

PARALLEL TRACKS?: ASSESSING MODELS FOR THE INTERNATIONALIZATION OF LAW SCHOOL CURRICULA IN LIGHT OF THE PRINCIPLES IN THE CARNEGIE FOUNDATION'S *EDUCATING LAWYERS*

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ABSTRACT: The Carnegie Foundation's Report, *Educating Lawyers: Preparation for the Profession of Law* reminds us that the challenge for legal education requires a linking of the "interests of legal educators with the needs of legal practitioners and with the public the profession is pledged to serve—in other words, fostering what can be called civic professionalism." *Educating Lawyers* would reverse the drift of American legal education recast legal education towards a purely academic orientation, recasting legal education as fundamentally professional rather than academic, outward and not inward looking. *Educating Lawyers'* focus is almost completely devoted to domestic law. Yet, civic professionalism does not end at the borders of the United States, and American lawyers long ago stopped thinking of national borders as the borders of their professional lives. The law schools have been responding. Many law schools are now wrestling with issues relating to the incorporation of a transnational legal component—including elements of international, comparative, foreign and transnational law—within their teaching and scholarship missions. These changes mirror discussions within the legal academy over a move from a "national law practice" to a multi-jurisdictional practice model of legal education. Yet these two great reform efforts have developed along parallel tracks. This paper looks at the development of these parallel discussions of reform of legal education. The paper starts with a review of *Educating Lawyers*. The focus is on the basic assumptions about legal education underlying the suggestions for the changes proposed. Part II examines critically the several strands of proposals for a movement in American legal education from a national to a transnational focus in this century. The paper suggests an analytical framework for evaluating these interaction proposals and for evaluating the ways in which these methods seek to incorporate the transborder element in law school curricular, research and service activities. These are divided into five categories—three are elaborations of traditional models and two others, an immersion model and separation model, represent emerging framework structures. Part III considers these models of integration in light of the foundational model of apprenticeship proposed in *Educating Lawyers*. It suggests that transborder legal education can be integrated in legal education within the framework of *Educating Lawyers* but that not all emerging models of such integration are compatible with that framework.

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I. INTRODUCTION²

Over a century ago influential members of the public began to worry about the social order. In the face of large numbers of immigrants with no cultural connection to English social and political values,³ and significant class distinctions arising as a consequence of the great revolution in American business and industry,⁴ all sorts of groups arose to help “fix” the problems that might have been viewed as threatening the Republic.⁵ This was the age of the Progressive Party and a new sort of Enlightenment progressivism in the United States—things could be fixed and made better, the application of “scientific” or “rational” principles could solve all problems.⁶

Among the more pressing issues of the early 20th century was the training of lawyers. The late 19th century saw a revolution in the legitimacy of methods for the training of lawyers. Abandoning the traditional customary system of training in customary (common) law as primitive, the new scientific age successfully gave rise to a new science of law and legal training to be based in the University—not the law office.⁷ By the early 21st century the law school stood triumphant atop a system of certification for entry into legal practice in the United States. But that triumph has not gone without a certain amount of criticism. On the one hand, some critics have suggested the present system may not be up to reflecting the changes—actual or hoped for—within American society.⁸

² A note on footnoting for this essay, ironically enough in a footnote: I have deliberately attempted to avoid over-footnoting or footnoting exhaustively. For many, pedantic footnoting may serve as a sort of proxy for assurance that the author has read all the appropriate sources and has been appropriately schooled in the proper boundaries of the debate in which she is participating. While there is a certain logic to these assumptions in specific contexts—the Ph.D. dissertation, and perhaps even the pre-tenure “masterpiece”—my object here is to duplicate neither experience. See Arthur D. Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009 (1990). I am also mindful of Alan Watson’s astute observation of the danger losing the power of insight in bloated articles. See ALAN WATSON, *THE SHAME OF AMERICAN LEGAL EDUCATION* (Lake May, FL: Vandeplass Publishing, 2005)

³ See, e.g., BORDEN, MORTON. *JEWS, TURKS, AND INFIDELS* (Chapel Hill University of North Carolina Press 1984); ELLEN CONDLIFFE LANGEMANN, *THE POLITICS OF POWER: THE CARNEGIE CORPORATION, PHILANTHROPY AND PUBLIC POLICY* (Chicago, IL: University of Chicago Press, 1992)..

⁴ See, e.g., MINK, GWENDOLYN, *OLD LABOR AND NEW IMMIGRANTS IN AMERICAN POLITICAL DEVELOPMENT UNION, PARTY, AND STATE, 1875-1920* (Ithaca Cornell University Press 1986).

⁵ See HAAS, GARLAND A. *THE POLITICS OF DISINTEGRATION: POLITICAL PARTY DECAY IN THE UNITED STATES, 1840-1900* (Jefferson, N.C.: McFarland & Co. 1994); PAUL KLEPPNER, *THE THIRD ELECTORAL SYSTEM, 1853-1892: PARTIES, VOTERS, AND POLITICAL CULTURES* (Chapel Hill University of North Carolina Press 1979).

⁶ See, e.g., HAROLD HOWLAND, *THEODORE ROOSEVELT AND HIS TIMES: A CHRONICLE OF THE PROGRESSIVE MOVEMENT* (New Haven, CT: Yale University Press, 1921).

⁷ See, e.g., WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (New York: Oxford University Press, 1994).

⁸ See, e.g., NOEL LYNN, *INSIDE LAW SCHOOL: TWO DIALOGUES ABOUT LEGAL EDUCATION* (Calgary, Alberta, Canada: University of Calgary Press, 1999).

Others have suggested the need for a more rigorously academic turn.⁹ Still others have suggested the need to reform the legal profession rather than its system of training.¹⁰

Yet other hand influential groups, almost from the inception of the turn to academic legal education, have suggested a certain danger in the increasingly academic character of legal education. Among the most persistent, and most influential of this group has been the Carnegie Foundation.¹¹ Over the course of the last century, it has fought a losing battle to reform American legal education. It has sought to recognize the class divisions in American legal practice by a corresponding diversity in the forms of legal education offered.¹² Additional studies of legal education, important in their time, were produced in the 1970s and 1990s.¹³

The Carnegie Foundation has now published the results of a study of legal education in the United States. That study “involved a comprehensive look at teaching and learning in American and Canadian law schools today. Intensive field work was conducted at a cross-section of 16 law schools during the 1999-2000 academic year.”¹⁴ Published in

⁹ See ALAN WATSON, *THE SHAME OF AMERICAN LEGAL EDUCATION* (Lake May, FL: Vandepias Publishing, 2005) (Most law professors are plumbers, but they wish to be regarded as philosophers, hence, they are poor plumbers).

¹⁰ See DEBORAH RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (New York: Oxford University Press, 2000) (“This mismatch between what law schools supply and what law practice requires argues for a different approach. The diversity in America’s legal needs demands corresponding diversity in its legal education. Accreditation frameworks should recognize in form what is true in fact. Legal practice is becoming increasingly specialized. It makes little sense to require the same training for the Wall Street securities specialist and the small town matrimonial lawyer.” *Id.*, at 190).

¹¹ The Carnegie Foundation for the Advancement of Teaching was founded in “905 and chartered in 1906 by an act of Congress, The Carnegie Foundation for the Advancement of Teaching is an independent policy and research center with a primary mission “to do and perform all things necessary to encourage, uphold, and dignify the profession of the teacher and the cause of higher education.” Carnegie Foundation for the Advancement of Teaching, The Carnegie Foundation, available <http://www.carnegiefoundation.org/> (accessed Feb. 1, 2008).

¹² See ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW* (New York: Carnegie Foundation, 1921) (also noting the race, religious and ethnic divisions cemented or privileged by that division).

¹³ See HERBERT PACKER AND THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* (1972); and ERNEST BOYER, *SCHOLARSHIP RECONSIDERED* (1990). For a history of the Carnegie Foundation’s efforts, see ELLEN CONDLIFFE LANGEMANN, *PRIVATE POWER FOR THE PUBLIC GOOD; A HISTORY OF THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* (New York: College Examination Board, 1999).

¹⁴ Carnegie Foundation for the Advancement of Teaching, Program Areas, Legal Education Study, available <http://www.carnegiefoundation.org/programs/index.asp?key=1819> accessed Jan. 28, 2008).

book form as *Educating Lawyers: Preparation for the Profession of Law*,¹⁵ the study is bound to have serious impact, though whether that impact will be successful or permanent remains to be seen. *Educating Lawyers* is supposed to provide “an opportunity to rethink “thinking like a lawyer”—the paramount educational construct currently employed, which affords students powerful intellectual tools while also shaping education and professional practice in subsequent years in significant, yet often unrecognized, ways.”¹⁶ The principal thesis is that academic law is losing touch with both its roots in the practice of law and its mission—to educate lawyers for practice. However, through practical application of the techniques offered, grounded in a change in fundamental conception of the nature of the legal education enterprise, legal education can be appropriately redirected. What is new is the suggestion that the ends of legal education ought not to be confined to the teaching of legal doctrine and analysis, but also include an equal dose of “the several facets of practice included under the rubric of lawyering,”¹⁷ and a broad “emphasis on inculcation of the identity, values, and dispositions consonant with the fundamental purpose of the legal profession,”¹⁸ a purpose left substantially undefined.

Ironically enough, at about the same time over a century ago, many groups and institutions engaged in the education of lawyers, when faced with the realities of the importance of transborder activities, that is of those activities arising from the creation of national markets and practices within the United States, reacted by digging more deeply into their traditional state oriented curricula and methods of training. Others, including what emerged as key groups of academic legal educators, embraced the challenge of this new reality. By the last third of the 20th century, most law schools, reluctantly or not, and more or less enthusiastically, had embraced a “national law practice” model as the foundation of their teaching and research missions.¹⁹ Though the foundations of that

¹⁵ WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, LEE S., SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION* (San Francisco, CA: Jossey-Bass, 2007) [hereafter *Educating Lawyers*].

¹⁶ Carnegie Foundation for the Advancement of Teaching, Program Areas, Legal Education Study, available <http://www.carnegiefoundation.org/programs/index.asp?key=1819> accessed Jan. 28, 2008).

¹⁷ *Educating Lawyers*, *supra* note 15, at 194.

¹⁸ *Id.*

¹⁹ For a general history of legal education in the United States, see, e.g., ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (Chapel Hill: University of North Carolina Press, 1983). The national model is reinforced by the American Bar Association through its role in the accreditation process. For materials on this process see the materials at American Bar Association, Section on Legal Education and Admission to the Bar, available at <http://www.abanet.org/legaled/> (accessed Feb. 14, 2007). It is also cultivated through the production of sets of acceptable cultural norms for the providers of legal education articulated through the organs of the collective representative organizations of American legal education like the Association of American Law Schools. See Association of American Law Schools, What is the AALS?, Purpose and Description, available at <http://www.aals.org/about.php> (“The AALS is a non-profit association of 168 law schools. The purpose of the association is “the improvement of the legal profession through legal education.” It

model have been challenged as perpetuating the power of wealthy elites and of contributing to the subordination of ethnic, religious and racial groups,²⁰ and though some sectors of legal education have sought to avoid its pull,²¹ there are few who deny the power of the “national model” as the dominant ideology of law school education.²²

Today, law schools that embraced the national law model face a challenge similar to that confronted a century ago.²³ But instead of confronting the challenge of a “national” practice, legal education now confronts the realities of multi-jurisdictional practice, sometimes described as the internationalization of law and legal practice, with little more than a heavily traditional set of approaches to teaching and scholarship.²⁴ Legal practice, traditionally grounded in the laws of states from which American lawyers are licensed, and substantially overlain with national rule systems affecting virtually every aspect of legal relations in the United States, now increasingly includes activities dependent of the application of rule or norm systems beyond that of the state or nation. Everything from large scale global business activity, to the movement of goods, people and services on the most modest scale, are tinged with issues the resolution of which requires facility with norm and legal systems other than the one from which a lawyer derives her license to practice law. And the greater possibilities for free movement of lawyers, as well as the provision of legal services, across borders, is becoming a larger reality in the market for

serves as the learned society for law teachers and is legal education's principal representative to the federal government and to other national higher education organizations and learned societies.” Id.).

²⁰ See, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (New York: Oxford University Press, 1977) (suggesting that elite nature of the profession and its emphasis on serving its business interests served to exclude participation by minorities.).

²¹ And, indeed, there are law schools within the United States, that remain substantially unchanged—focusing deliberately on a curriculum limited by the territorial boundaries of the state in which they are established, or on educating traditionally underserved communities. In a bar admission context grounded on licensing by states, this approach offers some schools a limited advantage in attracting students who are sure about where and what they wish to practice. California and Georgia, for example

²² Even its critics suggest that any necessary deviation from the dominant normative model is “costly.” Many arguments, then, are based on the idea that specific benefits from deviation are greater than its detriments. See, e.g., Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L. Q. 1035, 1075 (2001). Others have suggested less drastic deviations from the “one size fits all model.” For a discussion, see Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254, 277-80 (2006) (technology based changes and education through law school consortia drawing on collective strengths).

²³ See Harold Hongju Koh, *Luncheon Address (May 17, 2006)*, in American Law Institute Remarks and Addresses 83rd Annual Meeting, Washington, D.C. pp. 65-89.

²⁴ Academics have noted the coming of this reality for a number of years. See, e.g., Louis F. Del Duca & Vanessa P. Sciarra, *Developing Cross-Border Practice Rules: Challenges and Opportunities for Legal Education*, 21 FORDHAM INT'L L.J. 1109 (1998); Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 447 (1989).

legal services. Indeed, some within the legal academy have begun to recognize the inevitability of legal education confronting the realities of educating for an international and transnational multi-jurisdictional market beyond the borders of the United States.²⁵

Most law schools are not completely unprepared to respond to these challenges. Many have some faculty, and some programs, focusing one or another component of multi-jurisdictional practice beyond national borders. And the great organs of the production of legal education culture have begun to emphasize the importance of this maturing but still largely nascent reorientation of legal practice.²⁶ How law schools confront the challenge posed by the realities of human activity, and legal systems that no longer respect the niceties of the political borders of nation-states, will determine the shape of legal education for the future. Law schools that fail to conform their educational mission to the realities of law and the practices of the great global legal actors—merchants, immigrants communities, nongovernmental organizations, economic entities, banks and other users of legal services—will find themselves playing a limited (though no doubt important) role in the future of the development of law and the production of law and lawyers for the global marketplace. Certainly the bar has begun to recognize this reality, even well outside the centers of traditional internationalist practice.²⁷

In a number of forward looking law schools, or law schools looking to leverage niche competence into reputation gains within the legal academy, faculty have begun to examine this problem with a view to developing a comprehensive analysis of matters

²⁵ See, e.g., Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 995 (2001). Some have suggested a value "in itself" of such an education. See Jan Klabbers, *Legal Education in the Balance: Accommodating Flexibility*, 56 J. LEG. EDUC. 196 (2006).

