

The Maelstrom of a Moribund Legal Employment Market, the Engagement Of Law Students, and Global Legal Education

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Abstract: More than 10 years ago a prominent legal scholar observed “[t]he structure of legal education reflects a complex mix of public policy, professional oversight, market pressure, and academic self-interest.”² This observation has never been more true. In January 2011, the New York Times openly questioned whether a law degree was worth the investment of time and money. In the same vein, a prominent study of student engagement in law school issued in 2010 understated “law schools in the U.S. will face serious challenges in the coming year.” This paper will address possible consequences of the foregoing in global legal education and suggests possible planning scenarios that law schools might adopt.

Introduction

The crafting of a legal education is, at best, an inexact science. In assessing where global legal education is headed, I begin with a brief overview of the evolution of legal education in world today. I next describe significant externalities affecting legal education worldwide. I end by suggesting some possible responses by law schools.

I. Legal Education in the World Today.

Legal education in the world today is anything but static. From post-Revolutionary America when most received their legal education through apprenticeships under experienced practitioners of the law,³ the United States legal system evolved to the point that today there are 200 American Bar Association (ABA) approved law schools that provide a three-year post-graduate legal education.⁴ The ABA assesses law schools on criteria which include “input” measures, such as faculty size, budget, and physical plant.⁵ Two of the current standards – bar exam passage rates and employment statistics – are

¹ Professor of Law, University of California, Hastings College of the Law, San Francisco. Comments may be directed to martinez@uchastings.edu. For the purposes of this piece, the broad brush I use allows a comparison across nations without getting bogged down in details unnecessary to make the broad points.

² Deborah H. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 24 (2000).

³ ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 19 (1953). There are a number of other excellent works which cover American legal education. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 463 n.1 (3d ed. 2005); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s (1983); Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L. J. 775, 780 (2004); Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L L.J. 335, 362 (2006); Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L. J. 775, 780 (2004).

⁴ American Bar Association, <http://www.abanet.org/legaled/approvedlawschools/approved.html> (last visited Sept. 18, 2010). Externally American legal education has been significantly affected by the ABA, the Association of American Law Schools (AALS) and by the bar licensing authorities in each of the 50 states and the District of Columbia. For the sake of brevity I address only the ABA role in this piece. There are many American law schools that are not accredited by the ABA. The number of such schools is an elusive one. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s 243 (1983) (attributing the lack of accurate count to unaccredited law school's unwillingness to share data or respond to surveys).

⁵ James Podgers, *Sweeping Accreditation Review May Prompt 'Sea Change' in Law School Evals* ¶1 (2009) http://www.abajournal.com/news/review_of_accreditation_standards_likely_to_bring_sea_change_to_how_law_sch/. (last visited Jul. 29, 2009).

considered “outcome measures.”⁶ The considerable stir being created by the ABA today is that recently proposed changes to the accreditation standards would shift emphasis from “inputs” to “outcomes,” that is, what students know and understand when they graduate and how they fare in the practice of law. In taking this direction, the ABA took its cue from the legal profession in the U.S. and abroad in discovering a shift in the educational community to “what students learn, not how or what they are taught.”⁷

Outside of the United States, there has been increasing attention paid to the mechanism of legal education. In the European Union, legal education is moving through a period of reform under the “Bologna Process.”⁸ The 1999 “Bologna Declaration” committed 29 (46 as of 2008) European nations to develop a system of higher education based on an undergraduate and graduate model in which access to the graduate level requires completion of the undergraduate level, lasting for a minimum of 3 years.⁹ The process aims to create a system of comparable academic degrees, a uniform structure of the university curriculum in every discipline, and a common system of transfers for course credits.¹⁰ All member states that subscribe to the Bologna process have restructured or are considering restructuring their law degree programs.¹¹

In the Far East, there was no formal graduate system of legal education in Japan until 2004.¹² Up until then, legal education had been provided at the undergraduate level under the civil law model prevalent in Europe.¹³ With the 2004 reforms, law students study a field of their choosing at the undergraduate level before attending a 3-year graduate program and students who choose to study law at the undergraduate level attend a 2-year graduate program.¹⁴

China is surely poised for change. Currently, an aspiring Chinese lawyer must complete four years of undergraduate law study that resembles the European system.¹⁵ Still, China is at a stage where lawyers do not require a law degree in order to practice law and where a formal legal education does not always supplant the kind of experiential learning that the American apprentice system made possible.¹⁶ Indeed, the development of a system of legal education assumes a certain maturity of the

⁶ Jerry Crimins, *Standards for Law Schools Evolving; ABA Panel Says*, CHICAGO DAILY LAW BULLETIN, May 29, 2009.

⁷ *Id.*

⁸ Andreas Buckner and William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences*, 9 GERMAN L. J. 575 (2008).

⁹ *Id.*; Louis F. Del Duca (ed.), Symposium: *Enriching the Law School Curriculum in an Increasingly Interrelated World – Learning from Each Other*, 26 PENN ST. INT’L L. REV. 831, 891 (2008).

