Spring 2014

Stratification, Expansion, and Retrenchment: International Legal Education in U.S. Law Schools

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INTERNATIONAL LEGAL EDUCATION IN U.S. LAW SCHOOLS

By Nora V. Demleitner

Legal education in the United States has been undergoing substantial change in the last few decades. There has been an increase in experiential training—in the forms of clinical education, externships, and simulation training—and an expansion of transnationally focused teaching through courses, seminars, and hands-on opportunities. Since the economic downturn, pressure to produce the "practice-ready" lawyer—a largely undefined ideal—has continued to increase. In addition to practice-based skills such as those that enable lawyers to draft effective interrogatories and contract provisions, the profession demands that law schools teach an expanding array of professional competencies in such arenas as business development and business judgment, as well as other practice-oriented skills.

The recent report by the ABA Task Force charged with taking a look at the future of legal education reflects the profession's ongoing demands for greater practice proficiency. *See* ABA Task Force on the Future of Legal Education, *Report and Recommendations* (Jan. 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf. In a 41-page document that covers changes needed in legal education and ranges from tuition control to some discussion of the competencies law schools should impart to their students, there is almost no mention of international or comparative law, the need for cultural competency, or foreign language skills. Law appears to be an almost entirely local enterprise. Despite much discussion about globalization exacerbating law firm competition for clients and legal talent and facilitating the outsourcing of legal work, much law school education remains focused domestically.

This article will address some of the pressures upon U.S. law schools that drive what I term the "stratification" within legal academia. Stratification allows some schools to provide an increasingly deeper and more sophisticated international experience so as to prepare their students more adequately for the transnational legal world. At the same time and as a result of this stratification, other schools are increasingly retrenching to focus on core issues of professional licensing and job placement. I will also discuss some of the most sophisticated offerings in the transnational area, and I will challenge employers and the profession to reward such curricular options to incentivize students and law schools alike to prepare better for a global legal marketplace.

U.S. LEGAL EDUCATION: STRATIFICATION, PRACTICE-READINESS, AND BAR PASSAGE

The number of applicants to law school has been shrinking over the last few years. A significant number of higher-credentialed applicants and those with undergraduate degrees from more prestigious institutions—many of whom have studied abroad in college—appear to be pursuing other career paths, at least for now. Many applicants also seek to stay closer to their families, often to live at home to more effectively control their debt load and to take advantage of their personal local networks for employment purposes. This combination of factors leads students to focus more locally, a development that is, to a large extent, reinforced by state bar examinations and licensing requirements.

Despite the multistate exam, soon to be administered in 14 states, certification remains state-based. Not one state has begun to test on principles of international law, implicitly signaling that they are of secondary importance in legal training.

Appreciable numbers of schools are concerned about bar passage because of the licensing challenges their graduates have experienced. Substantive knowledge required for the examination has led schools to either mandate (or strongly recommend) courses in bar subject matters and/or adopt an often thinly veiled bar preparation course. While this action is highly defensible—after all, to practice, a law graduate must be licensed—such curricular decisions limit a student's ability to focus on international and comparative subject matters and generally depress enrollment in such courses.

Law schools' focus on bar passage will increase because of the close connection between bar passage and employment outcomes, even though the ABA Standards Review Committee appears to have set aside the task of revising or strengthening the currently applicable accreditation requirements with respect to bar passage. The recent threat of a more stringent bar passage standard may preserve the emphasis on passing the bar at many schools. This is especially true as the decrease in applicants leads schools to accept candidates with lower LSAT scores, which correlate with lower first-year grades and, ultimately, with more precarious bar passage results.

Legal education in the United States is consequently becoming increasingly stratified. On the one hand, more elite institutions have increased the international exposure of their graduates through traditional classroom courses in international law, international practice experience, and immersion opportunities. On the other hand, less prestigious institutions are ever more focused on "bread-and-butter" materials: bar exam coverage and those courses perceived to lead to "practice readiness." Students in those institutions will generally experience little exposure to international materials, let alone comparative ones. Will their practices really involve fewer transnational matters or clients outside the United States? Is this domestic focus justified?