²⁶ The current round of cultural production was kicked off in 2000 in the context of a Conference of International Legal Educators, hosted through the AALS, the contributions for which may be accessed at <http://www.aals.org/2000international> (accessed Feb. 7, 1007). The AALS then noted that the Conference "represents its strong commitment to foster more cooperative efforts among law schools throughout the world. The time has long since past that anybody can be educated members of society and the legal profession without developing an understanding of other cultures and legal systems." *Id.* This was followed by a widely touted conference, hosted in Hawaii in 2004 by the AALS, entitled *Educating Lawyers for Transnational Challenges*, the proceedings of which are available at <http://www.aals.org/international2004/> (accessed Feb. 8, 2007). The conference was "designed not only to bring about a dialogue concerning the education of graduates for a transnational law practice, but also to consider formulating a possible curriculum outline for a law school that seeks to educate its graduates for such a practice." *Id.*

²⁷ See, e.g., Janet H. Moore, *Going Global: A Guide to Growing an International Practice*, 69 Tex. B.J. 998 (Nov. 2006). Though, Texas, like other border states, has a long history of dealing with law that crosses national borders. See, e.g., Chris Wolfe, April A. Strahan, *An Overview Of The History Of Foreign Legal Consultants Between The United States And Mexico*, 47 S. TEX. L. REV. 557 (2006).

related to the multi-jurisdictional “component” of their law schools.²⁸ In some cases, that analysis is tied to the development of relationships with other related faculties of the universities in which the law school is resident. For example, many universities have established schools of international affairs, international relations or foreign service, with curricular objectives that might run parallel to those being contemplated for the international and transnational focus of a law school. Creation of formal relationships with such existing institutions might provide an efficient means to incorporate a transnational element in legal education.²⁹ In other cases, it may be tied to a leveraging of established programs of graduate legal education for foreign lawyers.³⁰

Basic to any such analysis is a consideration of core pedagogical issues—courses and their content.³¹ In addition, other important components would have to be identified and considered, including programs for foreign students, the addition of masters and SJD programs in international law and related disciplines for law students and others who qualify, other degree offerings, affiliations (both formal and informal, and both institutional and personal) with foreign institutions, and the institution of other programs abroad for our law students, foreign or “domestic,” including certificate programs and summer and semester programs abroad.³² Even clinical programs can go international.³³

²⁸ See discussion, e.g., Jeffery Atik and Anton Soubbot, *International Legal Developments in Review: 2001*, *Public International Law, International Legal Education*, 36 INT’L LAW. 715, 715, 717 (2002).

²⁹ At Penn State, for example, the Penn State Board of Trustees at its January 19, 2007 meeting approved an affiliated School of International Affairs for implementation. See Pennsylvania State University, *Penn State Establishes New School of International Affairs Intimately Linked With Law School*, available at <http://www.dsl.psu.edu/news/IntlAffairs.cfm>.

³⁰ See, e.g., Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 *Cardozo J. Int’l & Comp. L.* 143 (2006) (“Law schools experience financial and reputational gains from their graduate programs for foreign law graduates. These programs internationalize the student bodies of law schools, which schools use as evidence of their international and even global characters. While the international character of a law school may stem from its LL.M. program, the significance of the international label addresses a law school’s ability to attract applicants for its J.D. program as well.” *Id.*, at 154).

³¹ This can be a difficult issue, even in well-defined areas of law. See, e.g., Larry Catá Backer, *Human Rights and Legal Education in the Western Hemisphere: Legal Parochialism and Hollow Universalism*, 21 *PENN STATE INTERNATIONAL LAW REVIEW* 115 (2002). For a discussion of the development of special courses targeted specifically to teaching or introducing the transnational dimension in US legal education, see, e.g., discussion *infra* at notes ---.

³² For certificate programs in legal education, see, Larry Catá Backer, *General Principles of Academic Specialization By Means of Certificate or Concentration Programs: Creating a Certificate Program in International, Comparative and Foreign Law at Penn State*, 20 *PENN. STATE INTERNATIONAL LAW REVIEW* 67 (2001).

³³ See Karen Barton, Clark D. Cunningham, Gregory Todd Jones, Paul Maharg, *Valuing What Clients Think: Standardized Clients And The Assessment Of Communicative Competence*, 13 *CLINICAL L. REV.* 1 (2006); Dina Francesca Haynes, *Client Centered Human Rights Advocacy*, 13 *CLINICAL L. REV.* 379 (2006); Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 *PENN ST. INT’L L. REV.* 421 (2004).

Thus two great movements in legal education have been gaining momentum and legitimacy within the legal academy. On the one hand there is the century long dialogue of the nature of legal education and its connection to bench and bar within the United States. On the other hand there is the half-century long search for the expansion of the core areas of law that ought to form part of the basic instruction in American law schools, and in the practice of bench and bar. But these two great movements have been developing in parallel streams. There has been little in the way of communication between these movements. They do not take cognizance of each other. Yet both ought to have a great impact on the other. It is to address this failure to communicate, and perhaps to bridge that gap, that this paper is directed.

The paper starts with a critical review of *Educating Lawyers*. The focus is on the basic assumptions about legal education underlying the suggestions for the changes proposed. These assumptions both frame and may limit the suggestions for change. And it is the nature of the limitations inherent in the foundational assumptions of the study that must be understood to extract the most value from *Educating Lawyers*. The attitude changes proposed in its Introduction, and Chapter One are elaborated as practice models in the remaining chapters of the work. The section then examines the application of those assumptions to the form of proposals for change. Lastly, it explores the lacunae in its approach. The most prominent of these is its apparent insistence on an increasingly obsolete view of the law into which American lawyers must be trained. The dangers of modifying an ancient approach for modern times are the likelihood that the foundational frameworks within which these constructions are offered have been altered. So it is with the content of the law Americans lawyers must practice. Just as the law among states within the union was at the frontier of American legal education in the early part of the 20th century, so are the law among nation-states, and the law of a variety of communities of states, at the frontier of American legal education in the 20th century. The failure to consider the impact of these changes may mark a weakness in *Educating Lawyers*, or may limit its utility. Yet the insights of *Educating Lawyers* ought to be applicable in the expanding context of the law to be taught, a consideration taken up in Part IV.

Part III examines critically the several strands of proposals for the incorporation of some aspect of transnational legal education in the curricula of American law schools. The paper suggests an analytical framework for evaluating these interaction proposals, and for evaluating the ways in which these methods seek to incorporate the international and transnational element in law school curricular, research and service activities. Specifically, the paper suggests a possible structure for analysis of the value of integrating the transnational element within the teaching, research and service of law school stakeholders, and the contemporary framework of principles for incorporating the international and transnational element in law school curricular, research and service activities. The proposals themselves can be divided into five categories—three are modifications or extensions of traditional approaches to curricular issues. The three traditional models, the integration, aggregation and segregation models, each seeks to modify existing resources and teaching/research models to incorporate a transnational

element into the curriculum. Each model offers a number of benefits but also have some detriments. Two others approaches, an immersion model and separation model, are best understood as departures from traditional curricular models in legal education. The immersion model, applies the lessons of economic globalization to the business of legal education. Its success depends on the ability of a law school to forge effective networks with law schools in other states. The separation model is based on the idea that the transnational element in law is distinct enough to merit a substantial treatment in its own right. Grounded in notion that international and transnational law is somehow different from traditional aspects of legal education, it extracts all international and transnational legal studies—teaching and research—from the undifferentiated law school curriculum and places it within associated or affiliated departments of international law or international affairs that is not just a separate law department, but a focus of a multi-disciplinary pedagogy built around the study of legal regimes that cross borders.

Part IV considers these models of integration in light of the foundational model of apprenticeship proposed in *Educating Lawyers*. It will suggest the great tensions between the approaches to integrating transnational law into American legal education and integrating practice elements in *Educating Lawyers*. But it will also describe the possibilities of integrating the apprenticeship models of *Educating Lawyers* within frameworks for integrating transnational legal education in American law schools.

II. EDUCATING LAWYERS AND A RECONSTITUTED FRAMEWORK FOR PREPARATION FOR THE PROFESSION OF LAW.

Educating Lawyers is meant to respond to a crisis of professionalism.³⁴ “For professional education, the question is how to provide a powerful experience of what it means to take up a profession.”³⁵ And that question is the core problem taken up by the study. For the providers of legal education have lost touch with the profession whose educational objectives are ethical.³⁶ That conclusion, in turn, is grounded in a set of core assumptions about the relationship between academic legal education and its stakeholders. *Educating Lawyers* starts with a presumption—that the principal stakeholder of legal education is the bar, and that the bar has assumed a critical role in the functioning of the American state.³⁷ It interrogates this function through what it describes as “an unusual angle of vision.”³⁸

³⁴ *Educating Lawyers*, *supra* note 15, at 29-33.

³⁵ *Id.*, at 30.

³⁶ “Ethics in a professional curriculum ought to provide a context in which students and faculty alike can grasp and discuss, as well as practice, the core commitments that define the profession.” *Id.*, at 31.

³⁷ “Thus, the focus of this book is on the preparation of lawyers, more particularly on their preparation in law school—the crucial portal to the practice of law.” *Id.* at 1.

³⁸ *Id.* (“focusing on the daily practices of teaching and learning through which future legal professionals are formed.” *Id.*, at 2-3”)

But law schools and the legal profession no longer work as a harmonious whole—a whole focused on the same set of norms, tasks, goals, and incentives. When lawyer and law instructor were fungible and interchangeable, the common culture that bound them, in terms of objectives, frames of reference, professional incentives and the like, served to ensure that law instructors served the interests of the bench and bar, as then constituted. But for the last hundred years or so, it seems, the legal academy has been falling under the sway of a model that may not serve the interests of the profession as well as it serves its own interests.³⁹ The authors of *Educating Lawyers* somewhat charitably describe this split as producing a “hybrid institution.” This hybrid blends two distinct and not necessarily complementary communities—that of the ancient traditions of the common law bar, and that of the so-called modern research university.⁴⁰ But what should have been a happy union has gone bad—“as American law schools have developed, their academic genes have become dominant.”⁴¹ Thus the overall goal of *Educating Lawyers* is to bring balance back to this arrangement.⁴² And for that purpose, *Educating Lawyers* proposes a unitary framework for education within which the doctrinal, practice and ethical elements of practice can be integrated⁴³ within the normative context of a university environment in the form of a set of three related apprenticeships of professional education.⁴⁴

Yet, for all that, it remains unclear whether this sort of hybrid unity is possible within the context of an enterprise (university sourced professional education) that is neither fish nor fowl. Part of the problem, well identified by the authors, is described by them as a set of powerful “external factors.”⁴⁵ But what the authors characterize as external factors are in reality a set of internal factors—internal, that is, to the values and practices of the academic community within which law schools operate. These include the disciplinary mechanisms of the rankings by outsiders,⁴⁶ and the costs of providing the sort of education that students are willing to pay for.⁴⁷ Though it is hard to see how those factors are external to the university as such. Whatever their demerits, the disclosure standards used represent in large measure the decision taken both by industry leaders (the so-called top schools), and the consumers of those services (the bar and potential students). They serve as a significant disciplinary tool for the organization of academic communities as such and affect decisions with respect to the allocation of resources and the competition for faculty in ways that are internal to legal education as part of a university community.⁴⁸

³⁹ *Id.*, at 4-7.

⁴⁰ *Id.*, at 4.

⁴¹ *Id.*

⁴² *Id.*, at 12-15.

⁴³ *Id.*, at 194-197.

⁴⁴ *Id.*, at 27-29.

⁴⁵ *Id.*, at 33-34.

⁴⁶ *Id.*, at 33.

⁴⁷ *Id.*

⁴⁸ “Within academic circles, legitimacy and respectability accrued to whatever could be assimilated to the model of formal, science like discourse.” *Id.*, at 6.

At least of the factors identified are arguably “external.” Teaching to the test (the bar examination) can be viewed as external to the law school.⁴⁹ But that analysis fails if we adhere to the initial assumption of law schools as a hybrid institution. The bar examination may be external to the law school as an academic institution, but it is hardly external to the law school in its role as part of the community of the bar. The bar examination, in that sense, is no more external to the law school, than an examination in any course offered within the institutional framework of the university. Likewise, the hiring practices of the leading law firms are hardly external to the institution grounded in its principal relationship with the bar.⁵⁰ Decisions of the legal academy’s principal stakeholder (as identified in *Educating Lawyers*) here serves appropriate disciplinary role, but one internal to the institution itself. Hybridity, in this context, makes for complexity. In this case, the external may be far smaller, and contain internal contradictions, than that in non-hybrid systems.

But the greater problem is normative and may be insurmountable. The authors spend a bit of time identifying, and then ignoring, the crucial dilemma of legal education: the nature of law and the function of the legal profession within it. Since the mid 19th century there has been a contest in the United States for the “soul” of law.⁵¹ The progressive nature of American culture began to see the customary law as increasingly obsolete, or at best an impediment to progress. Scientific principles that began to infest all of the social sciences eventually found form in the science of law.⁵² That science, founded on a need to make sense and give order (in the sense understood in the great codification efforts of the European (and especially German) civil law) to law produced a great movement toward positivism that has to some great extent overcome the ancient foundations of the self conception of the bench and bar, and the understanding of its mission within the American legal framework.⁵³ “Law entered the American University at a time when attempts to blend academic and practitioner traditions of legal training resulted in what was, in some respects, less a reciprocal enrichment than a protracted hostile takeover.”⁵⁴

The problem then, is not merely methodological—the basis of the proposals in *Educating Lawyers*—but part of a complex contest for the control of the production of knowledge, and especially for control of the understanding of law in the United States. The contest between the bar and the university represents in symbolic form, a larger contest between the customary law origins and culture of the early American Republic, with the needs and

⁴⁹ *Id.*, at 33.

⁵⁰ *Id.*

⁵¹ See Larry Catá Backer, *Reifying Law: Understanding Law Beyond the State*, 25 PENN STATE INTERNATIONAL LAW REVIEW – (forthcoming 2007).

⁵² The authors of *Educating Lawyers* put it less provocatively. See *Educating Lawyers*, *supra* note 15, at 5.

⁵³ See *id.* (“All this spelled the eclipse of traditional forms of practitioner-directed apprenticeship by academic instruction given by scholar teachers.” *Id.*).

⁵⁴ *Id.*

aspirations of a positive law state into which the United States is evolving. But this contest, now over a century old, has been decided for all practical purposes—and the traditional bench and bar, as guardians of the customary law, have lost.⁵⁵ In this respect, *Educating Lawyers*, fails before it starts, at least with respect to the grand vision of restoring balance between the bar and university communities represented in legal academic education. The bar is now necessarily a junior partner in the enterprise. So the critical mission now becomes much more modest: to preserve some sort of role for the bar within an academic enterprise that serves the interests of a positivist legal order in which lawyers have a more pervasive but much more diminished role.

