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THINKING GLOBALLY: WILL NATIONAL BORDERS MATTER TO LAWYERS A CENTURY FROM NOW?

*Mary C. Daly**

MEMORANDUM

To: *The Dean of Academic Affairs*
From: *Associate Dean for Operations*
Re: *Pressing Issues of Concern for the November semester*
Date: *June 15, 2005*

I know it's not fair to be writing a memo about next semester before this one is over, but as I mentioned the other day, there really are some issues that we have to address now.

Admissions

It looks like the size of the in-coming class is right on target: 300 U.S. citizens and 100 foreign nationals. The problem is the ethnic breakdown of the foreign nationals. Despite our best efforts, for the third year in a row the students with the strongest academic predictors are coming from Western and Eastern Europe. The predictors for the students from Africa and India are lower.

In a perverse way, we are the victims of our own success. Global News & World Report has consistently given our third-year exchange program with law schools in Africa and India an "A+" rating. This means our strongest applicants for admission come from the U.S. and Europe, hoping to be accepted into the Africa and India exchange programs. On the other hand, our placements in Europe get "B" to "B+" ratings so we attract weaker applicants from Africa and India. The strongest applicants from these areas apply to U.S. law schools with "A" to "A+" ratings for their European programs.

We really need to do something about this. Not only is it creating admissions problems, but also down the road it will hurt the law

* Professor of Law and the Director of the Stein Institute of Law and Ethics at Fordham University School of Law.

school in related areas. Until our European exchange program started to decline, our African and Indian students were actually stronger than the European students. They were eagerly sought after by global and networked law firms and in-house departments. Indian and African alumni have been very generous in terms of gift giving, internship opportunities, and employment. We must not alienate them by failing to take remedial steps to improve the quality of the European exchange program. I suggest you approach the Deans of the European Consortium of Law Schools and ask for the establishment of an inter-school committee to examine the exchange program. Of course, that means the committee will be looking at the quality of our third-year program from the perspective of the European exchange students. The committee's review should not be too much of a problem. Global News & World Report gave our program a "B+" to "A-" rating last year.

Curriculum Reform

The faculty must come to a resolution on the proposed restructuring of the first-year curriculum. You will recall that three years ago, the Deans Council of the Association of Law School Consortia asked each consortium to encourage member schools to evaluate their curriculum. Our Dean appointed a Task Force composed of faculty members from this school and consortia schools who regularly teach here either in person or through classes at the long distance learning laboratory.

Although I don't necessarily agree with their opposition, I can sympathize with our colleagues' claim that curriculum reform goes in circles. When the ABA and the AALS first launched the global-lawyer curriculum initiative in 2005, it required a constant exchange of faculty among the law schools in the seven regional consortia (the U.S., Western Europe, Eastern Europe, Latin America, Africa, the Middle East, and the Pacific Rim). Because of the expense involved and language difficulties, the initiative did not really catch on until 2015 when teleconferencing and translation technology made enormous breakthroughs and suddenly law schools in the United States and in the consortia could be linked electronically. At first, students enrolled in telecommunicated courses taught by foreign law school faculty directly from their campuses abroad. Later collaborative telecommunicated courses came into vogue with U.S. and foreign professors co-teaching basic as well as advanced courses. As transportation costs declined and the modules of higher education (e.g., credits, semesters, and course sequencing) became more standard, faculty exchanges became routine. Ultimately, this proved to be disruptive because it involved a constant coming and going of faculty

from the fifty-two law schools in the consortia. It frustrated institution building and the law schools lost an important part of their distinctive character.

Team teaching and collaborative approaches made a great deal of sense when our faculty was not fluent in foreign law constructs. Most of our junior faculty, however, studied abroad as law students and undergraduates. The law school's tenure standards encourage them to teach in one of our exchange programs for two years and to write at least one article with a foreign or comparative law perspective. Therefore, abandoning the team teaching approach and replacing it with a pervasive method in which each professor automatically incorporates foreign law into each of his or her courses makes a great deal of sense. While fewer exchange professors from the consortia schools will be physically present each semester, the money we save on salaries can be used to improve the facilities in our long distance learning laboratory. Our teleconferencing capability barely meets Standard 707 of the Council of Law School Consortia. Adopting the new curriculum does not mean the death of collaborative efforts as some faculty members claim. It means making better use of electronic communication systems. Ironically, our foreign colleagues seem to be uniformly in favor of the proposed reform. Team teaching made them feel like academic appendages. Under the new model, they will be more fully integrated into the law school, even though there will be fewer of them physically present on campus.

Career Placement

For the last 25 years, the Consortia accrediting standards have permitted students to satisfy their semester of mandatory pro bono by working either in the country where they are matriculating or where they are enrolled in an exchange program. Students have correctly perceived that fulfilling their pro bono obligation in a foreign country gives them an advantage in their subsequent job search in that country. Apparently, the Deans Council is concerned that they may be getting too much of an advantage. Some law schools are complaining that their local graduates are losing jobs to these exchange/pro bono students. The Director of Career Planning has picked up a rumor that the Deans Council is thinking of adopting a directive eliminating the foreign-country pro bono option. Have you heard anything? The Directive would really hurt our students, especially the ones participating in the Latin American program.