This stratified effect is all the more challenging because of the degree of inappropriateness underlying the distinction between so-called "prestigious" and "less prestigious" schools. The leading rankings mechanism and reputational value of law schools appear ultimately tied to the financial resources available to an institution and its national exposure—which in some cases can derive from a winning football team—rather than the quality of education provided or the caliber of its graduates. Indeed, given demographic and institutional realities, descriptors such as "nationally" or "regionally" prominent might be more fitting than "prestigious" or "less prestigious." Notwithstanding this observation, this article will continue using the more traditional labels of "prestigious" and "less prestigious" in view of their broad usage in the profession. It does so, however, with implicit qualification at each such usage.

INTERNATIONAL LEGAL EDUCATION: SOPHISTICATED OFFERINGS

Many law schools have responded to the interests of incoming students and the expertise of their faculty members by increasing the transborder opportunities available to their students. Substantive knowledge about international and foreign laws, clinical involvement in legal issues abroad, and even dual degree and qualification are now available to law students.

Substantive Knowledge: Curricular Opportunities

Two broad philosophies govern the approach to transnational legal education in U.S. law schools. One, the minority approach, is to offer a transnational law course in the first—or second—year to provide an introduction to public and private international and some comparative law. The University of Michigan pioneered this approach with a transnational law course required for graduation and available as an elective during the 1L year. Michigan Law subsequently changed its curriculum so that the course is now mandatory during the 2L year. On the other hand, Florida International Law, Harvard Law School, Hofstra Law, Nebraska Law, and Washington and Lee require an international/comparative/transnational law course for all first-year students. Based on the ABA's *A Survey of Law School Currricula 2002–2010*, in 2010, six out of approximately 160 law schools had a required 1L or upper-level international law course; another 24 law schools offered international law among its 1L electives. Despite much discussion in the legal academy about the need for increased international exposure, mandating international or transnational law has not attracted many followers. This is in part because changes in the 1L year impact traditional conceptions of the learning required during those semesters and in part because bar pressure counsels against it. Even in most of the schools that have made that change, the course appears to come regularly under attack.

Some law faculties, including Georgetown, have adopted a variation on this approach that involves the integration of international issues in short modules into the curriculum. A simulated problem acclimates students into thinking beyond national borders, domestic clients, and local problems. Schools following this overall approach can offer more sophisticated upper-level electives because of the transnational exposure students have received in their 1L year.

The other approach that has attracted attention is the pervasive method that allows a faculty member to expose students to international issues at least in some core areas throughout the curriculum. The Pacific McGeorge Law faculty, together with others, has put together a series on "Global Issues," published by West–Thomson Reuters, which supplements traditional casebooks by focusing on one or more international issues arising in traditional 1L and upper-level courses. This approach facilitates the integration of transnational components into substantive courses. To assure internationalization and exposure of every law student to international issues, faculty members would ideally include these concepts in their courses. Because of this challenge, it is uncertain how successful this approach has been and how much effective exposure it has brought to law students.

Upper-level electives in the international, and, to a lesser extent, comparative, area have also proliferated. Courses on subjects related to human rights, trade and transborder corporate law, and international dispute resolution are among those offered. Some of these offerings are now taught in a foreign language, with "Spanish for Lawyers" probably the most frequent offering. In addition, simulation courses, such as those at Stanford and Berkeley involving international business negotiation, as well as clinical opportunities, including Yale's Allard K. Lowenstein International Human Rights Clinic or Washington and Lee's Criminal Tribunals Transnational Offering, are also available to students and may help fulfill the profession's demand for more practice-based courses. These

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types of opportunities often figure prominently in an applicant's decision about where to enroll, but they may appear less attractive later in a student's academic career as the pressure to find legal employment begins to dominate. While such courses may add to job candidates' options, they may also take up time that could be devoted to "bread-and-butter" courses that students may believe will appeal to smaller, local firms or government agencies.