“In the world of legal theory, this new spirit was exemplified in the efforts of legal positivists, who viewed law as an instrument of rational policymaking—a set of rules and techniques rather than a craft of interpretation and adaptation embedded in the common law.”⁵⁶ Nothing has changed. And though *Educating Lawyers* may lament this passage of power from the bar to the legislator and the academic, it does not propose revolution. And so, the bulk of the study reduces itself to an intense review of micro concerns—methodology for the most part.⁵⁷ The focus is on urging the university to incorporate a broader methodology that nods in the direction of the bar, without seeking to undo the shift in power over law. The law school is now to focus not only on the development of conceptual knowledge, but also on skills and ethics.⁵⁸ The purpose is to socialize the law students to the realities of law, today, but it is not to shift power back to the bar or to turn back the clock on the primacy of the common law. The academy has won, in this sense, and the only object left is to ensure that they find of way of training lawyers to function within the new realities more effectively.⁵⁹ In a sense the roles of the bar and the university have been flipped from their relationship a hundred years ago. “Law school can help the profession become smarter and more reflective about strengthening its slipping legitimacy by finding new ways to advance its enduring commitments.”⁶⁰ The forms of the old partnership are to be maintained—thus the emphasis on the apprenticeship models as metaphors for the methodological suggestions in *Educating*

⁵⁵ Indeed, the authors of *Educating Lawyers* suggest this in their reminder of the century long struggle of the Carnegie Foundation against the tide of the reconstruction of legal education (Id., at 18-20) in the face of the imperatives of membership in university communities (“Thanks in part to the development of legal scholarship, the law schools of the leading universities no longer fear being dishonored as ‘mere trade schools.’” Id., at 7), and in the contest for reshaping the meaning of law and the place of lawyers within American society.

⁵⁶ Id., at 5.

⁵⁷ “The focus of such attention naturally falls on teaching practices that enable learners to take art in the basic features of the professional practice itself. Id., at 9.

⁵⁸ Id., at 12-14.

⁵⁹ Id., at 23-24. Thus perhaps the emphasis on signature pedagogies as a method of specialization.. Id. at 23. These are understood in the manner of disciplinary techniques. See, MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan, trans., 1997, NY: Vintage Books 1995) pp. 195-228.

⁶⁰ *Educating Lawyers*, *supra* note 15, at 128.

Lawyers,⁶¹ but the focus is now on the construction of a lawyer better suited for the times.⁶²

Yet methodology can be important, and sometimes even acquire a normative dimension.⁶³ *Educating Lawyers* first focuses on the Socratic method as the core of legal education's signature pedagogy and its utility to the goals of extending the law school teaching objectives to skills and ethics.⁶⁴ It then explores the skills aspect itself,⁶⁵ and the place of law school as a site for professional formation.⁶⁶ It ends with a set of implementation recommendations.⁶⁷ And methodology may play a critically important role in the naturalization of new areas of legal study within the American academy. In this sense, *Educating Lawyers*, provides a powerful framework for understanding a basis for the incorporation of new practice areas that will maximize their utility to the bench and bar, while satisfying the institutional needs of the university, and remaining connected to their own sources. It is with this in mind that I briefly review the implementation proposals set forth in chapters 2-5 of *Educating Lawyers*.

Methodology focuses on socialization. What law schools do well is teach doctrine. What law schools must do better is to teach the individual to "think like a lawyer."⁶⁸ That involves more than the transmission of doctrine, even the transmission in a peculiar way. It involves the socialization of the individual into the mores and habits of a community, and in doing so more consciously take up the role once reserved to the bar and bound up in its transmission of the "craft, judgment, and public responsibility"⁶⁹ of lawyers. That socialization focuses on the case dialogue method of instruction.

While the authors of *Educating Lawyers* place much positive value on the case dialogue method as the signature pedagogy of legal education, they suggest the possibility of broader application. While the case dialogue method as classically developed is a superb instrument of socialization within a core mission to inculcate doctrinal knowledge, it is

⁶¹ *Id.*, at 25-29.

⁶² *Id.*, at 31-32.

⁶³ See Larry Catá Backer, *Global Panopticism: Surveillance Lawmaking by Corporations, States, and Other Entities*, 13 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES – (forthcoming 2007).

⁶⁴ *Educating Lawyers*, *supra*, note 15, at 47-86 ("In this chapter we attempt to unlock the secret of the learning process in the case-dialogue method and place it within the overall process of preparing legal professionals." *Id.*, at 47).

⁶⁵ *Id.*, at 87-125 ("In this chapter we look at some current promising experiments in the preparation of students for legal practice. In doing so, we hope to call attention to the largely unrealized potential that these models offer for addressing many criticisms of today's law schools, those of the profession and the public." *Id.*, at 88-89).

⁶⁶ *Id.*, at 126-161 ("We show how virtually all forms of the teaching tales place in law schools, . . . are pedagogies that can be used to shape professional identity." *Id.*, at 128).

⁶⁷ *Id.*, at 162-184 ("In this chapter we look closely at assessment in legal education—how it is done, how it might be done." *Id.*, at 164).

⁶⁸ *Id.*, at 47.

⁶⁹ *Id.*, at 4.

missing a piece. That piece is values.⁷⁰ There is a need to form the lawyer, through this power agency, as both a legal technician and moral agent.⁷¹ This points to the need for education beyond doctrine.

Education beyond doctrine serves as a bridges to practice that is of critical importance to the authors of *Educating Lawyers*. Here the authors confront the realities of the class hierarchies that are inevitable within the normative structures of university culture. This the authors refer to as the “problematic legitimacy” of clinical legal education.⁷² “The standard is so securely established that there are few leverage points from which to effect change to the model.”⁷³ Certainly such change is impossible if inconsistent within the values structure of university organization. The authors, drawing on earlier reforming efforts,⁷⁴ propose to change the dynamic indirectly, by changing the way in which clinical education is valued, and then integrating this segment of legal education within the doctrinal mainstream.⁷⁵ The core of that argument is based on an argument that privileges teaching case theory,⁷⁶ that is “the lawyer’s task of understanding the client’s needs and constructing a strategy to address those needs.”⁷⁷

The last building block of an integrated approach to legal education focuses on issues of professional identity and purpose. Lawyers are demoralized and their reputation is diminishing. The author’s ascribe this to a disconnection with morals and values on which the profession was and ought to continue to be grounded.⁷⁸ But it is also possible that the demoralization arises as a consequence of the instability in the self-identification of a profession that no longer serves, as in Coke’s day, as the guardian of the common law against both the state and the individual. Instead, as agents of a state which has increasingly absorbed lawmaking power, the lawyer finds herself between professions. In a sense, *Educating Lawyers* acknowledges both this transitional dilemma and the ultimate new source of equilibrium—grounded in the mission of the university law school to retool the lawyers it produces for their new role in society.⁷⁹ This requires a dialogue between the moral and the legal, for which the authors provide an example from contracts law.⁸⁰ Uniting cognitive, practical and ethical-social development requires a broad range of courses that take students from a passive role as the imbibers of doctrine to externship courses that permit them to try out what they have learned.⁸¹

⁷⁰ Id., at 56-58. This is value understood as both ethics and a direction toward the “right” result.

⁷¹ Id., at 84.

⁷² Id., at 89.

⁷³ Id., at 90.

⁷⁴ Id., at 91-95.

⁷⁵ Id., at 100-111.

⁷⁶ Id., at 124-125.

⁷⁷ Id., at 122.

⁷⁸ Id., at 126-131.

⁷⁹ Id., at 131-132.

⁸⁰ Id., at 142-144.

⁸¹ Id., at 147. The relationship between these integrative approaches based on both the infusion of ordinary classes with social and ethical issues and the development of more ethically charged

Lastly, *Educating Lawyers* tackles issues of measurement. There is a bit of irony here. For it is measurement, in part, that has brought the profession (and by that I mean the profession of legal education) to this impasse and the tensions with its traditional principal professional stakeholder—the bar. The slew of private rankings—and the important real life effect of these private efforts—evidences a pervasive academic culture of ranking. Hierarchy, subordination, judgment are key features of academic culture. It is no wonder that they carry over to the pedagogy offered to train students. Without reform in the way in which law schools create their own hierarchies, and subordinate, there can be little real hope for change in the way law schools assess their own work products. Still, *Educating Lawyers* makes a case against single end of semester examinations,⁸² and grading on the curve.⁸³ Drawing from related professions, *Educating Lawyers* makes a case for change.⁸⁴ They favor what they call institutional intentionality: “linking feedback to students with feedback from students about how well they are achieving the learning goals for the course.”⁸⁵

Putting this all together, the authors of *Educating Lawyers* warn against treating their suggestions as an additional component to be added to the curriculum of legal education. They warn that the point is to avoid both the segregation of professionalism and ethical components in legal education.⁸⁶ Instead, an integration model is preferred. “we endorse a different strategy, which we call *integrative* rather than *additive*. . . . The core insight behind the integrative strategy is that effective educational efforts must be understood in holistic rather than atomistic terms.”⁸⁷ For this purpose, “the common core of legal education needs to be expanded in qualitative terms to encompass substantial experience with practice, as well as opportunities to wrestle with the issues of professionalism.”⁸⁸ In that context, educational climate matters. “The goal should be to create a campus culture that is a positive force.”⁸⁹ It is clear that this can be done. But again there is cognitive dissonance. Law schools will have to pay much attention to reforming the climate among faculty and between faculty and administration, if they mean to be successful in changing the educational climate generally. Faculties are likely to reproduce for their students the

courses radiating from out of the traditional course in professional responsibility is explored *id.*, at 151-158.

⁸² *Id.*, at 167.

⁸³ *Id.*, at 168-170.

⁸⁴ *Id.*, at 171-179.

⁸⁵ *Id.*, 180.

⁸⁶ *Id.*, at 190-191. The case for clinical legal education is made *id.*, at 120-122.

⁸⁷ *Id.*, at 191 (“Legal scholarship has generated a succession of bold, even radical, new ways of understanding the law, but this kind of scholarly innovation has proved entirely compatible with a stable, even conservative orientation toward educational practice and is part and parcel of an orientation that privileges the cognitive apprenticeship in its present, stand alone configuration.” *Id.*, at 192).

⁸⁸ *Id.*, at 195.

⁸⁹ *Id.*, at 183.

academic climate in which they operate. What seems like an innocuous and separable component, thus suggests complexities untouched by the authors of *Educating Lawyers*.

But integration is costly. The authors of *Educating Lawyers* tacitly acknowledge the power of the university model in describing the skill sets necessary to effect the integrative model they propose.⁹⁰ A principal effect of the move to a university norm set has been to denigrate the practice experience of applicants for teaching positions. In many cases, too much experience is sometimes deemed to poison the candidate for a successful academic career. The idea, roughly, is that people too long in practice have too deeply imbued the values and norms of the bar and will not be able to successfully transition to the norm structure of the university—requiring a focus on doctrine and writing. And thus, “Faculty development programs that consciously aim to increase the mutual understanding of doctrinal and lawyering faculty of each other’s work are likely to improve students’ efforts to make integrated sense of their developing legal competence.”⁹¹ All must come to accept a common educational purpose and bend their efforts to that objective. Faculty with different strengths must “work in a complementary relationship.”⁹²

The study ends with a suggestion of law school steps in the right direction. The models proffered include that of New York University and CCNY, which, in different ways seek “to bring the three aspects of legal apprenticeship into active relation.”⁹³ One alternative seeks to leverage the de facto division of talent (doctrinal faculty who are not lawyers, and lawyers who are in charge of clinical courses) within the university to construct webs of courses that are linked in a way that privilege the three areas of legal training.⁹⁴ That approach works for large law schools with substantial resources and an institutional framework that permits an adequate administration of programs of this sort of complexity. Cost is certainly an obstacle.⁹⁵ And this sort of leverage is necessitated by the privileging of the normative structure of the university that tends to privilege “a distinguished well published faculty that includes leaders of the field.”⁹⁶ Another alternative involved a greater investment in integration within the curriculum. That required less attention to leveraging differences in talents and more on more broadly changing the focus of the curriculum.⁹⁷ Yale is cited for its decision to reduce the number of doctrinal courses “and encouraging students to elect an introductory clinical

⁹⁰ Id., at 202.

⁹¹ Id., at 196.

⁹² Id., at 197.

⁹³ Id.

⁹⁴ Id. The programs at N.Y.U. are described in some detail at Id., at 38-43.

⁹⁵ See id., at 198.

⁹⁶ Id., at 38. Of course, the field no longer necessarily includes the bench and bar, but the community of academic scholars. See, e. g., Larry Catá Backer, *Defining, Measuring and Judging Scholarly Productivity: Working Toward a Rigorous and Flexible Approach*, 52 JOURNAL OF LEGAL EDUCATION 317 (2002).

⁹⁷ Id., at 197. The programs at CCNY are described in some detail at id., at 34-38.

course in their second semester.”⁹⁸ This is said to point to an intermediate strategy, “a course of study that encourage students to shift their focus between doctrine and practical experience not once but several times, so as to gradually develop more competence in each area while, it is hoped, making more linkages between them.”⁹⁹

Reduced to its essence, then, *Educating Lawyers*, as a theoretical exercise, seeks to find a space within university centered and positivism focused academic law for the resulting new realities of law and the responsibilities of the profession. More importantly, as methodology, *Educating Lawyers* seeks to privilege certain specific principles of legal education. Foremost among them is the integrative principle of education over an additive or compartmentalized approach to legal education. Also important is the tacit acceptance of significant class divisions within legal education—what may be appropriate for “top tier” schools may be beyond the abilities, or even the ambitions, of lower ranked schools. To each class of law school belongs a different level of acceptable approaches to integration. In the language of *Educating Lawyers*, for every New York University, there is a CCNY, for every Yale Law School there is a Southwestern Law School. For those who still cling to the principle of equality among law schools—of horizontal rather than vertical professional organization, this might be disquieting, but only makes explicit what has been implicit for years. As a consequence, there is a bit of flexibility. But it is grounded in academic reputation and resources. Lastly, *Educating Lawyers* acknowledges that law schools are incapable of great changes in short order—they can act only incrementally.¹⁰⁰ Changes have to be adapted to that reality, but ought not to settle for incrementalism as a goal in itself. Partial changes must lead to an objective.¹⁰¹

III. THE MOVEMENTS TO INCORPORATE GLOBAL LAW IN AMERICAN LEGAL EDUCATION; A STRUCTURE FOR ANALYSIS.

Before it is possible to consider the impact of *Educating Lawyers* on the integration of transnational law in the American law school, it is necessary to understand the dynamics of that integration movement in its own right. The movement to such incorporation has acquired its own dynamic that may impact the means available for joining these efforts with those proposed in *Educating Lawyers*. Reviewed on its own terms, it is clear that the patterns of development in the discourse of incorporating international and transnational law in law schools has significant parallels with the discourse of the integration of professionalism and ethics in university centered legal education.

No consideration of the problem of integrating international and transnational practice issues into the operations of law schools can be adequately addressed without a

⁹⁸ *Id.*, at 197.

⁹⁹ *Id.* The programs at Southwestern law School are also identified as failing in this category—these involve some curricular changes. *Id.*, at 198.

¹⁰⁰ *Id.*, at 189-191.

¹⁰¹ *Id.*, at 191.

reasonable framework for analysis. That analysis must focus on three things: (A) what are the realities of law making and practice, (B) how do those realities relate to the mission of a particular law school; and (C) what are the resources and resource constraints of that institution. On the basis of that analysis, it becomes easier to approach the assessment of the objective: the manner, if any, in which a particular law school will choose to embrace (and support) international and transnational elements in its teaching, research and service. The structure of analysis ought to work from “big picture” issues to the minutiae of implementation. Unworkable dreams, like the dreams of infants, are distractions worth avoiding.