* * * * *

I. INTRODUCTION

Fantasy? Folly? I submit neither. This memorandum is a balanced projection of the future of legal education and practice for main stream law schools and main street lawyers. I am not so bold a visionary as to predict the demise of state or national borders in the next hundred years. Nation-state legislation will continue to regulate individuals' private lives (e.g., domestic relations, testamentary dispositions of property, purchases of real property for personal use, etc.) and their public lives (e.g., environmental restrictions on businesses, the imposition of fair labor standards on the employment of workers, and prohibitions against criminal behavior directed toward others).

The globalization of capital, financial, and commercial markets that has occurred over the past twenty years will never unravel. Advances in telecommunications and technology, intimately linking the remotest parts of the world are not "around the corner" — they are here and improving every day.¹ What I predict, therefore, is a revolution in legal education and in the delivery of cross-border legal services. Law schools will have to graduate students whose legal antennae are sensitive, for example, to the interstices of supranational sales codes, to the subtleties of foreign bankruptcy codes, and to the cultural differences in styles of negotiations. As cross-border trade becomes common place for medium and small companies, new forms of associations among U.S. and foreign law firms will be needed to service these clients.

While the globalization of the economy will have its greatest and most measurable impact on lawyers who practice in the organizational sphere of the profession,² lawyers in the personal sphere will need antennae sensitive to foreign law issues as well.³ Foreign law issues will

1. Even the quickest glance at contemporary practice literature shows that technology is dramatically altering the delivery of legal services today. E.g., Daniel S. Coolidge, *The Portable Lawyer: A Traveling Lawyer Shows How to Turn Any Landscape into the Reality of a Virtual Workplace*, 80 A.B.A.J., Sept. 1994, at 62; Jim Meyer, *The Portable Lawyer: Don't Leave Home Without It . . . Your Office That Is*, 79 A.B.A.J., Sep. 1993, at 71; Jim Meyer, *The New Lawyering: Microsoft's Bill Gates Looks at Computers' Impact*, A.B.A.J., Aug. 1993, at 56. To understand the potential impact of technology on legal education, see Ronald W. Staudt, *Does the Grandmother Come With It: Teaching and Practicing Law in the 21st Century*, 44 CASE W. L. REV. 499 (1994); see also Anne Stein, *Law Students Read Cases on Laptops*, 80 A.B.A.J., Oct. 1994, at 30. In the long run, technology may have a greater impact on the future of the legal profession than the forces of supply and demand, the consumer movement, legal education, and regulatory authorities.

2. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319-20 (1982).

3. See Mary C. Daly, *Practicing Across Borders: Ethical Reflections for Small Firm and Solo Practitioners*, THE PROFESSIONAL LAWYER 123 (1995).

intrude more regularly into clients' personal affairs,⁴ as patterns of immigration alter, as immigrants' choose to maintain closer ties with their native countries,⁵ and as more U.S. and foreign nationals become "global citizens" in their outlook and life styles.

These changes in the personal and organizational hemispheres of the legal profession will necessarily entail the modification of the current sovereign-state system for the admission and discipline of lawyers. They will also require the adoption of a common code of professional responsibility for the representation of clients in cross-border transactions. This essay first "looks back" to the next 100 years of lawyering and to the evolution of legal education and cross-border practice and then briefly examines an emerging model regulatory framework.

II. LEGAL EDUCATION

Legal educators and the organized bar do not see eye-to-eye these days on a significant number of issues.⁶ One area where they do agree, however, is the need for law schools to incorporate international material into the curriculum.⁷ This need will become even more critical in the

4. For an incredibly rich narrative of the impact of cultural differences in representing foreign clients in personal-hemisphere matters, see *The Changing Face of America — How Will Demographic Trends Affect the Courts?*, 72 JUDICATURE 125 (1988). See also Alan Hodgart, *Choosing Between U.S. and U.K. Firms*, AM. LAW., Nov. 1991, at 6 (Supplement: A Global View) (discussing cultural differences between the lawyering styles of corporate law firms in the United States and Great Britain).

5. One of the most striking differences between today's generation of immigrants and yesterday's is that many of the former choose not to apply for U.S. citizenship. Seth Mydans, *The Latest Big Boom: Citizenship*, N.Y. TIMES, Aug. 11, 1995 at A12. Advances in communication and transportation facilitate the retention of close ties with family and friends in the immigrants' native countries. Regular and extensive contacts between those who emigrated and those who stayed behind can be quite easy. Some countries have even adopted specific policies designed to encourage ties with their nationals who become citizens of other countries. For example, Mexico is about to adopt a constitutional amendment which will permit immigrants from Mexico to retain property rights and a nonvoting cultural citizenship. *Id.*

6. Contrast, for example, the organized bar's enthusiastic embrace of the MacCrate Committee's recommendations with the tepid reaction of most legal educators. Compare Debra Cassens Moss, *The Holistic Lawyer: ABA Task Force Lists Skills and Values of the Well-Rounded Attorney*, A.B.A.J. Oct. 1992 at 38; Geoffrey C. Hazard, *A Report Suggests Reforms to Improve Both Competence and Professional Values*, Nat'l L.J., Oct. 12, 1992 at 13 with John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEG. EDUC. 157 (1993); Robert MacCrate, *Paradigm Lost — or Revised and Regained?*, 38 J. LEG. EDUC. 295 (1988); Jack Stark, *Dean Costonis on the MacCrate Report*, 44 J. LEG. EDUC. 126 (1994).

