

2016

American Legal Education, Skills Training, and Transnational Legal Practice: Combining Dao and Shu for the Global Practitioner

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Recommended Citation

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TRANSNATIONAL LEGAL PRACTICE: COMBINING *DAO*
AND *SHU* FOR THE GLOBAL PRACTITIONER

Michael A. Simons*

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Michael A. Simons

Margaret E. McGuinness

Abstract

Transnational law subjects have become an integral part of U.S. law school curricula, and international students are vital members of our law school communities. However, to adequately prepare lawyers more effectively for global legal practice, law schools must integrate skills training into the teaching of transnational law. This essay discussing one comparative approach follows a recent symposia addressing current issues facing global legal education, and China's reform programs for legal education.

I. INTRODUCTION

On October 10, 2015, Tsinghua University School of Law celebrated the twentieth anniversary of its reopening by hosting two important conferences.² The first was a meeting of the China Law Society, focused on discussions and assessments of current reform programs for legal education in China. The second was a conference of legal educators from around the world addressing Global Legal Education at a Crossroads. The two conferences struck similar notes, reflecting a growing demand for access to legal education and legal services in China and around the globe, and the parallel need for law schools to assess whether legal education is up to the challenges and opportunities presented by increased globalization.

Global legal education has made significant progress in recent years. Just five years ago, when a different law school in Beijing celebrated a milestone anniversary with a similar conference, the tenor of the conference was decidedly different.³ Then, the legal educators gathered in Beijing were still advocating for the globalization of legal

¹ This essay is adapted from remarks delivered on October 10, 2015 by Dean Michael A. Simons at the Tsinghua Conference, Global Legal Education at a Crossroads, in Beijing. We extend special thanks go to Dean Zhenmin Wang, Vice Dean Weixin Shen, Ms. Rujun Yang, and Ms. Jun Wang for their warm hospitality in Beijing during the conference, and we congratulate the entire Tsinghua Law School community on their anniversary. Thank you also to Nok Hei Yuen and Hadas Peled and the staff of the *Tsinghua China Law Review* for their assistance with publication, and Ashlee Aguiar for assistance with citations.

² For a description of Tsinghua Law School's 20th Anniversary celebration, see http://www.tsinghua.edu.cn/publish/lawen/8425/2015/20150909095458810132635/20150909095458810132635_.html.

³ See The Second 21st Century Forum of International Law School Deans and Celebration for 60th Anniversary of Renmin University Law School, REMIN LAW SCHOOL (Oct. 3, 2010), <http://ruc.zuolang.com/eng/ShowArticle.asp?ArticleID=27712>.

education. Now, however, the concept of global legal education and a more globalized approach to the operation of law schools is, in 2015, a *fait accompli*. There is no question that global legal education has arrived. The question before us, at this crossroads moment, is where is global legal education going. . .

One answer to that question could be found in a common concern expressed by many of the Chinese legal educators at both the Tsinghua Global Legal Education conference and the China Law Association meeting: the importance of giving law students training in the specific skills they will need for the practice of law.⁷ Tsinghua University School of Law's former Dean Wang Chenguang emphasized the point by drawing a contrast between the Chinese concepts of "dao" (道) and "shu" (术), which roughly correspond to the American legal tradition's distinction between doctrine and skills. Drawing on recent advances in American legal education, and using St. John's University as an example, this essay will argue that the key to train lawyers effectively for transnational practice is to combine *dao* and *shu* in global legal education.

II. ADVANCES IN AMERICAN LEGAL EDUCATION: SKILLS TRAINING AND GLOBALIZATION

We received our legal training in different decades and at different law schools.⁴ And yet, we each experienced a similar curriculum – one that hewed quite closely in content and approach to the curriculum designed by Dean Christopher Columbus Langdell in the late 1800s.⁵ We learned legal doctrine by reading cases in the common law subjects of Contracts, Property, Torts, and Criminal Law. We then learned legal analysis by applying that doctrine to new situations, the so-called "hypotheticals" presented by professors through the Socratic method. That is how students learned the law at Harvard in the 1880s, that is how we learned a century later, and that it is how law students in the United States, at least first-year law students, still learn it today—at Harvard, at Stanford, and at St. John's.⁶

But we do not mean to suggest that American legal education has been static. There have been a number of important developments

⁴ Dean Simons attended Harvard Law School in the 1980s; Prof. McGuinness attended Stanford Law School in the 1990s.