A. Assessing the Impact of International and transnational Issues on Law School Stakeholders.

The assessment of the impact of international and transnational issues on law school stakeholders is not made in a vacuum. It involves an assessment of the impact of a variety of factors. The stakeholders are not hard to identify: faculty, students, employers, administrators, and institutional actors in the field of the production of legal culture (courts, government, norm makers). However, factors and assumptions underlying stakeholder choices are less apparent. These bear careful extraction before choices are made.

The factors affecting assessment are far more difficult to apply. First, there is the issue of time. It is tempting to assume that the character, desires, and practices of stakeholders *today* ought to serve as the basis for assessment. One can then simply determine the form of that reality and conform one’s analysis to it so conceived. But in a context in which such character, desire and practice is likely to change in the future, such assessment guarantees obsolescence even before implementation. Does one plan for the current context or a future context? If one plans for a future context, with what degree of certainty can one assess the characteristics of that future on which such assessments are to be made?

Second, there is an issue of identity. This is, of course, related to the issue of time. Today’s student pool may not resemble tomorrow’s pool. A realistic assessment of the character and general potential of students is necessary before any analysis. Many schools tend to avoid this issue—falling back on more or less empty rhetoric, or using the opportunity to reaffirm notoriously hortatory goals. A law school that deliberately (or which out of necessity) recruits a student body whose interests remain focused on state, local or even national practice, may tend to misallocate resources to international and transnational practice and research issues.

Or it may not. The desires, objectives and values of law school stakeholders may not be congruent. Indeed, they might cut in irremediably inconsistent directions. Consider the law school whose students are focused on state and local practice issues, and who draw an employer base that reflects those preferences. These students may be taught by a faculty whose predominant interests and strengths (including reputation with bench, bar

and other academics) are national, rather than state and local. But this institution may operate in a broad academic context in which reputation among elite academic institutional players is increasingly dependent on allocation of resources and emphasis on international and transnational law and legal issues (international, comparative, foreign and transnational law). And the institution's administrators, with the support of university administration, may be committed to a course of action the object of which is to secure a certain reputation among elite academic institutional players. Knowledge of stakeholder interests, in this context, provides little comfort. Information—knowledge—does not necessarily suggest choices.

In this context it is important to be realistic and honest. Unstated premises are dangerous things. Context is critical; both current and future context must be assessed realistically. For example, if very few of a law school's graduates will practice in the area of international human rights, for instance, talking about the pedagogical value of that aspect of international and transnational practice may be somewhat disingenuous, but less so if the faculty becomes committed to devoting resources to attract students (and employers and research focus) in that field. And it is also important to recognize that faculty preference and interest, as well as the "market" for students, drive the extent and manner in which international and transnational issues may be incorporated into a law school's mission, at least at this point in the development of a consensus of its general utility within American legal academic culture. Once the importance of the professional interest of the faculty is understood, and its relationship to pedagogical need honestly stated, it is more likely that a faculty can intelligently and openly discuss how to facilitate the work of all faculty.

In addition, there is the issue of substance (or taxonomy). The traditional division of fields touching on transborder issues—international law, comparative law and foreign law—now may no longer realistically define the field. An assessment bounded by current or past understanding of the definition of the "fields" contained within the objective (incorporating transborder legal issues within the curriculum) may substantially miss the mark. But this discussion, usually heated in many places, tends to reinforce the academic nature of the dispute, and works against the framework advocated in *Educating Lawyers*.

Moreover, change itself is costly. Inertia is not merely a matter of economics. It also affects social structures, power relationships and communal norms within a law school.¹⁰² Old approaches are powerfully defended in part because of their legitimacy, their traditional value. But they are also defended because those members of institutions that had embraced them have derived a certain amount of power—financial, reputation, influential—within and outside the institution on the basis of that institutional structure, and the resultant allocation of things of value. Change threatens those relationships, and that power. People thus threatened will do what they must, using whatever language or

¹⁰² For a sense of this, see, e.g., Michael P. Scharf, *Internationalizing the Study of Law*, 20 PENN STATE INT'L L. REV. 29 (2001).

devices available, to retain their position. Change this costly should not be lightly undertaken. But it should, for this reason alone, not be avoided. The proud saddle maker in 1930 could look with a certain amount of satisfaction at his ability to avoid losing status when she was able to successfully thwart plans to incorporate an automotive division within her firm. But she is the poorer for the experience, and her institution the more irrelevant for the choice. There is always a call for saddle makers, at least as long as people ride horses. A good saddle maker will always be in demand, but saddle making, like horse transport in general, is no longer a central element of transportation, and the saddle maker no longer occupies as important a place in the transport industry. Thus, to the extent the choice was made in light of knowledge of these consequences, it remains valid nonetheless. But the consequences, especially the economic consequences, are significant.

Still, the most contentious issue of the role of international and transnational issues in law school is the difficulty of arriving at agreement about the definition of the relevant terms and the methods for measuring their impact. International and transnational law is notorious for its ambiguity, as it encompasses more than one field, traditionally defined as such within American academia.¹⁰³ That is both the strength and weakness of a powerful yet dynamic and immature area of law. The issue is made more complicated by an increasingly power set of suggestions that the current traditional fields of law, and the courses defined around them, ought to be due for a substantial overhaul, even in their domestic context.¹⁰⁴ Some sort of working definition, and methods for “finding” evidence of its impact among stakeholders, is critical for assessing the value of expending resources on its integration into the programs of a law school.

These discussions, and the framework issues they invoke, are undertaken outside of the foundational issues touched on in *Educating Lawyers*. The very terms from which the issues are extracted suggest that this is something special, different, and apart. It is something that must consciously be interwoven into existing legal education. And it is something that, because not yet critically necessary, can be treated as optional rather than as a critical and inseparability component of American legal education.

Like the discussion about capabilities, the discussion about mission ignores the conceptual framework of *Educating Lawyers*. Indeed, the framework of that discussion might well tend to reinforce the academic oriented focus of legal education. No discussion of an assessment of the necessity or form of incorporation of a international and transnational element in law school teaching and research avoids conflict over the law school mission. Law Schools, like most other institutions, are notoriously reticent

¹⁰³ See, e.g., Larry Catá Backer, *General Principles of Academic Specialization By Means of Certificate or Concentration Programs: Creating a Certificate Program in International, Comparative and Foreign Law at Penn State*, 20 PENN. STATE INT’L L. REV. 67, 85-101 (2001).

¹⁰⁴ See, e.g., Thomas D. Morgan, *Educating Lawyers for the Future of the Legal Profession*, *The George Washington University Law School Public Law And Legal Theory Working Paper No. 189* (2005), available at <http://ssrn.com/abstract=881846> (accessed Feb. 11, 2007).

about articulating mission in other than the most general terms. Mission statements are usually broad enough to accommodate virtually any form of legal education. This is not a criticism, but a reminder that the mission of law school is often apparent more from its practice than from its statements. The reality of mission, rather than its formal articulation, must be the basis for assessment. That, in turn, is a function of a variety of factors.

First, preferences. The long-term preferences of stakeholders are a basic component of purpose. But, as the preceding discussion suggests, it is the most difficult component to fairly assess. Still, an assessment must be made, one that successfully mediates among the various perspectives and provides a means of modification as preferences and outlook change. Provision ought to be made for the production of information that facilitates such perspective shift. Fatal to any analysis of stakeholder preference is a failure to grasp its positive as well as its descriptive aspect. Law schools shape stakeholder preferences by modifying their behavior to change the character of their stakeholders. Increasing student diversity, or LSAT scores, can significantly affect stakeholder preference going forward. Changing the composition of faculty can do the same. Evolving employer tastes have the same effect, but so does changing the law school's employer base. A Law School must accept its past, and live in its present, but has some power to shape its future by changing the inputs that produce the preferences (and character) of its stakeholders. And in some schools, some success in this respect has been accomplished on a fairly modest budget.¹⁰⁵ Even so, "there was some initial resistance to the proposal" to internationalize the traditional domestic law curriculum.¹⁰⁶

Second, abilities. The aptitude of faculty, over the long term, and their willingness to conform to changes in the values of the production of certain kinds of knowledge, will substantially affect the ability of a Law School to incorporate changes, including but not limited to the addition of the international and transnational element, to the curriculum and research. Faculty committed to a particular world view, even one that that is belied by the reality around them, to which they may remain oblivious, or for which they have constructed a ready and plausible rationalization, may be a faculty unready to adopt change, even necessary change, with any degree of success. In such cases, either the aggregate composition of faculty will have to change or the matter put off. Reeducation is possible, but costly in terms of time and resources. Such faculty might be forced to conform, but conformity will yield mediocre results. Realism in assessment on this score

¹⁰⁵ See, e.g., Michael P. Scharf, *Internationalizing the Study of Law*, 20 PENN STATE INT'L L. REV. 29 (2001). Professor Scharf the success of a program which, in 1999, offered faculty at the New England School of Law a stipend of \$1,000 "if they would design and incorporate an international law teaching unit into their domestic law courses to ensure that students are exposed to international law issues in required and highly recommended courses throughout the curriculum" *Id.*, at 31-32.

¹⁰⁶ *Id.* at 32. Ironically, some resistance came from those concerned that wide internationalization of the curriculum would adversely affect enrollment in the international specialty courses. *Id.*, at 33.

is essential, no matter what the surrounding reality may be. Not every law school can serve as an industry leader—a risky proposition in any case.

Third, consensus. An institution led unwillingly to follow any course of action acts at its own peril. Consensus building involves more than the accumulation of *diktaten* from eager administrators or a similar accumulation of silences translated as acceptance. It is always useful to recall the experience King Canute's with the tides;¹⁰⁷ for us the lesson is as valuable for those who would command the tides as for those who believe that the rising and falling of the tides is somehow an indication of volition. While such actions have the appearance of forward movement, they produce no deep impression and no solid foundation on which to build lasting institutional cultural change. The hard work of consensus building, of building a desire to participate based on fair assessments of future realities, present capabilities, and resources, and the benefits of success (a success that must be fairly shared among institutional actors) is critical in any program of change. Where consensus goes missing, failure, however packaged and veiled, will surely follow.

But consensus building can be accomplished in a variety of ways. At Harvard Law School, for example, consensus is expressed in the number of faculty actually embracing a way of teaching and researching.¹⁰⁸ New York University Law School, consensus about the value of the international and transnational element in legal education, and its centrality to legal education, was solidified through the establishment of NYU's Hauser Global Law School Program.¹⁰⁹ But even New York University Law School started with a small number of faculty committed to internationalizing the curriculum.¹¹⁰ Thus, the reality that consensus is an ongoing project is no proof of its failure. Alternatively, a

¹⁰⁷ Canute sat at the seashore and unsuccessfully ordered back the tides to prove that kingly power has its limits (available at <http://www.inspirationalstories.com/0/91.html>) (accessed Jan. 30, 2007).

¹⁰⁸ See discussion at text at notes 22-23, *infra*.

¹⁰⁹ See New York University, Hauser Global Law School Program, *About Us*, available at <http://www.nyulawglobal.org/aboutus/aboutus.htm> (accessed Feb. 7, 2007) ("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.").

¹¹⁰ John Sexton relates how

[b]eginning in the late 1990s, "we asked for a single volunteer, subject neutral, from among the first year doctrinal faculty members. We have four first year sections. We asked for a volunteer from each of these four sections who would commit himself or herself to integrating global perspectives into his or her course. . . . After running that drill for one year we then asked for a second volunteer in each of the sections. So now we have global elements and perspectives being introduced in up to two of the five core courses. This is an intermediate step to a new and radical curriculum that we are going to be developing.

John E. Sexton, *Curricular Responses to Globalization*, 20 PENN STATE INT'L L. REV. 15, 17-18 (2001).

broad consensus among faculty might be required before proceeding. Alternatively, a faculty (and its administration) may choose to “make facts” by a deliberate program of faculty hiring that effectively changes the basis of consensus within that body. The choice will likely depend on faculty (or institutional) culture. It may also depend on administrative choices—a willingness to take risks and follow through may dictate the basis for moving forward to achieve a necessary minimum consensus. But a minimum consensus is necessary.

Fourth, resources. Change is not cost free. The allocation of resources directly impacts all faculty and law school programs. Resource allocation affects power relationships within a faculty. It affects morale. Morale affects the ability of law schools to produce happy (and contributing) faculty and perhaps even contribute to the length of decanal tenure. A law school without the ability or will to commit the necessary resources to effect successfully the introduction of the transnational element into its teaching and research culture, ought not to engage in the exercise. And law schools can remain true to their specific culture and objectives, that is, consciously elect to avoid a significant incorporation of the transnational element, without compromising on their ability to produce lawyers to serve specific market segments for legal services. In this context, it is important to remember that resource allocation and availability may take many forms, not all of which are financial. The issue of resources is thus intimately tied to the issue of consensus and institutional capacity. Resources, however, are not limited to economic resources. Stakeholder resources are also important. At least a critical number of faculty members must be willing to commit the time and energy to making a change of this kind possible. It might be possible to hire around resource shortfalls, but again, that option is sometimes not available to law schools with significant pressing obligations in other areas. Lastly, students must be willing to invest in the revamped curriculum. Even the most brilliant and foresighted reinvention of a faculty and its curriculum will serve no purpose if students fail to take advantage of it, and if employers fail to hire students thus trained.

Fifth, realistic expectations. The realities of the hierarchies of the legal academy, and the rigorously enforced behavioral expectations that flow from that hierarchy are not lightly bucked. Well-resourced institutions at the top of the reputation pyramid can not only expend resources to more accurately divine the future, they can also expend resources to facilitate consensus and fund its attainment. That sort of facility is more difficult for less well resourced law schools, which tend to be placed further down the reputation ladder. For law schools at the bottom of the reputation hierarchy, no such facility may be realistically available. This reality, usually avoided by the leveling rhetoric of academic self-assessments, is avoided at a law school’s peril. Dreams sometimes may not be realized. A realistic self assessment of the possibilities permitted a law school given its resources and place within the American academic reputation hierarchy is a necessary primary step in any consideration of moving to affect programs undertaken by reputation and resource leaders in the industry.

The last point of the preceding discussion ought to lead to a focus on the third great leg of analysis: a realistic assessment of capability. Capability provides the baseline for a number of decisions: the cost of embracing a program of international and transnational legal education, the form that program may or must take, the cost of amassing sufficient capability to make any such program viable, the likelihood of success for the program to be implemented, and the consequences (especially in terms of resource allocation) of embracing any such program.

Assessments of this type require the taking of an institutional inventory.¹¹¹ These sorts of inventories present difficulties beyond the need to control for institutional or personal self-delusion. It is, for example, not always easy to determine who among the faculty already has an interest or engages in teaching of material that meets the programmatic needs of a international and transnational regime. And there may be a gap between identification of the willing, and willingness to change old teaching and coverage habits. It is also not always easy to manage faculty education.¹¹² Suppose, for example, that a determination is made to add a “transnational” component to existing courses. Either existing single jurisdiction faculty will have to be retrained (a sensitive enough issue) or additional faculty resources will have to be deployed (by bringing guests). Both generate costs.