7. See MINI-WORKSHOP MATERIALS, AALS Miniworkshop on Teaching the First Generation of Global Lawyers, 1993 AALS Annual Meeting. See also Ted Gest, *Going International: Legal Education Is Discovering at Long Last that It is a Small World After All*, U.S. NEWS & WORLD REPORT, Mar. 6, 1994.

twenty-first century. The global economy cannot be undone. Capital, services, production, and trade are inextricably intertwined. To service a global economy law school graduates must receive a global education.

New York University recently launched an awe-inspiring program designed to transform itself into the first truly global law school. It includes offering faculty appointments to renowned law professors in foreign countries, the recruitment of extraordinarily talented students from foreign countries, and the promotion of extensive links between members of the U.S. and foreign judiciaries.⁸ NYU's initiative deserves only the highest praise and best wishes.

Very few law schools have NYU's resources. But their students too will graduate into a global economy and will need comparable foreign-law skills. How will these law schools prepare their students to practice law in the year 2095?⁹ I envision a radical transformation in three areas: curriculum, faculty, and teaching methodologies.

A. Curriculum

Curriculum reform calls for internal and external change. The external changes are fairly straightforward and unimaginative. Casebooks and hornbooks will routinely refer to nondomestic law and transnational codes, such as the Convention for the International Sale of Goods. Teachers will incorporate international materials into core courses and offer seminars to explore them in depth. For example, comparative federalism and fundamental rights will be an integral part of a required constitutional law course. In a law of lawyering course, students will explore cross-cultural understandings of the professional norm of confidentiality and the lawyer's role as an officer of the court.

These curriculum changes will not consume enormous intellectual resources. Over the years, professors grow nimble at shaping old clay into new vessels. Who among us has not rewritten a lecture to demonstrate the methodology of a law and economics analysis or deconstructed a line of cases to explore a critical legal studies perspective? In keeping with the spirit of Standard 302(a) of the ABA Standards for the Approval

8. See Carl Deal, *NYU Unveils Novel International Law Program*, N.Y.L.J., July 26, 1994, at A1; *U.S., Foreign Judges Hold Court in Italy*, N.Y.L.J., Aug. 2, 1995, at 2.

9. For the purpose of this essay, I am assuming that the three-year, post-college structure of legal education remains in place. I doubt very strongly that this will be the case. In my view, the increasing complexity of personal and business relationships, the rising cost of legal education, and the ready availability of computer-generated legal advice will force the organized bar to relinquish certain practice segments to licensed legal technicians. This relinquishment, in turn, will lead to a dramatic restructuring legal education.

of Law Schools, many professors now incorporate legal ethics issues into their substantive courses.¹⁰

The real challenge lies in internal change. It will require teaching U.S. students to experience the law and the role of the legal profession as they are experienced in other legal cultures. Over the next 100 years, law schools will need to construct a curriculum that enables students "to think like lawyers" — but in several legal languages not just one. This can only be accomplished by linking U.S. and foreign law schools and U.S. and foreign students in ways untried to date. As the hypothetical memorandum at the beginning of this essay suggested, the key to such a program lies in the establishment of regional consortia of law schools.

Undergraduate colleges and universities are far ahead of law schools when it comes to foreign exchange programs and they can teach us a great deal. The number of foreign students studying in the United States is at an all time high.¹¹ Their number is likely to increase.

The presence of foreign students on university and college campuses contributes to the institutions' financial and intellectual well-being. Their short-term benefit consists of the students' financial contribution to the communities in which they live and their educational and cultural contributions to their classrooms in which they study. Their long-term benefit consists of the value of their experience when they become our trading partners or strategic allies back home.¹² The same will be true of foreign students at U.S. law schools.

It is not just foreign students who are flocking to the U.S. campuses. Also rising is the number of foreign scholars who are coming to teach or study in the United States. They are establishing new relationships with their American counterparts. Mutual action is replacing mutual understanding as one of the primary goals of international scholarly exchanges:

10. AMERICAN BAR ASS'N, STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 302(a)(iv) (1994). For an excellent overview of the pervasive method and a superb collection of legal ethics materials organized by subject matter, see DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1994).

11. See INSTITUTE OF INTERNATIONAL EDUCATION, OPEN DOORS 1993-94 (1995). See also Paul Desruisseaux, *U.S. Enrolls Record Number of Foreign Students*, 41 CHRON. HIGHER EDUC., Nov. 23, 1994, at A38.

12. *Id.* The observation concerning long term benefit cannot be applied to foreign law students without some reservation. In many countries, the role of the lawyer in business transactions is far more circumscribed than in the United States. Cultural understandings restrict the lawyer's role to that of a scrivener or legal technician. However, as those cultural understandings change, the long term benefit of allowing foreign law students to study in the United States will become more evident.

It's important that scholars get together to pool their collective intellectual resources to attack some of the problems that transcend national borders, and working side by side contributes to that happening.¹³

These trends at the undergraduate level are expected to continue¹⁴ and are important for two reasons. First, the opportunities for study abroad increase and foreign students and scholars become a regular presence in undergraduate education, students will become more comfortable with foreign exchange at the law school level. They will regard it as a normal component of an educational experience not a novelty. Second, having been educated in this undergraduate environment junior faculty members will be more receptive to foreign exchange and collaborative scholarship.