Cultural Competence

While transnational issues may arise even in a largely domestic practice, large parts of the so-called international law practice center as much around cultural competence as substantive knowledge. Indeed, cultural competence can sometimes seem more important than substantive knowledge. The increasing separation of more elite and less elite programs is not merely a matter of students' curricular options; rather, it is perhaps even more reflective of a lack of depth in the different levels of exposure to foreign legal systems and experiences available.

As colleges have expanded international travel and study-abroad opportunities, so have many law schools. Anecdotal accounts indicate, however, that their popularity has decreased with the economic downturn. With the proliferation of college programs abroad, one may wonder what role programs abroad play and what value they provide during law school.

Semester Exchanges and Intersession Programs

Many U.S. law schools have exchange agreements with foreign law schools. Generally, foreign students are more likely to come to the United States than vice versa, leading to a large imbalance in student exchange numbers, levels of cultural and legal awareness, and financial burdens on the respective institutions. U.S. students may lag behind in their understanding of other legal systems and cultures. And, depending on the charging arrangements between the law school and the university, such support here for non-U.S. students may not be fiscally viable in the long run. Such one-sided arrangements may be further indicative of the pressure U.S. law students feel to gain directly marketable experience, as the value of foreign studies remains untested in the marketplace.

With undergraduate institutions now beginning to couch the value of exchange semesters in competency-based language, law schools need to prepare their students better to explain study abroad experience in terms of competencies. Immersion in foreign law study may demonstrate to an employer ambition, flexibility, adaptability, openness, and ability to operate in an unfamiliar setting. It may also attest to a student's improved foreign language ability and greater facility in working with lawyers and clients from that country and/or culture. Studying law in a foreign country also provides a different perspective on the development and analysis of law—think of the civil code, Islamic banking, or even the Canadian approach to human rights protections. An added externship component provides the deepest cultural immersion, as it allows a law student to compare the legal professions in practice. Internship experiences are apparently an integral component of the new NYU 3L semester abroad programs. These programs may also offer, as some other law schools do, a full-time summer work component.

To compensate for the inability (or unwillingness) of many students to immerse themselves for a longer term in a legal setting abroad, some law schools have created other, shorter opportunities for exposure abroad. These may take the form of summer or intersession programs or travel abroad in conjunction with a course. How successfully cultural competence and legal insights can be acquired during those shorter time periods depends on the amount of formal and informal exposure U.S. students will have to foreign law faculty, law students, and legal professionals, as well as on how focused these interactions will be.

With the decline in summer programs, many of which are costly and take up the time a student could use to gain domestic work experience, schools seem to focus increasingly on short, course-related travel. Seton Hall, for example, integrates field travel to Guatemala in its Guatemala Rule of Law Program. Washington and Lee offers a number of such courses, including human rights fact-finding and reporting in Tanzania and human rights training in Liberia. At Northwestern the International Team Project allows students to study comparatively a specific issue in a foreign country in depth before embarking on a field trip to meet with legal, economic, and political representatives to gain on-the-ground experience.

Even though a number of schools offer such cultural and legal competence-enhancing programs, they remain restricted to a relatively small quantity of students. If the students have appropriately reflected upon the skills the experience has allowed them to gain and are able to communicate those effectively, they should be in a stronger market position than an otherwise equally well-trained classmate. What if a student cannot afford such travel abroad, however? Must he or she inevitably be at a disadvantage?

Foreign Immersion on Campus: Foreign Students, Faculty, and Clients

As U.S. law schools experience increasing fiscal pressure due to the downturn in the number of applicants to their JD programs, ever more of them have opened or increased the size of LLM programs targeting foreign attorneys. Whether the greater exposure to foreign lawyers and law students (through exchange programs) truly expands the cultural competence of U.S. students is questionable. The largest of these programs fail to facilitate sufficiently effective interactions between U.S. law students and non-U.S. lawyers, often to the detriment of both. That result is not inevitable, and

the presence of foreign lawyers can contribute to the cultural competence of U.S. law students. Such a positive effect, however, requires both planned interactions and unstructured social time together.