Moreover, it is easy to overlook emerging institutional arrangements for accessing a international and transnational component in legal education. Among the easiest to ignore are programs of association with foreign law schools, systems of networked education that are becoming increasingly important.¹¹³ In tight fiscal environments leveraging through associations with foreign law schools may provide a viable alternative. Still, this is an alternative with its own costs.¹¹⁴

¹¹¹ Such an inventory must take into account a number of things. Among the most important might be the following: (1) Current course coverage; (2) Potential course coverage given faculty ability and preferences; (3) Current programs in place; (4) Potential programs that might be implemented; (5) Necessary course coverage to meet the objectives of adding the international and transnational dimension in legal education; (6) Necessary programs to meet the objectives of adding the international and transnational dimension in legal education; (7) Necessary faculty additions to meet coverage, research and other programmatic needs; and (8) Necessary administrative support necessary to support the programs,

¹¹² Thus, for example, this may affect matters like post tenure review processes, faculty support levels, teaching loads and the like. Essentially, incorporation in any of its aspects might change the set of fundamental contract and network relationships on which the field of legal production at the law school level has been organized for nearly a century. Those changes, to the extent they are fundamental enough, could require a great deal of attention, time and money. They will certainly pose significant institutional issues to the extent that its effects and obligations are meant to be spread widely among the faculty, or otherwise draw substantial resources away from traditionally privileged areas of funding.

¹¹³ See, e.g., Chang-fa Lo, *International Conference On Legal Education Reform: Reflections And Perspectives*, 24 WIS. INT'L L.J. 1 (2006).

¹¹⁴ See discussion, below, at text and notes ---.

It is also not easy to determine minima for course and program requirements. And those minima may be substantially affected by objectives—what is the precise nature of the product to be provided.¹¹⁵ Planning involves shooting at a moving target on multiple levels. That reality affects the resources that would be realistically necessary to commit to the program. It may thus affect the form that any program of naturalizing the international and transnational element within a particular law school may take. It is to that last point that I turn next.

B. Traditional Framework Structures for Incorporating the International and transnational Element in Law School Curricula, Research and Service.

There are three traditional models for incorporating the international and transnational element into law school curricula: the *integration*, *aggregation* and *segregation* models. Each seeks to modify existing resources and teaching/research models to incorporate a transnational element into the curriculum. Each model offers a number of benefits but also have some detriments. The models are sketched in “pure” form. Of course, no law school has committed to any single model; most law schools have sought to incorporate some aspect of each of the models. The mix chosen will depend on the resources available at a law school, as well as its sense of itself, its mission and its determination of the centrality of transnational law orientation for the future of the professions (law and legal academic).

1. Integration model. The first is the most comprehensive and “deep” form of integration, one that parallels the integration of “national” law in law school curricula, research and service at the start of the 20th century. This is an approach being attempted

¹¹⁵ This question involves both a consideration of the relationship between program content and student (what does one want the students to get out of the program) , program content and faculty (what does one want to suggest about the relationship of law faculty to the fields of law to which they are devoting their professional careers) , and program content to outside stakeholders—the bench and bar, prospective students, alumni, the local community and community of global peers (how does one want to *brand* the efforts). Branding is a particularly sensitive issue and one that affects both the internal and external relations of law schools as institutions within the hierarchy of institutions in the field. Thus, for example, branding within a field not recognized by rating groups (e.g. U.S. News & World Report (U.S. News & World Report, Guide to Law Schools, Rankings, available at http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/law/lawindex_brief.php (accessed Aug. 27, 2007)) or even the Leiter Reports (see Brian Leiter’s Law School Reports, available <http://leiterlawschool.typepad.com/> (accessed Sept. 1, 2007)) may yield costs in excess of institutional advantages. The lack of institutional advantages invariably translates, in some respects, to the individual. For example, the U.S. News and World Report Rankings rank specialties in (1) clinical training, (2) dispute resolution, (3) environmental law, (4) healthcare law, (5) intellectual property law, (6) international law, (7) legal writing, (8) tax law, and (9) trial advocacy (id., at http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/law/lawindex_brief.php (accessed Aug. 29, 2007) but not in other fields.

by a few institutions, most of which consider themselves (or might be considered by others) at the higher reputation levels of the legal academy. It is marked, at least in theory, by an attempt to refocus the educational and research hub of the law school from the national to the transnational to the greatest extent feasible. The object is to produce generalists.¹¹⁶

For example, Yale Law School, focusing on its current Dean, Harold Koh, “has made globalization a priority. Under his leadership. . . . The Law School’s longstanding international tradition occupies a central place in its intellectual life, and many legal issues are approached from a global perspective. The devotion of its faculty and students to its myriad international projects has made Yale a first-class global law school.”¹¹⁷ Yale appears to have accomplished this by larding its general offerings with a host of programs and centers each dealing with some aspect or other of law that crosses borders.¹¹⁸ Yale law students are offered a large number of “international law” courses and are told that “many domestic law courses contain international components.”¹¹⁹ Yale law students are also able to apply for “Graduate Certificates of Concentration in the following areas: International Development Studies, International Security Studies, African Studies, European Studies, Latin American Studies, Modern Middle East Studies.”¹²⁰

Harvard Law School offers a similar level of integration of the transnational element within the framework of J.D. education program. “At HLS an international perspective is foundational, rather than peripheral, to legal inquiry. And this forms the basis for scholarship and action that have tangible impact in the world.”¹²¹ This orientation requires a substantial institutional commitment from stakeholders. “More than half of the Harvard Law faculty incorporate international and comparative perspectives in their teaching, scholarship, and public service in a significant way. This year, they offer more than 65 HLS courses and reading groups focusing on international, foreign or comparative law.”¹²²

¹¹⁶ See, e.g., Sebastien Lebel-Grenier, *What is a Transnational Legal Education*, 56 J. LEG. EDUC. 190, 195-96 (2006).

¹¹⁷ Yale Law School, International Law, available at <http://www.law.yale.edu/internationallaw.htm>.

¹¹⁸ See Yale University website, *International Law Programs at Yale University*, available at <http://www.law.yale.edu/academics/internationallawyaleuprograms.htm>.

¹¹⁹ Yale Law School, International Law, Courses, available at <http://www.law.yale.edu/academics/internationallawcourses.asp>.

¹²⁰ Id.

¹²¹ Harvard Law School, International Legal Studies at Harvard Law School, available at <http://www.law.harvard.edu/ils/> (accessed Feb. 4, 2007).

¹²² Id. (“The scores of visitors and scholars from abroad, and some 4,000 alumni who live outside the United States, help make HLS truly international. Our research centers host hundreds of talks, workshops, and conferences with an international focus. And all of this activity draws on the world’s foremost academic law library.”) Id.

Georgetown University Law School offers a glimpse at a related form of implementation of the model. Georgetown's web site states a commitment "to preparing all of its students for a legal career in this increasingly globalized society. The array of course and seminar offerings at the Law Center dealing with transnational, international, and comparative law in many forms is the most comprehensive in the country. Numbering about 100 in the 2005-2006 academic year."¹²³ This sort of program requires not only international and transnational law specialists, but critically, a willingness of other faculty "who have broadened the scope of their scholarship and teaching to encompass transnational, international and comparative aspects of their fields."¹²⁴ The job of the law school is made easier by its ability to exploit its location, offering opportunities to expand curricular and research possibilities at smaller marginal cost than a similarly situated institution in a more remote location. The teaching focus of international and transnational issues is a one-week program of classes offered to first year law students after the end of their semester, which are meant to expose them to the transnational dimension of the domestic law to which they will be exposed.¹²⁵

The University of the Pacific offers another variation on this approach as well.¹²⁶ The law school web site explains that "The Pacific McGeorge initiative to globalize the curriculum took major steps forward this summer with the publication of more books in the Global Issues series by Thomson-West. The law school is at the forefront of a movement to prepare 21st Century students to practice in a legal world that has become increasingly global. The philosophy behind this initiative may be best summarized by Justice Stephen G. Breyer's statement that 'This world we live in is a world where it is out of date to teach foreign law in a course called Foreign Law.'"¹²⁷

Other faculties across the United States have tried similar approaches on a more ad hoc basis.¹²⁸ It is possible, in fact, to move into an integration approach slowly—starting with just a few courses and working one's way to a fuller integration over time. Thus, for example, several years ago American University's Washington School of Law, "made

¹²³ Georgetown Law School, International and Transnational Law Programs, available at <https://www.law.georgetown.edu/oitp/>.

¹²⁴ Id.

¹²⁵ See id.

¹²⁶ University of the Pacific, *Globalizing the Curriculum*, available at http://www.mcgeorge.edu/international/global/global_business/initiative.htm.

¹²⁷ Id.

¹²⁸ See, e.g., Neil S. Siegel, *Some Modest Use of Transnational Legal Perspectives in First Year Constitutional Law*, 56 J. LEG. EDUC. 201 (2006) (but cautioning that the transnational element remains "a relatively minor part of my overall course" Id., at 215); Rosalie Jukier, *Transnationalizing the Legal Curriculum: How to Teach What We Live*, 56 J. LEG. EDUC. 172, 172 (2006) (citing Roth Gordon, *Teaching the CISG in Contracts: The Challenges of Adding the International to First Year Contracts*, in 2006 AALS Conference Workshop Materials 141-144 (Jan. 2006)).

revisions to the first year curriculum to incorporate international issues into traditional first year ‘domestic’ law courses.”¹²⁹

This more or less comprehensive approach is complicated and requires a large institutional commitment in terms of resources and a willingness to change traditional academic culture.¹³⁰ At its limit, this approach requires all faculty to change their approach to teaching and perhaps even to research. Just as the focus of research at elite institutions shifted from state to national issues and from technical to theoretical discourse, the focus of research under this new approach may require a shift from the national to the cross or multi-jurisdictional. “The pull to follow the currently conventional thinking of the judiciary, and the inertia exerted by the traditional division of subjects within a law school curriculum, all tend to create barriers to any change in the current approach.”¹³¹ Thus, the integration model requires a certain amount of education of stakeholders and a willingness to develop programs for the long term. In the absence of this sort of comprehensive and long term commitment, this form of international law programming is unlikely to prove successful.

2. Aggregation Model. The second, and most popular, model of integration, is based on the “field of law” or aggregation model, by which international and transnational issues are segregated and privileged as one among equals of areas of study of law—like labor, corporate or tax law. The strength of this approach lies in its ability to leverage conventional approaches to law teaching. The great danger of this approach is that it will reinforce the conventional framework that privileges a strictly delimited territorial approach to legal education.

Under this model, international and transnational law (however understood) is consolidated in a number of courses, the extent and number of which will vary with the tastes of a faculty, their resources, capacities and the perceived interests of their local markets. This method involves virtually no changes in the structure of a law school’s programs. It reduces the issue to one of resource allocation. A number of courses are identified. These courses are developed and faculty found to teach them. Perhaps additional programs, ad hoc or more institutionalized in nature, are established, and students are encouraged to take advantage of the “value added” of such programs in the same way they would be encouraged to take advantage of other institutional resources that might be good for them.

¹²⁹ Caludio Grossman, *Building the World Community: Challenges for Legal Education*, 18 PENN STATE INT’L L. REV. 441, 446 (2000).

¹³⁰ I noted in earlier work that “[t]here exist several significant impediments to any movement in this direction. The addition of international and comparative themes to existing courses, and especially existing first year courses, may present fatal obstacles.” Larry Catá Backer, *Human Rights and Legal Education in the Western Hemisphere: Legal Parochialism and Hollow Universalism*, 21 PENN STATE INTERNATIONAL LAW REVIEW 115, 151 (2002).

¹³¹ *Id.*, at 152.

At its most imposing, this method permits a law school to provide a structure for the study of law as it relates to jurisdictions outside the United States. The University of Michigan Law School has adopted such an approach. There, a single first year course now serves, like contracts and property and torts for their fields, as the organizing course for further study of issues that touch on matters beyond the territorial limits of the United States. “The Transnational Law course will not replace advanced courses in public international law, conflicts of law or international litigation, but will provide a common foundation, liberating teachers of the advanced courses to give deeper coverage of the respective materials.”¹³²

At its least imposing, this approach is informal, easily integrated with other similar programs, and reducing any possibility of privileging the international and transnational element of law. At the Pennsylvania State University Law School, for example, the faculty adopted changes in the mandatory curriculum creating a requirement for a first year law student elective. Among the elective courses offered is on “Transnational Law and Legal Issues.”¹³³ These sorts of aggregation or add on programs can easily do more for the appearance of movement to an incorporation of a lively international and transnational component to legal education than actually make it so. It can suggest that transnational law neither presents systemic issues of education nor approaches to law and legal practice, nor does it require a change in the way law is understood. It is an add on course. It diverts resources but otherwise effects no fundamental change in the way the business of legal education is conducted. For many schools, especially those who do not expect many students affected, at least in the short term, by the turn to cross border practice, this may be enough.¹³⁴

3. Segregation Model. The third model is the segregation model. There are two basic approaches under this model. The usual approach is nicely illustrated by the University of Pittsburgh’s Center for International Legal Education (“CILE”) founded in the late 1990s (“Originally created to provide a home for international and comparative law programs at the School of Law and to administer Pitt’s LL.M. Program for Foreign Law Graduates, the Center has become a significant provider of legal education programs throughout the world. That process continues with the inauguration this year of the CILE

¹³² See Atik and Soubboth, *supra*, note – at 718. The authors also note that “In making the Transnational Law course mandatory, the Michigan faculty ‘conveys the important message that the international dimensions of law have become so pervasive that (as [their] alumni tell [them]) their study is not an option but a necessity. Michigan is meeting challenges in staffing four sections of the course and in preparing appropriate teaching materials. There is considerable interest in the Michigan model (at least among international law teachers) across the country.’”
Id.

¹³³ This course was created by this author. Its description can be found at http://www.personal.psu.edu/lcb11/trans_law.htm.

¹³⁴ Many law schools still face the situation described in 1997 with respect to academic course inventory for legal education. See, e.g., John A. Barrett, Jr., *International Legal Education in U.S. Law Schools: Plenty of Offerings but Too Few Students*, 31 INT’L LAW. 845 (1997).

Studies.”¹³⁵. Under this approach, a law school creates an administrative device that serves as the institutional bases from which all international and transnational programs can be developed, offered, assessed and participate in the education and research mission of the law school. This method is powerful. It can avoid the issue of systemic integration and the training of faculty across disciplines. It respects more or less traditional disciplinary boundaries within the conventional law school. It can provide an easy way to monitor resource allocation and the performance of the programs, now gathered together within a single subunit. It can also be combined with certificate or other specialized programs in legal education offered to willing law students.¹³⁶

On the other hand, such a model can serve as a gateway to greater integration. That might be a good way of understanding the development of New York University’s Hauser Global Law School Program, through which the Law School has been able to pace the naturalization of the transnational element in its program of instruction.¹³⁷ The success of the program has depended on the ability of New York University to attract a constant stream of foreign faculty for short visits to the New York University home campus.¹³⁸ Thus, rather than sending its students out into the world, it attempts to bring knowledge of the world to its students. And in the process appears to deepens the home faculty commitment to the program. There are great benefits for students having the “authentic” foreign element brought to them in New York City. But the resources required for this sort of program may be beyond the reach of all but a few schools.