⁵ See David A. Garvin, *Making the Case*, HARVARD MAGAZINE, Sept. 2003, available at <http://harvardmagazine.com/2003/09/making-the-case-html>.

⁶ See Harvard Law School Curriculum, <http://hls.harvard.edu/dept/academics/curriculum/> (last visited Nov. 23, 2015); Stanford Law School Law School JD Degree Requirements, <http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/181883/doc/slspublic/Overview%20of%20JD%20Requirements%20for%20the%20Class%20of%202016.pdf> (last visited Nov. 23, 2015); St. John's University School of Law Juris Doctor, <http://www.stjohns.edu/law/programs-and-majors/juris-doctor> (last visited Nov. 23, 2015).

building on the traditional first-year curriculum and on the traditional method of teaching legal analysis. The two most important are the expansion of skills training and the globalization of the curriculum.⁷

A. Skills Training in American Law Schools

Skills training is not new to American legal education. For over a century, since at least the time of Dean Langdell, law students have been trained in the skill of legal analysis. And for a very long time, American law students have been trained in the specific skills of legal writing and oral advocacy, particularly appellate oral advocacy. But, American legal educators eventually realized that we were not fully preparing our students for the practice of law, and a broad consensus emerged that law schools needed to better equip students with a set of skills they would need to draw on in practice. So, beginning in earnest in the 1980s and 1990s, American law schools greatly expanded skills training by doing three things: adding legal clinics, adding externships, and expanding simulation courses in the classroom.⁸

Our experience at St. John's provides a good example. St. John's Law School was founded in 1925.⁹ Fifty years later, in 1975, we still had no legal clinics. Now, we have ten live-client clinics, where students learn by representing actual clients in real cases, in such diverse areas as criminal law, bankruptcy, immigration, securities arbitration, real estate litigation, and consumer protection law.¹⁰ Similarly, thirty years ago, our students did nearly all of their learning in our building, inside a classroom. Today, almost all of our students complete at least one externship, where they work in a practice setting alongside a practicing lawyer, doing actual legal work.¹¹

⁷ See e.g., Legal Education and Admissions to the Bar, Legal Education and Professional Development – an Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap), A. B. A. (1992) (known as “the MacCrate Report”); Legal Education and Admissions to the Bar, Twenty Years After the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary, A.B.A. (2013); Robert MacCrate, *Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development*, 10 CLINICAL L. REV. 805, 818-19 (2004).

⁸ Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59(4) J. LEGAL EDUC. (May 2010), available at <http://jle.aals.org/cgi/viewcontent.cgi?article=1282&context=home>.

⁹ Susan Landrum, *Opening Doors: From the Start St. John's Changed the Face of Legal Education* (Oct. 1, 2015), <http://www.stjohns.edu/about/news/2015-10-01/opening-doors-start-st-johns-changed-face-legal-education>.

¹⁰ St. John's offers ten different clinics, staffed by students who, working under the supervision of practicing attorneys, manage their own cases, engage in client interviews, motion practice, negotiations, mediation, and oral argument. A complete list of clinics is available at <http://www.stjohns.edu/law/academic-programs/centers-and-clinics>.

¹¹ The externship program at St. John's allows students to work in a range of legal practice settings including private legal practice, the courts, state and federal government and international organizations. Seventy-five percent of students in the class of 2013 participated in at least one clinic or externship, see <http://www.stjohns.edu/law/academic-programs/externships>; see also Raising the Bar: Experiential

Even inside the classroom, our students are engaged in extensive skills-based learning. All of our first-year students take an intensive mid-year course in negotiation, client counseling, and drafting.¹² In their second and third years, our students can take courses in mediation and arbitration; trial advocacy, pretrial advocacy, appellate advocacy; advanced negotiation, advanced counseling, business planning; and a vast array of courses in drafting—everything from basic contracts to complex IP licensing agreements, from real estate transactions to wills and trusts.¹³ What is important – and distinctive – about those courses is not what the students learn, but rather the way they learn. They learn the substance of legal doctrine (for example, contract law), but they do so by applying that doctrine in the kind of real-life settings encountered by practicing lawyers (by, for example, negotiating the contract terms and then drafting the agreement themselves).