In light of the numerous exchange programs at the undergraduate level, the almost complete lack of academic-year, semester-abroad programs at the law school level and the absence of direct placement programs with foreign law schools are startling. The major oppositionist to cross-border programs has been the ABA. Until very recently, it used faculty and library accrediting standards as weapons to prevent law schools from awarding credit for study outside the U.S. in foreign law schools and from establishing their own academic-year, semester-abroad programs.¹⁵ The ABA's professed fear was that students would not receive adequate grounding in either foreign law or U.S. domestic law if they were away from the watchful eye of U.S. law school administrators. Rather than insisting that rigorous standards be adopted to insure the pedagogic adequacy of foreign study the ABA in effect opted for a flat ban. Although the accrediting standards have loosened in recent years, they continue to display the same hostility.¹⁶ For reasons that are not

13. Paul Desruisseaux, *59,981 Scholars from Abroad Teach or Study in U.S.*, 41 CHRON. HIGHER EDUC., Nov. 23, 1994 at A40, A41 (quoting Richard M. Krasno, president of the Institute of Legal Education); see also Stanley J. Heginbotham, *Shifting the Focus of International Programs*, 41 CHRON. HIGHER EDUC., Oct. 19, 1994, at A65 (noting a shift from "traditional area studies to problem-focused programs").

14. E.g., Amy Magaro Rubin, *Notes on Exchanges*, 41 CHRON. HIGHER EDUC., June 9, 1995, at A40 (describing 5 new programs).

15. The ABA has given grudging approval to approximately four academic-year, semester-abroad programs. Their sponsors are Notre Dame University School of Law, Pepperdine University School of Law, Pace University School of Law, and University of Detroit Mercy School of Law. In contrast to the undergraduate accrediting agencies, the ABA will not permit a student to receive credit for attending more than a single semester.

16. AMERICAN BAR ASS'N, CRITERIA FOR APPROVAL OF INDIVIDUAL STUDENT STUDY ABROAD FOR ACADEMIC CREDIT 1-5 (1994) (on file with the author); AMERICAN BAR ASS'N, REVISED CRITERIA FOR APPROVAL OF SEMESTER ABROAD PROGRAMS

entirely clear, the ABA has regarded summer-semester programs with greater favor.¹⁷

As a result of a recent antitrust settlement between the ABA and the Department of Justice, the ABA has agreed to review certain of its accreditation standards.¹⁸ While it is not clear that the foreign study standards fall within the agreement's scope, there is no better time than now for their review. The ABA's isolationist approach to legal education is an embarrassment.

Liberalizing the accreditation standards to permit foreign study will not by itself produce the desired integration. The key to integration lies in the creation of an international consortium of law schools that will allow (and indeed encourage) students to spend two semesters outside their native country.¹⁹ There are two immediate models for my proposal. The first is the collaboration of the University of California with universities in Britain, France, Germany, Italy, Spain, and the Netherlands.²⁰ This multinational approach represents the latest thinking at the undergraduate level on how best to create cross-border exchanges. It is a particularly attractive model for law schools because it demands faculty involvement and strives for truly multinational perspective.²¹

The second is Project Erasmus, a program that has been operating in the European Union for the past several years. This program allows tens of thousands of European students to earn credits at a foreign institution.²² In the 1993-94 academic year, 145 institutions in 18 different

FOR CREDIT-GRANTING FOREIGN SEGMENT OF APPROVED J.D. PROGRAM (1994) (on file with the author).

17. See *Voyage to Discovery: Student Lawyer's Annual Guide to International Summer Programs*, STUDENT LAW., Jan. 1994, at 28-60; 25 SYLLABUS, Spring 1994, at 14.

18. See Daniel Wise, *ABA to Alter Accreditation Process: Fed'l Civil Antitrust Complaint Settled*, N.Y.L.J., June 28, 1995, at 1.

19. In endorsing the establishment of an international consortium of law schools, I am not blindly overlooking the practical problems involved. For example, U.S. and foreign universities have quite different academic calendars. Their curricula are also very different. In most countries outside the United States, law is an undergraduate course of studies; studies directed to obtaining a license to practice law may not be offered until after completion of the undergraduate degree or in the last year of undergraduate studies. An apprenticeship may be required. U.S. law schools charge enormous sums for tuition. Foreign universities do not. I acknowledge that these differences present obstacles to cross-border studies. I dispute that these obstacles are insurmountable.

20. Amy Magaro Rubin, *Extending the Reach of Exchanges*, 41 CHRON. HIGHER EDUC., Nov. 16, 1994, at A45.

21. *Id.*

22. In 1991, 59,000 students from 12 European Union countries participated in the Erasmus Program. *Erasmus Program*, EURO92, 1991 WL 2534008. It will shortly be replaced by the even more ambitious Socrates Educational Program. *Socrates Educational Programme and the Youth for Europe III Programme*, EUR. SO. POL'Y, Mar. 9, 1995, 1995 WL 8400535.

countries participated.²³ Each of the participating universities has agreed to recognize the other's degree courses.²⁴ While I applaud the enormous contribution Project Erasmus has made to cross-border education, I find it a less attractive model than the multinational approach. In my view, the greater faculty involvement of the latter makes quality control more likely. Faculty involvement is also more likely to stimulate the intellectual growth of individual faculty members.

B. Faculty and Teaching Methodologies

U.S. law schools will not shed their isolation and embrace integration overnight. The process will be gradual, advancing incrementally as U.S. and foreign law schools and faculties learn more about each other through academic exchanges and assistance programs.

