a decade later and made similar criticisms and recommendations.

Though less organized, students as a bloc tend to “vote with their feet” and in most law school programs have some control after their first year over the subjects they study. They frequently choose courses that prepare them for practice—either in terms of classes that improve their substantive knowledge in areas of current interest, or in learning subject matter and skills that will enhance their employment prospects. Special practice courses, skills courses, and clinics also become effective recruiting programs when law schools look for new admittees, and can become attractive programs for advancing practical skills and useful when reaching out to alumni and future employers.

Pressures from Abroad

Globalization is also a primary force behind curricular reforms that seek to prepare students to function as lawyers in a transnational legal world. For instance, today, trade is subject to the harmonizing influences and requirements of the World Trade Organization agreements. The trading of goods, services, foreign investment, and intellectual property protections are all affected by the international law of trade. Moreover, the proliferation of preferential trading agreements among countries increasingly commits them to a system governed by law and subject to various forms of dispute-settlement. In addition, the importance of such international organizations as the International Monetary Fund, the World Bank and the European Union—in a world where economies are inter-connected and interdependent—is regularly felt by all of us.

Responding to Needs for Transnational Legal Education

Approaches

Against this panoply of forces, U.S. legal educators have the opportunity to offer substantive knowledge about transnational law and to develop student skills for dealing with a multi-cultural and multijurisdictional, globalized world. A survey of U.S. law school efforts demonstrates that schools in a variety of areas are making multiple efforts to prepare students. Yet, in a few exceptional cases, these efforts are uncoordinated within the law school, and, even less, within the legal education profession. Nonetheless, each offers some exposure to the globalized legal world and therefore is valuable.

10. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

Programs

- U.S. Law School Summer Law Study Programs: A large percentage of U.S. law students gain an exposure to subjects of transnational law and foreign law cultures via summer law study programs, organized and sponsored by U.S. law schools. Over 200 programs were offered in summer 2011¹¹ involving as many as 50 percent of most student bodies over the course of a three-year student career. These programs offer students a wide range of comparative-transnational law courses, and are located on all continents. The most popular venues tend to be English-speaking countries, but many are held in non-English-speaking countries. In addition, many programs offer extern/intern experience in courts, governmental agencies and/or law firms, assuming the student has proficiency in the local language.
- Expansion and Nature of Curricula Revision: U.S. law schools have used a variety of approaches to improve their offerings in substantive law and skills-training to respond to the call to train students in transnational law. A few law schools require students to take international law or transnational law courses for graduation.¹² Others have offered first year electives on international law subjects¹³ as part of a package of curriculum reform designed to “engage” students. Still others have integrated materials into the first year required courses,¹⁴ introducing students to the international-transnational dimensions of law and their applications to cross-border activities.
- In further efforts to prepare students to be “globalized lawyers,” many law schools allow credit for internships with foreign government agencies, foreign courts, and international organizations—some of which place students in the foreign legal culture for a full semester or more. Also, some law schools offer a range of opportunities introducing students to international practice. A few have established clinics to address human rights, immigration and international business issues. Some offer skills courses,¹⁵ others provide seminars in which students can grapple with real-life cases or problems and actively discuss them in classes with small student-to-faculty ratios. Where a whole course

11. See Foreign Summer and Winter Intersession Programs, available at www.americanbar.org/groups/legal_education/resources/foreign_study/foreign_summer_winter.programs.html.

12. *E.g.*, both Harvard Law School and the University of Michigan Law School have done so.

13. *E.g.*, Southwestern Law School offers public international law as a first-year elective.

14. *E.g.*, University of the Pacific, McGeorge School of Law, has developed such materials for first year courses.

15. *E.g.*, Southwestern Law School has offered a skills course on international litigation and arbitration that focused on problems requiring students to exercise of practice skills.

might not be available for skills development or discussion, simulations may be used to give students a view of transnational legal issues and their resolution.

- **Professorial and Student Exchanges:** Exchanging students and faculty with foreign universities and law schools is a common technique for enhancing the transnational legal study environment. In addition to the national foundations that sponsor such exchanges,¹⁶ law schools are increasingly negotiating bilateral agreements with other law schools; also law school consortia¹⁷ in the U.S. and in foreign countries can offer a vehicle for facilitating and sponsoring visits by students and faculty.
- **Experimentation with Technologies:** Electronic communication via the computer and Internet has endless possibilities, and some are already being undertaken by creative legal educators. Experimenting with video-real-time negotiations involving student and/or professors and practitioners around the world exposes students to other legal cultures. Moreover, technology can also enable U.S. legal educators to reach and teach students in remote areas of the globe.

Considering Transnational Legal Education

These are but a sampling of the possibilities, many of which—in one form or another—are being offered in U.S. law schools today to educate students about the nature of and skills required to function effectively as a transnational lawyer. The problem is that, while much is being done school-by-school, American legal education is somewhat without direction. As law professors, we are among the major guardians of the future of the profession and naturally tasked with the responsibility of developing a “vision” for its future. Through institutions that have a stake in the development and teaching of transnational law,¹⁸ further exchanges of ideas and approaches will undoubtedly generate a better understanding of the educational needs of the global lawyer, and how best we can achieve them in law school.

16. *E.g.*, Fulbright Scholar Program, *available at* <http://www.cies.org/>.

17. *E.g.*, the North American Consortium on Legal Education, *available at* <http://www.nacle.org/>.

18. *E.g.*, the Section of International Law of the American Bar Association, the International Bar Association, the American Branch of the International Law Association, and the American Society of International Law are all potential vehicles for such future discussions.