B. Globalizing American Law Schools

Globalization is a more recent development in American legal education, with a surge in globalization of the curriculum and research occurring in the last decade or so. St. John's has been part of that globalization wave and provides a good example of how globalization has altered American law schools.

For most of its ninety years of existence, St. John's was a true New York City law school. It produced many of the leading local practitioners: two governors of New York State, two police commissioners of New York City, thousands of lawyers in law firms in New York City, all kinds of public servants, and many of the judges in New York State.¹⁴ For much of our history, we were viewed as a very good local law school.

But, of course, New York City is not a local city. It is not only a media and cultural capital for the United States, but also a major center of international banking and finance.¹⁵ And that means the practice of law in New York City is necessarily a global practice. So, in the past

Learning Opportunities Abound at St. John's Law, ST. JOHN'S UNIVERSITY (Feb. 26, 2014), <http://www.stjohns.edu/about/news/2014-02-26/raising-bar-experiential-learning-opportunities-abound-st-john-s-law#sthash.5oufNUMu.dpuf>.

¹² See St. John's Law 1Ls Learn Key Lawyering Skills in New Intersession Course, ST. JOHN'S UNIVERSITY (Jan. 28, 2015), <http://www.stjohns.edu/about/news/2015-01-28/st-john-s-law-1ls-learn-key-lawyering-skills-new-intersession-course#sthash.SeZZicnR.dpuf>.

¹³ A list of all course, including upper-level electives is available at <http://www.stjohns.edu/law/course-descriptions>.

¹⁴ See St. John's Law Alumni at <http://www.stjohns.edu/law/alumni/alumni-association/prominent-law-alumni>.

¹⁵ See e.g., John Glover, *New York Strips London of Mantle as World Financial Center*, BLOOMBERG, (Mar. 16, 2014, 8:01 AM), <http://www.bloomberg.com/news/articles/2014-03-15/new-york-steals-london-s-mantle-as-world-s-top-financial-center>.

several years, we have transformed St. John's into a global law school. To do so, we made three important changes.

First, we established a Center for International and Comparative Law to serve as a focal point for the research and study of transnational legal issues in a way that connects students to practitioners and scholars.¹⁶ Second, we greatly expanded our global law curriculum and created what we call the International Legal Practice Pathway.¹⁷ Third, we established an Office of Transnational Programs to manage experiential learning and exchange opportunities for students, with the dual goals of sending St. John's students overseas to study and bringing overseas students to St. John's to study.¹⁸

In the past few years, students from 54 different countries have come to study at St. John's, typically in one of our three international LL.M. programs. That includes students from our twelve current partner schools here in China.¹⁹ Those LL.M. students are fully integrated into our J.D. courses, which means they immeasurably enrich the learning environment for all of our students. The presence of students from Chinese law schools, who bring knowledge of Chinese law and legal method, is particularly important given China's growth as a global economic power, the rapid developments in China in the rule of law, and the growing legal practice in New York, around the U.S., and around the globe, involve Chinese clients, counterparties and businesses.

¹⁶ Center for International and Comparative Law, ST. JOHN'S UNIVERSITY, <http://www.stjohns.edu/law/center-international-and-comparative-law>.

¹⁷ For many decades, our international curriculum consisted of two basic courses: public international law and private international law. It now includes over two dozen courses: international environmental law, international criminal law, international sports law, international arbitration, international art law, international bankruptcy, international finance, international intellectual property, comparative law, trade law, China law, E.U. law, and more. All of these courses can be applied to a particular practice pathway to prepare students for different areas of global practice. The pathway also guides students through co-curricular programs: externships and internships, clinics, academic journal membership and student fellowships. See <http://www.stjohns.edu/law/pathways-profession>.

¹⁸ Transnational Programs, ST. JOHN'S UNIVERSITY, <http://www.stjohns.edu/law/transnational-programs>. In addition to the opportunities for students from across the globe --including students from our partner schools in Europe, Latin America, and Asia, St. John's J.D. students may also study abroad during their three years of legal education, including summer programs in Paris or Rome and a semester-long program at the University of Glasgow studying topics in Scottish, UK, and European Union law.