The process is already unfolding. In the wake of the collapse of Communism, the countries of Eastern Europe appealed to the ABA for assistance in a number of areas. They particularly sought help in the reestablishment of intellectually vibrant, politically independent law schools. The ABA launched the Central and Eastern European Law Initiative (CEELI), enlisting the services of U.S. law schools.²⁵ Some hosted visits from the deans of law schools in Eastern European countries. Others sponsored foreign faculty members interested in studying particular areas of the law. Still others sent their own faculty members abroad to teach at foreign law schools and on occasion to advise foreign governments.²⁶ The success of CEELI inspired the African Law Initiative Sister Law School Program in which 16 African law schools are linked with ABA-approved law schools in "two-way partnerships."²⁷ This initiative has pioneered a draft agreement between a U.S. and African law school organizing "joint research, student summer exchanges

23. For a more complete description of Project Erasmus and a six-year pilot project, the European Credit Transfer System, see Burton Bollag, *Transferring Credits Across Borders*, 41 *The Chronicle of Higher Education*, May 5, 1995 at A45.

24. See *European Community Promotes Multinational University Programs*, *Christian Science Monitor*, Mar. 8, 1990 at 13.

25. See Janet Key, *Old Countries, New Rights: Four Years after the Collapse of the Former Soviet Block, an ABA Program is Laying the Foundations of Democracy*, 80 *A.B.A.J.*, May 1994 at 68.

26. See e.g., James P. White, *Law Schools Build Relationships Through CEELI Programs*, 26 *SYLLABUS*, Summer 1995, at 2. See also George A. Critchlow, *Teaching Law in Transylvania: Notes on Romanian Legal Education*, 44 *J. LEG. EDUC.* 157 (1994); Sanford Levinson, *National Loyalty, Communalism, and the Professional Identity of Lawyers*, 7 *YALE J. OF LAW & HUMANITIES* 49 (1995).

27. Robert Fullerton, *Update on African Law Initiative Project*, 26 *SYLLABUS*, Summer 1995, at 4.

[and] providing an African master's law."²⁸ A similar initiative links U.S. and Latin American law schools. These commendable efforts will eventually lead to the establishment of the seven regional consortia imagined in my hypothetical.

Other ties are being formed in Western Europe, the Pacific Rim, the Middle East, and Latin America. NITA has established a formal relationship with Nottingham Law School in England to train solicitors to assume courtroom duties.²⁹ The Fulbright program regularly recruits law professors to teach abroad. Over 90 U.S. law schools are currently sponsoring summer programs abroad.³⁰ Foreign law professors teach in each of these programs. Often courses are team taught. U.S. faculty members frequently seek out these opportunities so they can meet foreign law professors with similar academic interests and to take advantage of research opportunities not available in the United States.

There is one additional reason why I have little doubt about the ultimate establishment of international law school consortia. Employers and law students will demand it. Indeed, their demand will be synergistic. If law firms and corporations believe that graduates trained abroad are better lawyers because they are more sensitive to issues of foreign tax, environmental, labor law, etc.; are more appreciated by foreign clients because of their language skills;³¹ or make foreign clients feel more at ease because of their familiarity with different cultures, they will hire disproportionately from law schools offering this training. From the students' perspective, if study abroad enhances career opportunities and mobility, then a law school without a foreign program is worth less than a law school with one.

Finally, the same forces that will operate to give U.S. lawyers with foreign training a competitive edge in the global marketplace will also be operating outside the nation's borders. U.S. law schools cannot expect foreign law schools to open their classroom doors while U.S. law schools keep theirs closed. At the present time, foreign students who want to study law in the United States have only two options: admission into a

28. *Id.*

29. NITA NOW, July/Aug. 1995, at 1.

30. What is particularly striking about many of the summer programs is that they provide internship opportunities for students, placing them in foreign law firms and government offices. See *supra* note 17.

31. One law school is currently experimenting with foreign language instruction. Vivian Curran, *Developing and Teaching a Foreign Language Course for Law Students*, 43 J. LEGAL EDUC. 589 (1993).

J.D. or LL.M. program.³² I envision a non-degree conferring system modeled on exchange programs familiar to U.S. undergraduate colleges and the University of California and the Project Erasmus programs discussed earlier.

III. THE DELIVERY OF LEGAL SERVICES ACROSS BORDERS

In politically correct terms, law firms have been "profit-per-partner challenged" over the past several years. The forces responsible for the decline in profitability and stagnant growth are well known. Corporate clients are exercising tighter fiscal control over outside law firms. More work is being done in-house and its quality can rival that of the best firms. Law firms are competing more fiercely among themselves. Accounting firms, consulting firms, and other non-law firm suppliers of services are becoming formidable rivals, winning assignments from clients for work that was once exclusively reserved for law firms.³³

The provision of cross-border legal services is a significant exception to the decline and stagnation. According to the Department of Commerce, U.S. law firms collected \$1.4 billion from foreign clients in 1992 alone. Legal services ranked fourth on the Department's 1992 list of highest grossing export businesses and professional services.³⁴ As one astute observer of the U.S. legal profession so aptly put it, "From Moscow to Berlin to Tokyo, law — especially business law — is a product on the rise. Law is the wave of the future."³⁵

A. *Crossing Borders: The U.S. Law Firm Experience*

Most U.S. firms initially established offices abroad for the sake of appearance. The role of those offices and the firms' expectations evolved over time.³⁶ Branch office lawyers originally functioned as

32. For an informative discussion of graduate school education for foreign law students, see Julia E. Hanigsberg, *Swimming Lessons: An Orientation Course for Foreign Graduate Students*, 44 J. LEGAL EDUC. 588 (1994).

33. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE GROWTH AND TRANSFORMATION OF THE BIG LAW FIRM* (1991); ROBERT L. NELSON, DAVID M. TRUBEK & RAYMAN L. SOLOMON (eds.), *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* (1992).

34. Gary Taylor, *U.S. Firms Are Export Machines: Sale of Legal Services Abroad Soars in '90s*, NAT'L L.J., May 30, 1994, at 6. Foreign companies are attracted to U.S. law firms in part because of the quality perceived to be inherent in "brand name" representation. Steven Brill, *Turmoil Beneath the Surface*, AM. LAW., July/Aug. 1995, at 5.

35. Steven Brill, *Short-Term Pain, Long-Term Gain*, AM. LAW., Jan./Feb. 1991, at 5 (1991).

36. For an excellent overview of the internationalization of the legal profession from a sociological perspective, see David M. Trubek, Yves Dezalay, Ruth Buchanan & John R. Davis, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the*

business facilitators, overseeing foreign matters for U.S. clients and referring foreign clients back to the main office for legal work in the United States. Today, these lawyers function as business generators, pursuing new clients in foreign countries. The clients they represent and the deals they do increasingly have no connection to the United States.³⁷ Their clients are changing too. Foreign governments and agencies are regularly retaining U.S. law firms to advise them on privatization matters.

For the purposes of this essay, there are four models for providing cross-border legal services. The first three — Cravath, White & Case, and Baker & McKenzie — are named after prominent law firms;³⁸ and the fourth, “networks,” refers to an incipient system of affiliation among law firms. Cravath has eschewed the establishment of branch offices. It has only two, one in London and the other in Hong Kong. It is an international law firm of the old order, representing an impressive array of foreign clients in U.S. litigations and transactions. The London and Hong Kong branches work in areas such as project financing and privatization.

In contrast, White & Case has over 22 branch offices around the world. Those offices practice local law and pride themselves on representing foreign clients in foreign deals as well as U.S. clients. Baker & McKenzie is an international law firm with a persona very different from that of either Cravath or White & Case.³⁹ It is more like an affiliation of local law firms, each of which has adopted a common surname. The percentage of foreign lawyers working in the Baker & McKenzie offices is much higher than the percentage at the Cravath and White & Case branch offices. Not surprisingly, the firm boasts of its local law capabilities.

Prestigious multinational corporations regularly retain these three firms for their most complex transactions. Their clients are willing (but

Creation of Transnational Arenas, 44 CASE W. L. REV. 407 (1994). See generally VIRGINIA KEYS VEENSWIJK, COUDERT BROTHERS — A LEGACY IN THE LAW: THE HISTORY OF AMERICA'S FIRST INTERNATIONAL LAW FIRM 1853-1993 (1994).

37. Brill, *supra* note 35 at 5.

38. I have borrowed these designations from a conference on the Globalization of the Legal Profession sponsored by the International Bar Association in May 1995. The panelists extensively explored the strengths and weaknesses of the “Cravath” and “White & Case” models of providing cross-border legal services. The designations and descriptions in this essay obviously do not capture the richness of the two firms’ international work. Their distinct approaches, however, suggest the firms’ suitability as paradigms for discussion purposes. See generally Karen Dillon, *Brand Names at the Brink*, AM. LAW., May 1995, at 5.

39. See Larry Smith, *Think Global, Act Local: Firms Face the New World Order*, 13 OF COUNSEL, June 1994, at 2.

not necessarily happy) to pay significant sums in legal fees to obtain the brand-name, quality representation that the firms provide. The globalization of the economy, however, has trickled down from "Wall Street" to "Main Street." As a consequence, small and medium-size companies increasingly require cross-border legal services. These companies will never possess the financial resources to retain the Cravaths of the twenty-first century. To meet their needs new forms of professional associations are emerging in the United States. Known as "networks" these associations link small and medium-size law firms in different jurisdictions. By joining together the firms hope to provide multi-state and multi-national services to these Main Street clients without suffering the miseries of unsustainable growth or relinquishing autonomy.⁴⁰

I believe that over the course of the next 100 years there will be significant changes in the four models just discussed for providing cross-border legal services. The mega-firms such as Cravath and White & Case will come to resemble the Big Six accounting firms in management and culture. They will also become multi-disciplined. For the past several years, a great debate has raged over admitting lay persons to law firm partnerships. Washington, D.C. is the only jurisdiction to have taken that giant leap.⁴¹ Many firms, both in Washington and elsewhere, have found the establishment of auxiliary businesses an acceptable alternative. Increased competition among law firms and between law firms and other service providers such as accounting firms and "consulting" organizations⁴² will eventually force regulatory authorities to dismantle the ethical barriers to multi-disciplinary practice. Multi-disciplinary practice rules are already in place in England and Wales.⁴³

Trade regulators will also play a role in this evolution. Prohibiting lawyers from admitting lay persons to partnership and from sharing fees

40. There are approximately 200 networks around the world. The nature of the affiliations among the member firms varies greatly. See LEX MUNDI, DIRECTORY: LAW FIRM ALLIANCES, NETWORKS, CLUBS, ASSOCIATIONS AND OTHER AFFILIATIONS (1995) (on file with the author).