¹⁰ Frans J. Vanistendael, *Blitz Survey of the Challenges for Legal Education in Europe*, 18 DICK. J. INT’L L. 457, 460 (2000); Andreas Buckner and William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences*, 9 GERMAN L. J. 575, 615 (2008).

¹¹ *Id.*

¹² Peter A. Joy et al., *Building Clinical Legal Education Programs in a Country Without A Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study*, 13 CLINICAL L. REV. 417, 418 (2006). There are a number of scholars who have written about the Japanese experience. See, e.g., Annelise Riles & Takashi Uchida, *Inaugural Article: Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan*, 1 DREX. L. REV. 3 (2009); Mark D. West, *Making Lawyers (and Gangsters) in Japan*, 60 VAND. L. REV. 439 (2009); Hisashi Aizawa, *Japanese Legal Education in Transition*, 24 WISC. INT’L L.J. 131 (2006).

¹³ Annelise Riles & Takashi Uchida, *Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan*, 1 DREXEL L. REV. 3 (2009).

¹⁴ Robert F. Grondine, *Reform in Japanese Legal Education: An International Perspective on Japan's New Legal Education System*, 2 ASIAN-PACIFIC L. & POL’Y J. 1 (2001).

¹⁵ Deborah Meiners and Jian Chen, *Professionalization in the Chinese Legal System: Current Education and Certification of Chinese Lawyers*, The Bar Examiner at p. 29 (May 2007), available at http://www.ncbex.org/uploads/user_docrepos/BEMayChineseLawyers.pdf; Xinyi Hou, *Modern Legal Education in China*, 31 OKLA. CITY U. L. REV. 293 (2006).

¹⁶ Pamela Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE H.R. & DEV. L.J. 117, 128 (2005).

legal system itself.¹⁷ As one scholar astutely observes, legal education and the rule of law can only thrive in a context in which there is a “culture of law.”¹⁸

The rise of the market economy in China may signal a trend towards a focus on individual rights – a catalyst for the development of a culture of law.¹⁹ China’s entry into the World Trade Organization may accelerate this trend.²⁰ Finally, the regulation of law schools in China is minimal and there is considerable variation in the quality of legal education.²¹ With the rise in respect for the legal profession in China, large changes loom.²²

II. Externalities.

While the impetus to accomplish changes in legal education appears to vary among countries, all seem united in the thought that the result will be an improved legal profession. In the material that follows, I discuss four factors that may affect this development. These are: the trend to standardization, a core of knowledge, the costs of legal education, and law student engagement.

While there are a significant number of countries that adhere to a four-year undergraduate model of legal education, both the Bologna Process and the Japanese reforms suggest significant gravitation to a graduate model of legal education. Legal education is becoming standardized.

A lawyer requires a minimum core of knowledge. There is a perception, whether well-founded or not, that a graduate model of legal education is well suited to impart a large volume of knowledge to a more mature student body. In Japan, for example, the impetus to move to the graduate model of legal education was driven in part by the heightened demand for sophisticated legal services in Japan as litigation rates rose with the collapse of the bubble economy.²³

In the United States at least, the cost of a legal education has been rising exponentially. Many public schools, which should theoretically be funded primarily by individual states, charge fees or tuition which approximates the cost of private schools. Perhaps not surprisingly, a recent New York Times article openly questioned whether a law degree was worth the cost – especially in the context of a shrinking legal market and the contraction of law firms.²⁴

A recently published comprehensive law student engagement study titled *Law Student Engagement in Law School: In Class and Beyond* records some aspects of the law school experience from

¹⁷ Sam Hanson, *The Chinese Century: An American Judge’s Observations of the Chinese Legal System*, 28 WM. MITCHELL L. REV. 243, 248-49 (2001)(overview of the state of development of the Chinese legal system).

¹⁸ Pamela Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE H.R. & DEV. L.J. 117, 125 (2005) citing John Burman, *The Role of Clinical Legal Education in Developing the Rule of Law in Russia*, 2 WYO. L. REV. 89, 100 (2002); Sam Hanson, *The Chinese Century: An American Judge’s Observations of the Chinese Legal System*, 28 WM. MITCHELL L. REV. 243, 245 (2001).

¹⁹ Charles Irish, *Reflections on the Evolution of Law and Legal Education in China and Vietnam*, 25 WIS. INT’L L.J. 243, 245 (2007).

²⁰ Charles Irish, *Reflections on the Evolution of Law and Legal Education in China and Vietnam*, 25 WIS. INT’L L.J. 243, 250 (2007).

²¹ Xinyi Hou, *Modern Legal Education in China*, 31 OKLA. CITY U. L. REV. 293, 295 (2006)(only five political and law universities in China are under the jurisdiction of China’s Ministry of Justice).