¹⁹ St. John's maintains partnerships in China with Beijing Jiaotong University Law School, East China University of Political Science and Law, Nankai University School of Law, Shanghai University of International Business and Economics School of Law, Soochow University Kenneth Wang School of Law, Tsinghua University School of Law, Zhejiang Gongshang University School of Law, East China Normal University School of Law, Capital University of Economics and Business School of Law, Shanghai Jiaotong University KoGuan Law School, Hunan University School of Law, and Northwest University of Political Science and Law. See full list of St. John's University School of Law's global partner schools at <http://www.stjohns.edu/law/transnational-programs/international-school-partners>.

III. THE CROSSROADS: BRINGING TOGETHER SKILLS TRAINING AND GLOBALIZATION IN TRANSNATIONAL LEGAL PRACTICE

The growth of skills training and the globalization of the curriculum are, compared to the Nineteenth Century Langdellian orthodoxy of American law schools, still quite recent developments. But both are signs of the health of American legal education, even in a time of declining enrollment in American law schools.²⁰ And both point the way for the future of global legal education: bringing together skills training and a globalized curriculum to prepare truly transnational legal practitioners.

The challenge of transnational legal practice can be illustrated with an example from popular culture. On our flight from New York to Beijing for the Tsinghua conference, one of the films being shown on board was *Woman in Gold*, starring the famous actress Helen Mirren.²¹ The movie tells the story of a young American lawyer's quest to have a painting that had been stolen by the Nazis returned to its rightful owner. The legal drama in the movie begins with a regulatory proceeding in Austria, continues with extensive litigation in the United States, then proceeds through a failed mediation in the United States, and finally concludes, in the climax of the movie, with a private arbitration in Vienna.

The core doctrinal issue at the heart of the legal proceeding depicted in the film is whether the U.S. Foreign Sovereign Immunities Act can be applied retroactively.²² This issue requires knowledge of both statutory interpretation methods and the public international law basis of sovereign immunity. But to prevail for his client, the lawyer-hero has to do much more than know the law around the Foreign Sovereign Immunities Act. He has to understand Austrian law, and how it interacts with American law; he has to understand American law and how it interacts with Austrian law; he has to be able to strategize about the financial barriers to pursuing remedies in one jurisdiction or the other; he has to have an understanding of the available domestic and international dispute resolution options—litigation, mediation, arbitration; and, importantly, he has to be able to function, to practice law, in each one of those settings. The common

²⁰ See Margaret Loftis, *Drop in Applications Spurs Changes at Law Schools*, U.S. NEWS AND WORLD REPORT (Mar. 11, 2015, 9:00 AM), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2015/03/11/drop-in-applications-spurs-changes-at-law-schools>.

²¹ WOMAN IN GOLD (BBC Films Original Pictures 2015). The film is based on the true story of a Jewish refugee to the U.S. who employs a young lawyer to help her fight the Austrian government for the return of a famous painting of her aunt which was stolen from her family by the Nazis in Vienna and later claimed by the post-war Austrian government.

²² The case on which the movie was based reached the U.S. Supreme Court in *Republic of Austria v. Altmann*, 541 U.S. 677, (2004) (holding that the Foreign Sovereign Immunities Act applies retroactively to conduct that took place before its enactment).

thread running through all these knowledge areas is an important intellectual skill: he needs the ability to think across different legal systems.

That is transnational legal practice. The challenge before us, as global educators, is how to prepare our students for that practice. Filling out a law school curriculum with assorted international courses is a start, but it is not enough. Our students also need training in the practical skills needed for transnational work.

At St. John's, one way we provide that training is through an LL.M. program specifically dedicated to the *practice* of transnational law.²³ Like many LL.M. programs, our Transnational Legal Practice LL.M. program has students from all around the world. But, unlike many other American LL.M. programs, the primary purpose of our program is not to teach foreign students American law.²⁴ Rather, the purpose of the Transnational Legal Practice program is to teach them the skills they will need to be international practitioners. Students learn U.S. law in the process, but they learn it in the context of acquiring specific skills for transnational business planning and transactions, transnational negotiation and dispute resolution, and transnational regulation and compliance.