¹³⁵ Id., available at <http://www.law.pitt.edu/academics/programs/cile-uncitral2005.php>.

¹³⁶ Thus, for example, Santa Clara University School of Law requires enrollment in one of its summer programs of study abroad as a requirement for receipt of a certificate in international law. See Santa Clara University, School of Law, Center for Global Law and Policy, International Law Certificate, available at http://www.scu.edu/law/international/international_certificate.html (accessed Feb. 11, 2007).

¹³⁷ New York University, Hauser Global Law School Program, About Us, available at <http://www.nyulawglobal.org/aboutus/aboutus.htm> (accessed Feb. 7, 2007). “At New York University School of Law, globalization is . . . a fundamental organizing principle. The Hauser Global Law School Program (HGLSP) 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.”).

¹³⁸ The Law School describes this for outsiders:

Approximately 80 new courses have been taught by members of the Global Law Faculty, and approximately 50 courses have been co-taught with full-time NYU Law professors. These courses touch every part of the curriculum, including business law, criminal law, family law, international and comparative law, labor law, legal philosophy, property law, international taxation and trade regulation. The global faculty teach these courses to all Law School students, not merely to those who anticipate careers as international lawyers.

New York University School of Law, Hauser Global Law Studies Program, Courses, available at <http://www.nyulawglobal.org/courses/globalcourses.htm> (accessed Feb. 8, 2007).

C. Emerging Framework Structures: An Immersion Model for Incorporating the International and transnational element in Law School Curriculum, Research and Service.

Two emerging framework structures stand out among the less traditional approaches to the incorporation of transnational elements in legal education. The first, the immersion model, applies the lessons of economic globalization to the business of legal education. Its success depends on the ability of a law school to forge effective networks with law schools in other states. Together, these networks of law schools could, by each offering little more than their own parochial law as the basis of instruction, provide students willing to travel among them the opportunity to acquire a strong grounding in law across jurisdictions. The second, the multi-disciplinary departmental model, is based on the idea that the transnational element in law is distinct enough to merit a substantial treatment in its own right. Grounded in the traditional segregation model, it extracts all international and transnational legal studies—teaching and research—from the undifferentiated law school curriculum and places it within associated or affiliated departments of international law or international affairs that is not just a separate law department, but a focus of multi-disciplinary study built around the study of rule systems across borders.

1. Immersion Model. It is possible to construct from out of very recent developments, the skeleton of a possible alternative model that I might call the immersion model. This model suggests the disingenuousness of American academic retooling for the purposes of conveying the law of other places. It also places little value on the current form of delivering such education to American law students abroad—principally through summer and semester programs in which American students remain segregated for the most part in foreign places, taught for the most part by American faculty and from American case books or American materials—in English. The focus of this approach is to acknowledge that Americans are best at their own national law systems, and that others, likewise, are best at theirs. There is a shared knowledge with respect to border crossing law and international law, perhaps, but even there, the perspective will be different.

The immersion method starts from the idea that law of other jurisdictions is best learned in those jurisdictions, with their students and in their language. It suggests that international and transnational law may require a sensitivity to context that makes collaborative efforts essential to understand all sides of any transaction involving the application of the law of multiple jurisdictions. As a consequence, a truly transnational program requires the participation of educational institutions in multiple jurisdictions. It requires the ability to learn in the language in which law is written—whether it be French, German, Mandarin or Thai, unless the institution is willing to limit exposure to English only programs abroad. It accepts that beyond some level of generality, the transnational element of legal education must always be partial. Students must choose: language, system, and perspective. There can be no such thing, at a level of specificity necessary for practice, of a general knowledge. And the object of such education, in the most developed case, ought to be licensing in the multiple jurisdictions studied. In less developed cases, the object might be to cultivate a level of expertise cultivated sufficient

to be a careful observer of the law of the ‘foreign’ jurisdiction. In this sense, the immersion perspective can be understood as classical comparative law applied. Where a program is satisfied with the cultivation of a more general knowledge—in foreign and domestic environments but grounded in conflicts of laws and international law and legal systems—the immersion program can be understood as closer to a classical education as a private or public international law education, though one ultimately based in a single domestic jurisdiction. It is possible to seek to produce generalists, even under an immersion approach.

In either case, the bulk of law school resources would not be used on ‘retooling’ or otherwise requiring faculty trained in the municipal law of the state in which they might be licensed to learn something else. No incorporation of the ‘international,’ ‘transnational’ or ‘comparative’ element of law would be required. That education would come *in situ* abroad, to the extent that it is otherwise not attainable within the domestic institution. The greatest expenditure would be focused on the cultivation and maintenance of webs of relationships with other institutions in other states. This would require arrangements that would permit American students to study in other places, with reciprocal rights in the students of the host institution. American legal academic institutions already have a certain experience with more or less ad hoc relationships of this sort. But most of these relationships are flexible and informal, even in the context of formal institutionalizing relationships. Thus, for example, the North American Consortium on Legal Education (NACLE) has been operating for a number of years as a vehicle for the promotion of student and faculty exchanges among law schools in Canada, Mexico and the United States.¹³⁹ These sort of cooperative arrangements have been encouraged by authoritative institutions and personalities within legal academia.¹⁴⁰

But institutionalizing these relationships, and rationalizing them to provide a consistent and measurable cumulative educational experience would be more difficult. This is especially so where the object is not merely exchange, but the attainment of an educational experience sufficient detailed to merit the awarding of a degree. The difficulty is thus compounded by limitations of time and the requirements of licensing jurisdictions. But there are institutions that have already begun to forge these networks. For example, Michigan State University College of Law has formally institutionalized a joint degree program with the law faculty of the University of Ottawa.¹⁴¹

¹³⁹ For a descriptions, see Nancy B. Rapoport, *When Local IS Global: Using a Consortium of Law Schools to Encourage Global Thinking*, 20 PENN STATE INT’L L. REV. 19 (2001). The NACLE website suggests that “Laws emanate from legal cultures that are rooted in the history, culture, language, traditions and music of a society. By participating in a NACLE student exchange program, you will be gain a cultural experience that is as important as the learning experience of studying codes and judicial decisions. And you will take a journey that you will never forget.” NACLE, Home Campuses, available at <http://www.nacle.org/content.asp?secnum=17> (accessed Feb. 9, 2007).

¹⁴⁰ See, e.g., Carl C. Monk, *Working Together: Developing Cooperation in International Legal Exchange*, 20 PENN STATE INT’L L. REV. 23 (2001).

¹⁴¹ The description on the Michigan State University web site states:

The program permits students to choose where they begin their education. They are obliged to fulfill all of the mandatory course requirements at each institution but can earn their degrees by residence at each for two years.¹⁴² Students must meet the entrance requirements of both institutions.¹⁴³ Other schools have similar single programs, including the University of Southern California,¹⁴⁴ Harvard Law School,¹⁴⁵ New York University Law School,¹⁴⁶ and the University of Detroit Mercy School of Law.¹⁴⁷

Graduates of the Joint J.D.–LL.B. Degree Program are ready to practice law transnationally. One of the most exciting programs at MSU College of Law and the University of Ottawa Faculty of Law, Common Law Section is their joint-degree program, where students earn both the American J.D. degree and the Canadian LL.B. degree. Earning both a U.S. and Canadian law degree will prepare students for the economic and social consequences of international integration and globalization, making graduates quite marketable on either side of the border.

The description of the program can be found at <http://www.law.msu.edu/academics/ac-multi-llb.html> (accessed Feb. 6, 2007).

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ The University of Southern California School of Law has established a joint degree program with the London School of Economics. See University of Southern California School of Law, Graduate and International Programs, <http://lawgip.usc.edu/studyabroad/jdlseinfo.cfm> (accessed Feb. 5, 2007). “The program, which began last year, currently includes three LSE students, who are studying at USC Law, while four USC Law students are studying abroad. LSE students participating in the program earn their J.D./LL.B. after completing two years of law study at LSE, followed by two years at USC Law.” University of Southern California School of Law, News and Events, Semester Ends for Law Students in London, Dec. 1, 2006, available at (accessed Feb. 5, 2007). USC also hosts a semester exchange program with the University of Hong Kong. See University of Southern California School of Law, Graduate and International Programs, available <http://lawgip.usc.edu/studyabroad/jdhkuinfo.cfm> (accessed Feb. 5, 2007).

¹⁴⁵ Harvard Law School offers a joint J.D. LL.M. degree program with Cambridge University in England. “This program offers Harvard JD candidates the opportunity to earn a Cambridge LL.M. and a Harvard JD in a total of three and a half years. Each year up to six Harvard 2Ls will be selected to spend their 3L year reading for the LL.M. degree in Cambridge, England. Following the LL.M. year, they return to HLS for their final JD semester.” Harvard Law School, Joint Degree Programs, available at http://www.law.harvard.edu/academics/special_programs/joint.php#jdllm (accessed Feb. 4, 2007).

¹⁴⁶ New York University School of Law, [NYU@NUS](http://www.nyulawglobal.org/graduateadmissions/singapore/index.htm), The NYU School of Law and NUS Dual Degree Program, available at <http://www.nyulawglobal.org/graduateadmissions/singapore/index.htm> (accessed Feb. 7, 2007). “New York University School of Law and National University of Singapore (NUS) are pleased to announce an exciting new dual degree program to be offered in Singapore at NUS. The inaugural class will begin in May 2007. Students enrolled in the NYU School of Law and NUS Dual Degree Program (NYU@NUS) will earn an LL.M. in Law and the Global Economy from NYU and an LL.M. from NUS. Courses will be taught by NYU and NUS faculty.”

Some law schools have begun to develop more complex networks of joint degree programs. Columbia University Law School, for example, has instituted multiple joint degree programs among which a student may choose.¹⁴⁸

What makes the Columbia program particularly interesting is that it is one of the few joint degree programs that are not tied to English language instruction. The Vermont Law School offers a similar dual degree program with universities in France that permit the student, upon completion of the program, to sit for licensing exams in both France and the United States.¹⁴⁹ The barrier of language, especially for American law students, may become a great impediment to the growth of these programs beyond a small group of universities.

However alluring this method might be, and for the purists, there is some allure, it is difficult, at the moment, to gauge the willingness of American academics to put the bulk of their resources for international and transnational training in efforts that require a substantial investment in new faculty and new locations. Moreover, it is not clear that leveraging the “domestic” component of a network of globally placed law schools will provide any education in the transnational element of law. On the other hand, it requires much more administrative resources than academic resources. Law faculties continue to do what they have done in the way they have done it; administrators manage the network

¹⁴⁷ See, e.g., the joint J.D. LL.B. program between the University of Windsor Faculty of Law and the University of Detroit Mercy School of Law, available at <http://www.uwindsor.ca/jdllb> (accessed Feb. 1, 2007). The program suggests the value of this degree in the following terms: “In a competitive global economy, a key success factor is the ability to provide a service that your competitor cannot match. A joint degree can be the first step to advancing your competitive edge.” Id.).

¹⁴⁸ This is described in its literature:

In 1994, Columbia was the first U.S. Law School to establish a double degree program providing its participants with both a U.S. Juris Doctor and a foreign law degree, in this instance the French Maitrise en Droit. Recently, Columbia has expanded its foreign double degree programs to include a four-year JD/LLB from Columbia and the University of London, and a three-year JD/LL.M., also with the University of London, and a three-year JD/DESS with the Institut d'etudes politiques (“Sciences-Po”) and the Universite de Paris I - Pantheon Sorbonne.

Columbia Law School, Double Degree Program, Foreign Dual Degree, available at http://www.law.columbia.edu/center_program/intl_progs/Double_degrees (accessed Feb. 3, 2007).

¹⁴⁹ See Vermont Law School, Academic Program & Calendar: International & Comparative Law Programs: Program Options: Dual Degree Program, available at http://www.vermontlaw.edu/academic/index.cfm?doc_id=990 (accessed Feb. 12, 2007) (“Participating students spend two years of study at Vermont Law School and two years in France. The program is unique in two respects: it involves study at two French universities—the University of Cergy-Pontoise and the University of Montpellier—and it involves two internships at French law firms. . . . Graduates will be able to sit for the bar examination in each country, according to each country’s requirements.”).

and their subordinates coordinate and implement the program through the movement of students. In a sense, this approach adapts the framework on which the E.U.s highly successful Erasmus and Socrates Programs are grounded.¹⁵⁰ It does suggest that a method of incorporating the transnational element might be on the basis of the creation of a network of relationships with other institutions worldwide, and moving students around such a network.

2. Multi-Disciplinary Departmental Model. Law schools have begun to consider the value of establishing schools or departments of international transactions or international affairs (a “DIA”). In a sense, it could be said to take the essence of the New York University model, based on the development of a self contained but porous unit of the law school devoted to a particular focus of law related education,¹⁵¹ and use that as a basis for the reconstruction of law school pedagogy. Alternatively the department could be kept free of direct law school faculty participation (or affiliation) and serve merely as an organizing focus for the interdisciplinary focus of teaching the international and transnational elements of law.

It might be suggested that these new departments enrich the legal curriculum by offering courses of instruction designed to prepare individuals for positions of leadership in organizations that will bring global solutions to global problems. Such an approach would permit a law school not only to segregate international and transnational legal education within its institutional matrix, but also to use the segregation as a means of focusing on building bridges to related disciplines that would enrich any study of legal issues across borders. Thus, a DIA can serve as an institutional site for substantial, yet focused, efforts to build interdisciplinary elements into legal education. For schools where adherence to a traditional municipal (local, state or national) law focus is difficult

¹⁵⁰ See generally Louis F. Del Duca, *Cooperation in Internationalizing Legal Education in Europe—Emerging New Players*, 20 PENN STATE INT’L L. REV. 7 (2001). The European Union describes the Socrates Program “Socrates is Europe’s education programme and involves around 30 European countries. Its main objective is precisely to build up a Europe of knowledge and thus provide a better response to the major challenges of this new century. . . . Socrates advocates European cooperation in all areas of education. This cooperation takes different forms: mobility (moving around Europe), organising joint projects, setting up European networks (disseminating ideas and good practice), and conducting studies and comparative analyses.” Socrates, European Community action programme in the field of education (2000-2006), Gateway to education, available at http://ec.europa.eu/education/programmes/socrates/socrates_en.html (accessed Jan. 31, 2007). Erasmus is the higher education portion of the Socrates II program; it “seeks to enhance the quality and reinforce the European dimension of higher education by encouraging transnational cooperation between universities, boosting European mobility and improving the transparency and full academic recognition of studies and qualifications throughout the Union.” European Commission, Education and Training, Socrates-Erasmus: The European Community Programme in the Field of Higher Education, available at http://ec.europa.eu/education/programmes/socrates/erasmus/erasmus_en.html (accessed Jan. 31, 2007).

¹⁵¹ See discussion, *supra*, at text and notes --.

to overcome, this may serve as a means of preserving the traditional core focus of the institution while creating an open ended framework for expansion of non-traditional approaches to the study of new legal issues.