41. WASHINGTON, D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1994).

42. It was not polite to say "the Emperor has no clothes," but it was true. It is not polite to say "the consultants are engaged in the unauthorized practice of law," but it is also true. Law firms compete on a daily basis with nonlawyers for clients' tax, ERISA, environmental, labor, and ADR work. Litigation support services supply legal judgment masking as "technical assistance." Unauthorized practice of law statutes are never used against the providers of services to sophisticated corporate clients. Regulatory authorities invoke them only when the "bread and butter" practice of local lawyers is threatened. See generally Ward Bower, *The New Competition: Time for a Wake-Up Call*, AM. LAW., Oct. 1994.

43. In general, the ethical rules prohibiting affiliations between lawyers and nonlawyers are more relaxed in other countries than they are in the United States. Larry Smith, *Big-6 Accounting Firms Encroach Foreign Legal Turf*, 14 OF COUNSEL, Mar. 1995, at 1.

with them are anti-competitive measures. As the line between practicing law and consulting grows even blurrier, domestic trade regulators, such as the Federal Trade Commission, are likely to call for the elimination of these prohibitions, especially if a strong case can be made that the integrity of the profession will not suffer.⁴⁴ Joining their call will be foreign trade regulators, such as the Department of Commerce. To the extent these prohibitions deny access to foreign law firms they constitute a free trade barrier. They also provide a handy excuse for foreign countries, desirous of denying practice rights to U.S. firms.⁴⁵

In sum, at the end of the next one hundred years, commercial law firms will look very different than they do today. The mega-firms will adopt strategic growth plans modeled on the successes of White & Case and Baker & McKenzie and will eventually offer a broad array of interdisciplinary services. Small- and medium-size law firms will either adapt to the cross-border marketplace by affiliating with similar size law firms in other countries or withdraw from the marketplace entirely.

B. Crossing Borders: The Foreign Law Firm Experience

Foreign law firms are fighting back.⁴⁶ Commercial lawyers in other countries, especially in Western Europe, have responded vigorously to the U.S. invasion, restructuring the legal profession in their countries, recasting local law firms in the U.S. mold, and establishing new affiliations. Often they try to buy time to complete their catch-up by holding U.S. law firms captive to restrictive admissions and practice rules. These responses are essentially defensive measures intended to keep U.S. law firms from stealing local clients and from practicing local law.

Foreign law firms are also searching for ways to compete with U.S. law firms without having to implement aggressive growth strategies.

44. The restrictions imposed on nonlawyer partners in Rule 5.4 of the Washington, D.C. Rules of Professional Conduct demonstrate that protecting professional integrity is not at all an impossible task.

45. For example, as Professors Hazard and Hodes have noted, it was necessary to amend Model Rule 8.5

[t]o facilitate international law practice. Specifically, it was required by professional regulatory authorities in France as a condition of their recognition of American lawyers as *conseil juridique* (juridical advisors in American law).

GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 967 (1994 Supp.).

46. For a comprehensive overview of the responses of foreign law firms, see Richard Abel, *Transnational Law Practice*, 44 *CASE W. L. REV.* 737 (1994).

They have joined together to form alliances, clubs, and federations.⁴⁷ Just like their U.S. cousins, they argue that linking firms in this way preserves each member firm's autonomy and culture while providing clients with representation comparable to that offered by larger firms. Foreign law firms have physically entered the U.S. marketplace through branch offices. Their lawyers are taking advantage of state admission regimes permitting them to practice as foreign legal consultants. Most interestingly of all, they are hiring U.S. lawyers and recruiting at U.S. law schools!⁴⁸

IV. WHAT'S NEXT — A LICENSE TO PRACTICE GLOBAL LAW? OR A GLOBAL LICENSE TO PRACTICE LAW?

The current system of lawyer admission and discipline is already inadequate⁴⁹ to meet the needs of cross-border practitioners and clients.⁵⁰ The question is not whether the system will disintegrate but how soon. Restructuring the system will not be difficult, once a consensus is reached on its desirability. I suspect that a future cross-border fraud will trigger a serious study of regulatory and ethical issues in transnational practice. My favorite script for such a fraud involves marrying the facts of *O.P.M.* and *B.C.C.I.*⁵¹

What would an admissions and disciplinary system for cross-border lawyers look like? A working model already exists. Like the United States Supreme Court, the Court of Justice of the European Union has played a very active role in striking down local bar barriers to the prac-

47. For a more extended discussion of these new forms of affiliations, see Mary C. Daly, *Ethical and Liability Issues*, in *International Law Practice*, in 17 *COMPARATIVE LAW YEARBOOK OF INTERNAT'L BUS.* 223 (1995).

48. E.g., Edward A. Adams, *The British Invade U.S. — to Hire Lawyers*, N.Y.L.J., Apr. 10, 1995, at 1. U.S. law firms have always employed a small number of foreign lawyers in their main offices to advise on the laws of other countries. Firms are now expanding their hiring, hoping that it will lead to the generation of more business when the foreign lawyers return home. See Cindy Collins, *Foreign Internship Programs: Mutually Beneficial for Intern and Law Firm*, 14 *HIRING & TRAINING REPORT*, AUG. 1994, AT 1.