One key teaching method used in the Transnational Legal Practice LL.M is problem-based simulations. For example, students learn transnational commercial law by role-playing a basic cross-border sales transaction. To use a simple illustration, a manufacturer in the United States wants to buy component parts from a producer in China. Organized into teams, the students play the role of outside counsel, client, bank or counterparty for the sale. Imagine a room of thirty students from five or six different countries, playing different roles in negotiating that transaction and structuring the deal. To do that, they need an understanding of substantive sales law – American commercial law, Chinese commercial law, and the potential application of international commercial rules through treaty.²⁵ They also need to understand basic international banking rules, international financing options and, in order to plan properly, the available international dispute resolution methods. They also need to be proficient in the skills of negotiating, counseling, and drafting. And, they need to be able to use those skills while functioning effectively

²³ Transnational Legal Practice, LL.M., ST. JOHN'S UNIVERSITY, <http://www.stjohns.edu/law/programs-and-majors/transnational-legal-practice-llm> (last visited Nov. 23, 2015).

²⁴ If a foreign student wishes to come to St. John's to learn American law and sit for the New York bar exam, she may do that through our J.D. program or through our LL.M. program in U.S. Legal Studies. U.S. Legal Studies, LL.M., ST. JOHN'S UNIVERSITY, <http://www.stjohns.edu/law/programs-and-majors/us-legal-studies-llm>.

²⁵ United Nations Convention on Contracts for the International Sale of Goods, Jan. 1, 1988, 1489 U.N.T.S. 3.

in English, which is the global language of business and, increasingly, of global legal practice.²⁶

In the Transnational Legal Practice program, our students conduct a number of these problem-based simulations, including in private business transactions, court litigation across borders, mediation and arbitration, and public international law disputes in environmental, trade, and investment law.²⁷

Local expertise, of course, is still important, and it is essential that law schools still train lawyers in the knowledge and skills necessary for practicing domestic law. Most legal work still occurs in local and domestic systems. All lawyers need a strong grounding domestic law, including the skills to analyze and apply domestic law to complex problems, draft legal documents and enforceable instruments under domestic law, and to argue before local and national tribunals. But, while local expertise is necessary, it is no longer sufficient. Even local experts need broad exposure to how their own practice can be affected by globalization. It can be as simple as a will drafted in the United States that involves a bequest from Germany, a child custody agreement between parents located in New York and Mexico, a New York real estate lease financed by investors in Shanghai, or a criminal indictment brought in Brooklyn against soccer officials who need to be extradited from Switzerland.²⁸

We share the optimism expressed at the Global Legal Education conference that teaching in law schools around the globe has, in some ways, never been better. For their part, American law schools have made enormous progress in recent years in more effectively teaching the specific skills needed for the practice of law. American law schools - and law schools all around the world - have also made enormous progress in globalizing their curricula. It is now time to bring those two advances together. To prepare the next generation of global lawyers, law schools must do more than just teach our students international and comparative law. We must equip them to practice *transnational* law. It is our obligation as legal educators, to give them

²⁶ Teaching legal English, as was noted throughout the Tsinghua conference, has become an important part of the Chinese law school curriculum. U.S. law schools have for several decades required research and writing courses for all J.D. students, but with globalization, U.S. law schools are recognizing the need for legal English dedicated to foreign students. St. John's accomplishes this through the American Law: Discourse and Analysis pre-LLM year, as well as the skills-training in the core TLP LLM courses. See description at <http://www.stjohns.edu/law/programs-and-majors/transnational-legal-practice-llm>.

²⁷ The example used here is a relatively simple commercial transaction. Add some regulatory complexity to the simulation and role play, such as intellectual property rights, or tax consequences, or trade regulation, or a long production schedule that implicates currency fluctuations and interest rate changes, and the range of knowledge and skills the students will need expands greatly.

²⁸ See, e.g., Indictment of *Jeffrey Webb et al.*, (No. 15-CR-0252(RJD)(RML)), available at <http://www.justice.gov/opa/file/450211/download> (FIFA officials charged with crimes by the U.S. Attorney in the United States Court for the Eastern District in Brooklyn, NY).

not just knowledge, but also skills; to teach them not just theory, but also technique; to give them not just *dao*, but also *shu*.