A DIA can also serve as a space within which all of the international and transnational energies of a law school can be focused. This approach is essentially the conceptual opposite of the immersion model. Instead of incorporating the transnational element within the curriculum and research/service of a substantial portion of the faculty, the multi-disciplinary department model starts with the assumption that the most efficient means of bringing the transnational element of law into law schools is to segregate the efforts. Once segregated, the transnational elements can be extracted and privileged within an environment in which it can be amplified by other related disciplines—international relations, politics, economics and business, for example. This extraction and recombination points to the great synergies possible with this approach, putting together lawyers and academics from related fields working together in an increasingly unified and powerful academic discipline (global law(s)) with many sub disciplines (international law, international relations, comparative law, political theory, etc.).¹⁵² It provides efficiency and convenience, making international and transnational issues easy to place, maintain and resource.

On the other hand, there can be significant difficulties with this approach. For example, at its worst, it can serve as little more than a vehicle for empire building by Deans and others eager to create something else to brag about without directly affecting the operation of the law school as such. Related to that is the issue of connectivity. Such a program runs a real risk of relating to law in name only—just another graduate department populating (in the ordinary course) large research universities. Unmoored to traditional programs, however, they might become either orphans (and ultimately abandoned) or become merged with international studies or other graduate departments where they might better belong. It also runs the risk of isolating faculty from its creation and operation. DIA programs can be effectuated outside of the law school environment. Law school faculty could have little to say about its structure, operations and most important, relationship to the law school itself. To the extent that DIA is operated independently of the law school (other than at the administrative level) DIA runs the risk of losing core law school support.

There are two substantially different methods of incorporating a DIA. The first is to affiliate a non-law DIA into the official structure of a law school as an autonomous department. Such a department would house the multi-disciplinary elements of transnational legal education. Its personnel can include faculty from other schools in a

¹⁵² This model suggests the Canadian approach of teaching civil and common law within one faculty, but the division is along distinct functional lines. For a discussion of the approach at McGill, see Peter L. Strauss, *Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?* 56 J. LEG. EDUC. 161 (2006); Rosalie Jukier, *Transnationalizing the Legal Curriculum: How to Teach What We Live*, 56 J. LEG. EDUC. 172 (2006).

university, serving on a joint appointment basis. Alternatively, the law school can serve as the tenure home for a small core of faculty whose primary emphasis is not on law but who work in law related areas of their respective fields—everything from law and economics to politics, business and international relations. The department would then serve as the focus through which an integrated system of law and law related courses emphasizing the transnational element could be developed and offered. It also serves as a place where other activities—conferences, workshops, grants, and other programs—can be housed.

Alternatively, it might be possible to move (through joint or affiliation appointments) all law school faculty with primary international and transnational research or teaching interests to an affiliated DIA. They, together with non-law faculty, could together constitute an autonomous and internally complete department within the law school. Courses offered by these faculty (along with those offered by the members of that School) would be cross listed as Law School courses, and all research and programmatic issues associated with the international and transnational element of law funneled through the department of International Affairs. An associate dean of international law programs at the law school could also serve as an associate dean of academic affairs at the department of International Affairs. Under this approach, the law school would have created a vehicle through which it could separate the domestic from the transnational elements of legal education (at least for organizational purposes). The principal benefit would be to avoid disruption in the way law schools operate. Rather than force or induce change within a law school, a DIA model would serve as an addition (albeit an extremely significant one) to the body of the law school and its mission. It would change the fundamental orientation of a law school from strictly legal to effectively multi-disciplinary. It moves law schools away from a strict professional school model to one that might appear to reclaim its place within the traditional university, but without affecting the primary mission to train lawyers.

Despite its severe limitations (from the perspective of running an integrated law program), this model has yet to be successfully implemented fully in the United States.¹⁵³ But it has certain possibilities that may be worth exploring in more detail. The section that follows suggests some of the issues that may arise in the creation and implementation of a DIA model within (or affiliated with) a law school. It proposes a possible approach to the implementation of such a program. It focuses on the addition of non-law related elements to the DIA and assumes that these elements will serve to supplement the inclusion of all of the non-domestic (international, comparative, foreign and transnational) law elements (and faculty) from the law school. In some cases, law schools

¹⁵³ In 2007, the board of trustees of the Pennsylvania State University approved the creation of a School of International Affairs to be affiliated with the Penn State Law School. It is far too early to tell, however, how the model will be actually incorporated within that university structure and more specifically the development of its relationship and integration into the operations of the law school there. See University to Establish School of International Affairs (February 1, 2007), available at <http://www.giveto.psu.edu/news/003866/default.aspx> (accessed Feb. 9, 2007).

might even consider creating an integrated but freestanding degree-granting department. Such a DIA would not only serve as an institutional space for the transnational resources of a law school, but also provide graduate level education in the related areas of international affairs. It is that model that serves as a basis for the discussion that follows.

3. A Closer Look at the Stand Alone Multi-Disciplinary Departmental Model. A DIA affiliated with a law school should differ in significant ways from a typical school or department of international or foreign affairs. A DIA with strong connection to the work of a law school should concentrate on the law aspects of all areas of international affairs. The DIA might then serve not only law students but also serve graduate students with an interest in international affairs from other university departments. In this form, such a department could serve as the focal point of a J.D. program as well as a department autonomous enough to make available its own graduate degree (a master's degree and ultimately perhaps even doctoral programs).¹⁵⁴ Recipients of post graduate degrees in international affairs or international transactions would be prepared to become highly effective participants in the formulation, analysis, advocacy, implementation and monitoring of policy in governmental or private organizations. This section considers the contours of such a free standing but affiliated department.

i. Rationale and Objectives. DIA could be most effective if it can avoid two great pitfalls. The first centers on the creation of a unit of graduate study that did little more than duplicate or focus substantive study in fields already offering graduate degrees at the university. DIA could do more than merely focus the substantive study offered elsewhere. The second centers on its affiliation with a law school. DIA could do more than merely serve as a basis for a focused legal postgraduate degree – a dressed up LL.M. To differentiate DIA, that is to justify its creation, DIA must offer something unlike anything offered at the other units of the university in which it will be developed or otherwise within a law school. For that purpose, DIA must advance a new and distinct mode of analysis. That analysis provides the basis for transforming the substantive knowledge from the other academic units of a university into policy, and from policy into

¹⁵⁴ Indeed, it might be possible to use the DIA not only as a place within which to develop multi-disciplinary degree programs (masters and doctoral programs) but also an essential resource in the building of post J.D. law programs that focus on transnational aspects of law (from an LL.M. to S.J.D. programs). And significantly, such an association might be useful as a means of providing degrees that are recognized in other jurisdictions, especially, for example, in Bologna process states. “The Bologna Process is an intergovernmental initiative which aims to create a European Higher Education Area (EHEA) by 2010 and to promote the European system of higher education worldwide. It now has 45 signatory countries and it is conducted outside the formal decision-making framework of the European Union. Decision-making within the Process rests on the consent of all the participating countries.” Europe Unit UK, The Bologna Process, available at http://www.europeunit.ac.uk/bologna_process/index.cfm (accessed Feb. 1, 2007). For a description of the Bologna Process for degree recognition, see, e.g., The U.K. HE Europe Unit, *Guide to the Bologna Process*, available at <http://www.europeunit.ac.uk/resources/Guide%20to%20the%20Bologna%20Process%20booklet.pdf> (accessed Feb. 1, 2007).

action.

DIA could create an environment in which to focus on all aspects of challenges that transcend national boundaries. Today, these challenges can be global, regional or bilateral. Challenges touch on all aspects of human interaction; they can range from migration, to communicable diseases, to trade barriers, to corruption, to access to education, food and economic opportunity. Actors meeting those challenges are no longer just governmental; policy is now an integral part of the operation of a great constellation of non-governmental actors, ranging from organizations formed to further specific policy goals, to global religious organizations, to large multi-national corporations. DIA could focus on the major transnational policy actors affecting and affected by law, actual current policy issues, the language and recognized approaches to contemporary policy analysis and the methodologies of implementation and monitoring of policy ‘as applied.’

Based on this focus on the policy actors, contemporary policy problems, forms of policy analysis and methodologies of implementation of solutions to problems with global effect, DIA could offer a course of study the principal aim of which is to provide its students with comprehensive and rigorous training sufficient to enable them to function effectively in international affairs, from the conceptualization and formulation of policy, to its implementation and monitoring.

But a DIA approach presents issues of separation. One of these issues might be accreditation. The establishment of a department of international affairs within a law school has certain implications for accreditation, but none for certification, or licensure. Accreditation may be obtained through a professional organization—the Association of Professional Schools of International Affairs (“APDIA”).¹⁵⁵ APDIA “comprises 29 member schools in the United States, ADIA and Europe dedicated to the improvement of professional education in international affairs and the advancement thereby of international understanding, prosperity, peace, and security. APDIA members work to promote excellence in professional, international affairs education worldwide by sharing information and ideas among member schools and with other higher education institutions, the international affairs community, and the general public.” Membership in APDIA is not required for the DIA to commence operation but is highly desirable and may be obtained after DIA begins operation.

Membership in APDIA requires conformity to a number of requirements.¹⁵⁶ These

¹⁵⁵ For information on APDIA, see their web site at <http://www.apDIA.org/apDIA/index.php>.

¹⁵⁶ These include the following: (a) an educational program of high academic quality; (b) a substantial and demonstrated commitment to the study of international affairs; (c) a basic commitment to graduate professional training; and (d) significant autonomy within a major university, e.g., as one would expect to find with a law school or graduate business school. See APDIA membership qualifications available at <http://www.apDIA.org/apDIA/membership/membership.php>.

criteria can be demonstrated in a variety of ways.¹⁵⁷ In addition, the law school would have to be sensitive to accreditation issues under ABA¹⁵⁸ and AALS¹⁵⁹ rules. These would require a showing that the additional programs would not substantially detract from the traditional J.D. program.

ii. Formalizing the DIA: Vision and Mission Statements. It is easy to overlook, but there is great value in using the mission and vision statements as a method for the articulation of well tailored objectives for a DIA meant to be centered on law. Though usually largely general, they can provide the boundaries for the implementation of any program. These statements may be a critical means of keeping the law school effectively tied to the development of any DIA.

A vision statement ought to provide a general framework within which a law related program of international affairs could be constructed and against which such a program could be measured.¹⁶⁰ The mission statement ought to provide the department with the

¹⁵⁷ The APDIA describes these as follows:

The existence of these qualifications may be demonstrated by the following: a) significant programs of research and publications in international affairs; b) an integrated curriculum comprised of courses for the most part, if not exclusively, developed and located in the professional international affairs school; c) an integrated curriculum which combines professional training, the study of geographical regions, and the analytical tools of specialized disciplines; d) a record of educating graduates for and in cooperation with distinctive clienteles, including international affairs agencies, international business and financial corporations, international organizations, and the communications and academic professions; e) a substantial, if not exclusive, commitment to professionally oriented graduate education; f) a faculty for the most part integral to or designated for the professional school; g) a relationship to the parent university characterized by substantial autonomy as is usual to a professional school within higher education; h) programs abroad, including exchange and affiliation arrangements.”

See <http://www.apDIA.org/apDIA/membership/membership.php>.

¹⁵⁸ On law school accreditation, see, e.g., The Princeton Review, What You Should Know About Law School Accreditation, available <http://www.princetonreview.com/law/research/articles/find/accreditation.asp> (accessed Aug. 12, 2007). It is possible that separation may detract from accreditation since it might be viewed as drawing resources away from law teaching in a manner to goes against the policies of the accreditation standards.

¹⁵⁹ On the rules of the Association of American Law Schools, see American Association of Law Schools, Bylaws and Executive Regulations Pertaining to the Requirements of Membership (Aug. 2005), available http://www.aals.org/about_handbook_requirements.php (accessed Aug. 30, 2007).

¹⁶⁰ A vision statement for a department of international affairs intimately tied to a law school should include a reference to its focus (for example, to be a leading institution for defining and strengthening the field of international affairs (IA) in the academic community worldwide). It should describe the going forward basis of its connection with programs of traditional legal education (for example, provide the foundation for the implementation of DIA’s unique mission.

opportunity to focus its objectives.¹⁶¹ It should memorialize a commitment to the teaching of international and transnational legal issues by indicating the nature of its commitment to the training of students¹⁶² and should indicate the nature of the department's focus on research and service.¹⁶³ The mission statement might also indicate the sort of training the department will impart.¹⁶⁴ In addition, it might be worth considering the ways in which the DIA could leverage the particular strengths of the law school to which it is affiliated. These might include strengths in local or regional law, faculty or programmatic strengths in interdisciplinary collaboration, policy, analysis, or collaborations across the university, a particular emphasis on collaborative learning and especially learning through the use of on-line and in-class technologies as well as cutting-edge pedagogies such as problem-based learning models of teaching and learning, or facility in the use of information technology to increase accessibility to the curricula through programs of sharing alone and in partnership with other related academic enterprises.

In considering the mission or vision statements, there should be a significant consideration of the ways the department could be built as an organization that insists on respect for individual and intellectual diversity that defines the interdisciplinary vision demands from the faculty, staff, and students. The process of developing either a mission or vision statement could also serve as the point in the planning and implementation process in which the organizers can think through how the department could be used to create a broad based set of curricula that shares a commitment to the global perspectives of education, especially to the extent they might draw on existing strengths and curricular elements already in place in the institution. The importance of additional programs—like

It could also point to the general nature of the connection between international affairs and law in the planned courses of study (for example, to be known for conducting boundary-pushing, multi- and interdisciplinary research focused on the integration of the key constructs of international or cross border affairs—key public and private institutional actors developing, advocating, implementing and monitoring policy—that crosses disciplinary boundaries and links theory with application).

¹⁶¹ For example, it might provide that the department will serve as the academic unit where the knowledge derived from the substantive fields of study at a research university is cast into policy terms, transformed into rules, and applied by institutional and other actors into action that directly affect the lives of people and institutions.

¹⁶² For example, a mission statement might provide that the department is committed to prepare individuals for positions of leadership in organizations that will bring global solutions to global problems.

¹⁶³ For example, the mission statement might suggest generally the ways in which department will seek to improve the lives of people through high quality teaching and learning, internationally recognized research and outreach, and associations with leading IA global institutions.

¹⁶⁴ The mission statement, for example, can state that DIA degree holders will be prepared to become highly effective participants in the formulation, analysis, advocacy, implementation and monitoring of policy in governmental or private organizations. DIA will offer a rigorous program of professional education founded on a multi-disciplinary approach to the training of its students. And the DIA will train students in the application of theory and substantive analysis to practical issues in international affairs.

conferences, joint research projects, partnerships with business, industry, government, and other educational institutions, student joint educational programs, and faculty sabbatical placements (inbound and outbound)—ought to be developed as well.

iii. An Example of a Possible Core Curriculum. The DIA curriculum could be built upon the realities of the actual ‘business’ of a law based international affairs in the contemporary world. That focus, for example, could be divided into four areas of study: actors,¹⁶⁵ policy,¹⁶⁶ tools,¹⁶⁷ and realization.¹⁶⁸

¹⁶⁵ International affairs are not conducted in a vacuum. Since 1945, the business of international affairs, and especially in its expression through law, has been institutionalized within a complex matrix of public and private institutions. The number of forms of public institutions has expanded significantly in the last century. Global political organization has moved from a loose set of interactions among nation-state to systems of national interdependence in which a number of new forms of other public international actors play increasingly important roles. These new actors range from loose global associations, centered on the United Nations, to overlapping bilateral and regional systems of economic, human rights and criminal regulation. But the greatest change in governance since 1945 has occurred in the private sector. The end of the 20th century has witnessed the institutionalization of what is now recognized as international civil society. This is made up of countless groups organized in a variety of different ways to further all forms of policy objectives. These groups now play an increasingly important role in shaping policy. They play an even more important role in monitoring the implementation of policy. Thus, a basic understanding of the actors involved in the discourse of issues that require multi-national responses is essential for individuals involved in international affairs.