²² Charles Irish, *Reflections on the Evolution of Law and Legal Education in China and Vietnam*, 25 WIS. INT’L L.J. 243, 251 (2007); Xinyi Hou, *Modern Legal Education in China*, 31 OKLA. CITY U. L. REV. 293 (2006).

²³ Robert F. Grondine, *Reform in Japanese Legal Education: An International Perspective on Japan’s New Legal Education System*, 2 ASIAN-PACIFIC L. & POL’Y J. 1 (2001).

²⁴ David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1.

the student perspective in the United States.²⁵ The Study reported that less than 60% of students felt prepared to practice law. Significantly, the students who reported interacting with faculty were more likely to report improved professionalism than students who did not so interact.²⁶

III. Reconciling Legal Education and Externalities.

Several points can be made with these externalities. With the move to a graduate model of legal education prevalent in the world, there is a distinct trend to homogenization. This has both good and bad aspects. The good is represented by the systematic and efficient assessment of the competency of the practicing bar. This, in turn, becomes a not so subtle mechanism by which the performance of law schools can be measured. Standardization is also a catalyst for mobility. In the United States, for example, one of the primary motivations for the National Conference of Bar Examiners' push for a national bar examination is the increased mobility of lawyers.²⁷ Indeed, lawyer mobility is one of the motivations cited in the Bologna Process for a standardization of legal education. Whether a trend to standardization is sufficient to deal with the variation in legal regimes among countries throughout the world is an open question.

The bad associated with standardization is that opportunities for improvement are diminished. Where countries are allowed and encouraged to experiment with legal education, it seems reasonable to assume that innovation would flourish to a greater extent. A system of legal education that has reached a static stage will not likely foster other than incremental change.

The question to be asked is how well law schools are imparting to their graduates the tools necessary to serve the public. As articulated in the Bologna Declaration, one desirable aspect of a graduate legal education is the production of a cadre of lawyers who are both able to practice law at a sophisticated level and who speak a language, in the legal sense, that is readily understood by others. This whole effect is especially prominent where licensing is concerned. If the goal of legal education is merely the transmission of knowledge, as is the case in many other disciplines, licensing plays a very small role. Thus, the possibility of attainment of an undergraduate law degree makes sense. On the other hand, if the goal of legal education is to create professionals upon whom clients depend, then rigorous licensing and the requirement of an extended legal education also make sense. Having a core of knowledge becomes indispensable.

Imparting a core of knowledge is not a costless proposition. Efficiency matters. If a school is to engage its students in a meaningful way, faculty will play a large part in the process. As resources become dear and government support of legal education wanes, there has to be recognition that a smaller law school will likely be a better law school. Of course, each school must weigh the advantages of scale versus the effectiveness of education. This is a delicate task.

Finally, it is ironic that the United States, which long ago shed the apprenticeship model of legal education, has, through the ABA accreditation process, lessened the emphasis on the mechanism by

²⁵ The Law School Survey of Student Engagement (LSSSE) is a non-profit organization headquartered at the University of Indiana. Its impressive advisory board includes the ABA's Consultant to Legal Education, the Executive Director of the Association of American Law Schools, the Executive director of the Law School Admissions Council, and several prominent and influential legal educators.

²⁶ Sadly, the report states that the average student found faculty members to be only moderately available or helpful and few reported working with faculty.

²⁷ Veryl Victoria Miles, *The Uniform Bar Examination: A Benefit to Law Graduates*, *The Bar Examiner* at p. 8, 11 (August 2010); Martha Neil, *ABA Group Backs Uniform Bar Exam*, *ABA Journal*, Sept. 15, 2010, http://www.abajournal.com/news/article/aba_group_backs_uniform_bar_exam/ (last visited Sept. 19, 2010).

which legal education is provided and has instead returned to a system under which only the ultimate result is the measure of success. While this marks a move to greater flexibility in a world which is otherwise trending to homogenization, it is also a move to mimic the student engagement that characterized the apprentice model. We have come full circle.

Conclusion

An effective model of global model of legal education would be one in which each law school developed its own approach to imparting a core of knowledge to its students. Some thirty years ago, one study advocated this approach with law schools in the United States.²⁸ The idea was that all law schools could not accomplish everything. What individual law schools can achieve is constrained and defined by resources, geographic location, and the relative number of law school competitors.²⁹ An older study observed that the relatively beneficial effects of avoiding over-standardization were the result of the inability external organizations like the ABA to exercise a guiding hand than they were the result of a conscious effort to allow and encourage experimentation among law schools.³⁰ This tension between diversity and uniformity seems destined not to be diminished.³¹

²⁸ W. SCOTT VAN ALSTYNE, JR., JOSEPH R. JULIN, LARRY D. BARNETT, *THE GOALS AND MISSIONS OF LAW SCHOOLS* (1990).

²⁹ *Id.* at 129-132.

³⁰ ALFRED ZANTZINGER REED, *PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA* 391-392 (1928).

³¹ These are the terms used by Alfred Reed. ALFRED ZANTZINGER REED, *PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA* 391 (1928).