The presence of non-U.S. law faculty members on law school campuses may also prove beneficial. While they often teach smaller, specialized courses, their different perspectives on law present unexpected cultural and legal challenges to a JD student who is socialized in U.S. law and culture. That experience can provide some of the cultural immersion necessary to make a U.S. lawyer more effective in international exchanges.

Some slightly different kinds of learning can be achieved in clinical or externship settings when the client hails from a foreign country and brings legal and cultural assumptions that are different from those of the law student. In light of the relatively high immigration rate the United States has experienced over the last few decades, such clients may be part of any clinic caseload, although they will obviously be most concentrated in immigration and asylum clinics. Even an in-house externship, for example, may bring such exposure when foreign entities or employees are involved in a legal matter.

Exposure to those socialized in foreign legal systems is crucial to gaining an understanding of legal and cultural differences. After all, it is often the unspoken assumptions about law and culture that make client counseling, negotiation, and resolution of a legal issue so challenging. The extent of the availability of such experiences depends in part on the location of the law school, but perhaps it depends even more on the value attached to the acquisition of cultural competence.

DUAL DEGREES: DOMESTIC AND FOREIGN

The combination of substantive knowledge and deep cultural competency should be strongest for those lawyers who have obtained credentials in two different legal systems. However, only a handful of law schools have developed ways for their graduates to combine a JD degree with a foreign law degree. Among the small number are Cornell's dual degree programs with Humboldt University and Université de Paris-Panthéon-Sorbonne and the dual degrees offered by Detroit-Mercy with the University of Windsor in Canada and the Monterrey Institute of Technology and Higher Education (Instituto Tecnológico y de Estudios Superiores de Monterrey, or ITESM) in Mexico. Law schools seem more interested in joint degrees recently, though, as such programs are likely to expand students' employment opportunities.

As (some) JD degrees may become an entry-level credential to be supplemented by LLM degrees in highly specialized and technical areas of the law such as tax and intellectual property law, it may become of increasing interest to U.S. lawyers to gain those second credentials abroad. This could be, in part, because of lower tuition charges, but also because U.S. lawyers may view the added international component of the credential of greater benefit. Whether this will occur will depend largely on the value employers assign to a foreign law degree, whether it be an LLM or a first law degree. If the employment market, despite occasional assertions to the contrary, does not reward such a degree choice either in hiring or in remuneration, U.S. lawyers may remain—or perhaps become even more—inward-focused.

The interest of U.S. lawyers in foreign LLM programs may inure to the fiscal detriment of U.S. law schools. However, the U.S. legal profession and economy may benefit from having more attorneys with some foreign experience, as more economic transactions and capital flows occur between (rather than inside) individual countries. As a result of the creation of cross-border economic and legal zones, not only in the seemingly ever-expanding European Union but also in Africa and Asia, studies and professional degrees earned in a member state are increasingly recognized in other countries. If this development trend continues, the U.S. state-centered licensing regime will not only look outdated, but it will impede the transnationally focused learning of U.S. law students that is becoming increasingly necessary in our globalized world.

CONCLUSION

Educating and training lawyers for a more global legal practice and the multicultural values reflected in modern U.S. legal practice remain a work-in-progress. Despite the recognition of global necessities, the current strain on legal education restricts the choices many law students and law schools are willing to make with respect to curricular expansion, foreign immersion, and cultural competency training. As the law schools with greater wealth, higher prestige ratings, and better employment outlooks for their students have the freedom and resources to focus their students on international opportunities, the resulting duality increases the stratification within the legal academy.

While many of the developments outlined above cannot be addressed easily or quickly, organizations such as the International Association of Law Schools (IALS) and the American Association of Law Schools (AALS) may play a useful and necessary role in reminding the U.S. legal academy that its obligation is to prepare lawyers, not just for the first day of practice, but also for decades of successful functioning as legal professionals. The profession, bar associations, and legal employers must reinforce the need for globally trained lawyers to help bring about change. The task is a tall one for a relatively conservative profession that is itself under pressure by some of the global forces for which it does not appear to be currently prepared. ◆