¹⁶⁶ The expression of international affairs in law are understood in policy terms. Policy expresses the substance of international affairs. Policy is an elastic concept embracing laws, rules, actions, plans and behaviors, as well as their social and legislative ramifications. It can be expressed as the things public entities choose to do (e.g., to build a dam to generate power) or not do (e.g., not to build a dam to preserve the environment). It can also be understood as a product of the collective effect of the conscious choices of private entities (e.g., to standardize scientific terminology). And it can include rules or understandings resulting from the action or lack of action of individual private actors (e.g., standardization of letters of credit). Policy is given life through the actions of actors through which it is formulated, implemented, and monitored. It is the language of substantive discourse of actors in the international affairs field.

¹⁶⁷ Policy does not appear unbidden. Policy does not sell itself to actors in international the public and private spheres of institutional society. Policy must be conceived, formulated, explained, justified, defended and advanced. Each of these functions requires certain analytic tools. These tools are drawn from a variety of disciplines: economics, sociology, politics, philosophy, psychology, mathematics, linguistics, quantitative analysis and empirical methods (e.g., econometrics), law, and business. Each provides a means of systematically evaluating alternative means of conceiving, developing, and achieving social goals. These tools supply a common language for policy choices among actors; they supply a mechanics for valuing choices among policy options. An ability to understand and use analytic tools is essential to the development of policy and the steering of policy to implementation.

¹⁶⁸ The object of policy is implementation. The rules of that implementation touches on issues of law and other disciplines. Policies unrealized are goals unrealized and good undone. Taking policy from conceptualization to adoption represents one of the great tasks and serves as one of the great rewards of policy actors. Realization of policy does not happen by itself. It requires

The core curriculum should reflect this understanding of the framework for international affairs within its legal context. It is through this core curriculum that the integrative aspects of DIA in providing students with a grounding in the international, comparative and foreign law aspects of law as applied can be developed. On this basis a core curriculum could be created that emphasized the following areas of instruction as the foundation of any program of study. For example, a core program of study could include an introductory course on institutions,¹⁶⁹ another on current policy challenges touching on legal practice,¹⁷⁰ a course in analytical methods relevant to the work of lawyers,¹⁷¹ and a

navigating complex, multi-state and multi-level systems of governance. It may require action among private actors as well as more formal action in the public sphere. There are systems, and systematic approaches, to policy realization. It requires an understanding of systems and politics, of law and psychology. Moreover, approaches to implementation may differ substantially from approaches to monitoring implemented policy, or seeking policy change. Approaches could also differ depending on the place of the actor within the systems of public and private actors involved in policy decision-making. A critical understanding of these complexities is essential to those who intend to further policy objectives.

¹⁶⁹ This course could be designed to introduce students to the principal actors in international affairs as well as to the frameworks within which they operate in a global legal environment. The course could be devoted first to a study of public actors: the nation state and its subordinate divisions (e.g., U.S. states, German Land); transnational and regional associations (e.g., NAFTA, MEROSUR, EU); international organizations (UN); and other international or transnational actors (e.g., WTO, ICC). The second semester should focus on a study of private actors, and the construction and operation of global civil society, including public/private cooperative arrangements (e.g., OEDC), institutionalized non-governmental organizations (e.g., Amnesty International) and other expressions of collective civil society. The objective of this course is to provide the student with a comprehensive understanding of the principal actors involved in the production and consumption of policy. The focus in this course will be on law and political science, with additional contributions from other disciplines.

¹⁷⁰ This course could serve to introduce students to current areas of policy and regulatory focus within global legal frameworks. This course is the most flexible and interdisciplinary of the core curriculum. This could be designed as a 'topics' course, with the topics changing from time to time to reflect the most significant policy issues of the day. Those topics ought to be focused on issues with consequences for the practice of law in an American context. The specific areas of policy might be reserved for periodic review to ensure relevance. For example, the legal ramifications of corporate social responsibility as a matter of national, transnational and international law could serve as a focus.

¹⁷¹ In formulating policy, and translating that policy into legal norms, the traditional language of law is sometimes insufficient. It might thus be useful to introduce students to the tools needed to conceptualize, formulate, analyze, adopt, implement, and monitor policy through rigorous application of recognized modes of analysis. One segment could be devoted to qualitative methods. These may include theories of bargaining and negotiation, game theory, decision analysis and methodologies for making choices where the analysis must account for complexity and uncertainty. The other segment could be devoted to an introduction to quantitative analysis and empirical methods. These may include basic statistical methods, econometrics, experimental design and data analysis. The purpose would not be to achieve mastery but to provide the

course on the legal aspect of program implementation in the public and private sectors.¹⁷² The program could also include elements focusing more on lawyering, for example, a courses on implementation and ethics.¹⁷³ A number of additional requirements could be considered. The importance of these and additional courses will depend on the focus of the department, the degree of interaction with the law school, and the ultimate objective of the educational experience. These additional courses could include language requirements, the basic courses in international and comparative law typically offered as part of traditional law school curricula, and economic analysis in law.

The interdisciplinary and cooperative potential of DIA could be realized beyond the core curriculum. The objective would be to combine this core training with specialized study in one or more areas. The curriculum also might draw upon regional or cultural subspecialties and language training. The emphasis, of course, would be on leveraging resources.

For example, it might be possible to develop a set of curricular offerings to enable candidates for the Master's degree to select an area of concentration (AC). ACs could be designed to reflect the evolving emphases of policy makers and the interests of our students. Most could be identified as the substance of the evolving core course *Introduction to Current Policy Challenges*. Leveraging would be critical to the success of a program like this. It would require reliance on a large number of cross listed courses. This model would tend to favor larger capacity general purpose institutions over smaller and more focused institutions. Or it would require the expenditure of large sums to create courses where none existed before. Still, depending on the resources of the institution considering this alternative, the DIA model could offer its students the possibilities to choose an emphasis to meet virtually any interest—from geography, to information

foundations communication with specialists outside the law who are critical for the formulation of policy and standards that might be translated into legal terms.

¹⁷² The basic purpose of this course could be to prepare students to become effective leaders in any organization involved in international affairs. The students will be introduced to organization theory, systems theory, sociology and organizational psychology, as well as the legal framework of organizational functioning. Through readings and problems or case studies, students could learn to understand formal and informal structures of organizations and to navigate within it to further policy objectives and to anticipate reactions and consequences of actions both within and outside organizational structure. To a great extent, this is course should be conceived as a practicum: how to get things done; how to translate and implement policy into lawyer's terms; how to translate lawyer's terms into policy and action.

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technology, to agriculture, law, journalism, the social sciences, education, mathematics, the hard sciences or any other substantive field.¹⁷⁴

The specific courses suggested for completing each of these concentrations, of course, would have to be developed at every institution. Once developed, students will also be encouraged to develop their own specialization based on their needs and desires. Programs of concentration will be adopted in close cooperation with DIA core and affiliate faculty, who will act as program of study advisors to DIA Master's students.

The development of concentrations also poses risks for law affiliated programs. Programs leading to their own degrees may well take on a life of their own. And interdisciplinary studies have a way of moving toward one or another of its component parts. If the focus is to privilege law, then it becomes critical to mold programs so that the emphasis on the legal aspects of the matters studied remains clear. But this may be difficult to the extent that the DIA program becomes autonomous, or more closely affiliated to other schools or fields of study. The great danger of segregation, even in an association context, like that contemplated with a DIA model, is to enhance the likelihood of separation. The institutional structure of DIA may well pose its own greatest danger to the project of building international and transnational capacity for legal education.

v. Ambitious Program—Great Weaknesses: DIA May Not be Educating Lawyers. As a response to the problem of transnational legal education that is effectively untried and little developed, DIA is unique. For that reason, I have devoted substantial space to developing a “best case” set of arguments for a DIA approach to internationalizing the law school curriculum. And there is much to be said for an expansion of law school programs outside the traditional model of legal education, especially where it concerns an expansion of legal training beyond the confines for which traditional law schools were created.

Still the DIA model ought to raise serious concerns and should not be lightly embraced. Among the most serious are “as applied” criticisms. For example, construction of such programs can serve more as monument building than as something useful “on the ground.” As such, it is most useful for large multipurpose research institutions that are seeking to add to its collection of offerings. That sort of environment increases the risk that programs will remain more impressive on paper than in reality. It can also serve as a vehicle for churning students. It is possible, for example, for administrators to see in such a program a means of increasing student residence at the university by recruiting law students (and perhaps others) to an additional program requiring the payment of

¹⁷⁴Areas of concentration, then, could emphasize the relative strengths of a particular institution. In this sense, DIA offers the potential for internal leveraging of capacity and deepening a branding of the institution within its fields of demonstrated competence. For some institutions that might mean a focus on dispute resolution, of others business transactions or finance, and for others human rights elements.

additional fees. The value, of course, is in the collection of an additional degree. But it might have been possible to integrate the programs into existing institutional contexts rather than to separate its elements out. This is especially problematical where the bulk of courses for a DIA is drawn from a series of “cross listed” offerings. In such a case, there is very little value added for students, but a greater administrative value added. I am not sure how easy it may be for administrators to avoid this temptation.

Moreover, at a personal level, it can serve as little more than a vehicle for empire building by Deans and others eager to control larger budgets and more personnel without directly affecting the operation of the law school as such. Connectivity could be sacrificed to institutional imperatives that might draw the DIA away from rather than closer to the law school. And in large research universities, the creation of entities like DIA may subject them to the realities of department politics that may have unintended but very real consequences. That additional funding can be quite valuable at the margin if the number of new faculty and new offerings can be kept to a minimum through the system of cross listings. It can also serve a particular sort of administrator as another means of rewarding and punishing personnel. But the same sorts of temptations face participating faculty. Institutional discipline, and an eye on remaining true to the institutional vision is always a hard task. In creating a new enterprise, that task grows harder.

Equally important are a number of connectivity issues. The further isolated the internationalization from the traditional structures and pedagogy of the law school, the less likely such a program will impact legal education. This is not an approach to integration, it serves principally as an escape from the legal academy. But escape here leaves legal education substantially untouched. Thus the very success of DIA is the formula for its failure in changing legal education except perhaps at the margin. Related to that is the issue of connectivity. Such a program runs a real risk of relating to law in name only—just another graduate department populating (in the ordinary course) large research universities. Unmoored to traditional programs, however, they might become either orphans (and ultimately abandoned) or become merged with international studies or other graduate departments where they might better belong. It also runs the risk of isolating faculty from its creation and operation. DIA programs can be effectuated outside of the law school environment. Law school faculty could have little to say about its structure, operations and most important, relationship to the law school itself. To the extent that DIA is operated independently of the law school (other than at the administrative level) DIA runs the risk of losing core law school support.

In a sense, then, the isolation that provides the key benefit to DIA, also poses its greatest sets of risk. At its most independent, DIA can easily become unmoored from the American law school. It becomes something else—perhaps an institution with greater affinity to its European counterparts than its American roots. Isolating international, comparative and foreign law faculty, separating and isolating international, foreign and comparative programs tends to reduce rather than increase the visibility and availability of these aspects of legal raining to the average student. It also draws faculty into ever

tighter field bound groups, reducing inter field communication among law faculty. From a specialty it becomes independent of the law school experience—something as different as the business school. Lastly, DIA could lose touch with the essential teaching mission of the law school—the training of lawyers. The closer DIA comes to resemble traditional graduate programs, the less useful it might appear to a professional school. Ad there are already fine graduate programs in the fields of international affairs and the like that do much of what DIA attempts—and perhaps more focused and more successfully so.

And it should be remembered that a DIA model is expensive. It draws a tremendous amount of resources. And it may be beyond the capacity of all but the largest institutions. The institutional resources necessary to ensure that a DIA remains tethered to the law school are probably large—in terms of labor resources and attention to changes in their respective evolution. To that extent, at least, the DIA model can serve only a very limited role in the incorporation of transnational elements into legal education as a general and realistic matter. A DIA should not be lightly undertaken, and might well have to be heavily supervised. At its core, DIA may be hopelessly incompatible with the form or substance, and certainly inimical to the insights, of *Educating Lawyers*.

IV. Globalization of Education Models and the Principles of *Educating Lawyers*.

Educating Lawyers had added a new, and important wrinkle, in the evaluation of the suitability of the forms used to integrate a global law element in American legal education. to issues of global law as a component of American legal education, the complex set of approaches to the incorporation of global or international and transnational law practice within the American legal academy tends to be blind to the principles extracted and applied in *Educating Lawyers*.

But even the DIA model could effectively serve the needs identified in *Educating Lawyers*.

[to be completed]

V. On the Value of Crossing These Parallel Tracks.

Internationalization of the legal curriculum is inevitable. So is the connection between legal education and the needs of the bench and bar. Many law schools have already begun to respond to this change in the environment in which lawyers must be trained. On the academic side, research that remains tied to a particular locale will be marginalized as increasingly parochial in the coming decades. Likewise, law schools that ignore the needs of the practicing bar will find themselves less useful as law schools, functioning more like graduate schools of legal policy than schools for training in the practice of law. There are several possible responses to the need to integrate legal internationalization and the interests of the practicing bar within law schools. .

Whatever model is chosen, whatever choice is made, it is clear that at some level, the character of American legal education is changing. I think Jonathan Cahn, a partner at Coudert Brothers at the time he wrote this, got it right when he suggested to legal academics:

*Your challenge, as educators, is to learn enough about the global legal organization and the cross border disciplines they rely upon, to design courses that are relevant, that give your students mobility within the culture of those organizations. Obviously, this task places an emphasis on both transferable disciplines and a capacity with comparative law that enables the lawyer to transfer these competencies (and individual experiences) across national borders from one legal system to another.*¹⁷⁵

Cahn identifies the core of the transnational element in law that many schools have attempted to capture. Those institutions have begun to demonstrate the alternatives available to meeting the challenges of legal problems that cross borders and jurisdictions. There are a number of ways that law schools can change to meet this challenge. Those changes might be resisted at the local level and for good reason (or not so good reason) by individual institutions. But change is coming nonetheless. *Educating Lawyers* suggests a method of both assessing those alternatives against a standard that is sensitive to the needs of the practicing bar, and modifying the alternatives to meet those needs. If incorporating the international and transnational element in law school is to be relevant to *lawyers*, it might be wise for law schools to be sensitive to that framework in fashioning their approach to legal internationalization.

¹⁷⁵ Jonathan D. Cahn, *The Global Legal Professional and the Challenges to Legal Education*, 20 PENN STATE INT'L L. REV. 55, 61 (2001) (emphasis in the original).