49. Regulatory authorities in the United States have reached a similar conclusion with respect to domestic lawyering. See *Symposium, Ethical Issues in Multi-Jurisdictional Practice*, 36 *S. TEX. L. REV.* 1 (1995).

50. By focusing on the needs of cross-border practitioners and clients, I do not intend in any way to ignore or diminish the public's interest in regulating the legal profession. In my view, the organized bar has consistently and wrongfully excluded the public from meaningful participation in the debates over lawyer regulation and the delivery of legal services.

51. See *Report of the Trustee dated April 25, 1983 Concerning the Fraud and Other Misconduct in the Management of the Affairs of the Debtor*, In re *OPM Leasing Service, Inc.*, 40 *Bankr.* 380 (*Bankr. S.D.N.Y.* 1984); Stuart Taylor, Jr., *Ethics and the Law: A Case History*, N.Y. *Times (Mag.)*, Jan. 9, 1983, at 32; *Vast BCCI Conspiracy Defrauded Millions*, *Nat'l L.J.*, Dec. 28, 1994, at 511.

tice of law by nonresident lawyers.⁵² Sensing the futility of resistance the bar associations of the member states formed an umbrella organization, the Council of the Bars and Law Societies of the European Community (CCBE). After a long and heated debate that lasted several years, the CCBE adopted the Code of Conduct for Lawyers in the European Community.⁵³ The regulatory authorities of the member states, in turn, incorporated the CCBE Code into their individual regimes governing lawyer conduct. The net result is that within each member state two codes of conduct exist side-by-side, one for cross-border transactions and the other for purely domestic transactions.⁵⁴

The actual admissions and disciplinary system governing cross-border practice in the European Community, however, is more complicated and unsettled than the history of the CCBE Code's adoption might suggest. The CCBE has adopted a Draft Directive on the Right of Establishment for Lawyers.⁵⁵ The European Commission has been reviewing it and working on one of its own. The regulatory system that is most likely to emerge will recognize the jurisdiction of the licensing state and the state in which the cross-border services are provided. Both will possess the power to investigate and discipline.

The most important lesson we can learn from the European Union's experience is that optimism, dedication, and hard work will pay off in the end, just as they do in other areas of law practice. There is no *insurmountable* difference preventing the organized bar in the United States and in other countries from agreeing on a common code of professional responsibility for cross-border transactions and a unique regulatory system.

Regardless of the country of origin professional standards respond to three categories of dilemmas: core function, structural, and professionalism.⁵⁶ Core-function dilemmas are those that go to the very heart

52. See Roger J. Goebel, *Lawyers in the European Community: Progress toward Community-wide Rights of Practice* reprinted in MARY C. DALY & ROGER G. GOEBEL (eds.), *RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICE* 239 (1995).

53. The CCBE Code is reprinted in DALY & GOEBEL, *supra* note 52 at 379.

54. This description is painted with a very broad brush. For an excellent and thorough analysis of the CCBE Code, see Laurel S. Terry, *An Introduction to the European Community Legal Ethics Code (pts. 1 & 2)* 7 *GEO. J. LEGAL ETHICS* 1 (1993). See also John Toulmin, Q.C., *A Worldwide Common Code of Professional Ethics?*, reprinted in DALY & GOEBEL, *supra* note 52 at 207.

55. Heinz Weil, *Proposal for a Directive on the Right of Establishment for Lawyers in the European Community* reprinted in DALY & GOEBEL, *supra* note 52 at 223.

56. Totalitarian regimes are an obvious exception to this observation. For example, the 1980 Lawyers' Regulations in China define lawyers as "state legal workers" and require an aspiring lawyer to be a citizen who "warmly loves" China and supports the socialist system. The founder of

of the attorney-client relationship (e.g., confidentiality, loyalty, fiduciary obligations, etc.). While the elaboration of the specific values inherent in the relationship can differ significantly, acknowledgement of their existence links the disparate legal systems. The Preamble to the Model Rules of Professional Conduct begins by observing "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."⁵⁷ The Preamble to the Model Code of Professional Responsibility describes lawyers as "guardians of the law" and acknowledges their duty "with courage and foresight . . . [to] be able and ready to shape the body of the law to the ever-changing relationships of society."⁵⁸ The Preamble to the CCBE Code of Conduct instructs: "In a society founded on respect for the rule of law the lawyer fulfills a special role. His duties do not begin and end with the faithful performance of what he is instructed to do so far as the law permits. A lawyer must serve the interests of justice. . . ."⁵⁹

Acknowledging that there are core functions common to nontotalitarian legal systems does not mean that achieving a consensus on the substantive provisions of a cross-border code of ethics will be an easy task. Quite the contrary, because core functions go to the very heart of each society's concept of the rights and responsibilities that bind lawyers and clients, efforts to harmonize those functions will provoke the most controversy and dissent.

Structural dilemmas spring from the relationship among lawyers *inter se* and between lawyers and the legal system (e.g., division of fees, regulation of "of counsel" relationships, supervisory responsibilities over junior attorneys and nonlegal personnel, restrictions on the sale of a

one of the leading law firms in China has dedicated his firm to upholding the "four fundamental principles:" "[T]he leadership of the Chinese Communist Party, Marxist-Leninist-Mao Zedong thought, the people's democratic leadership, and the socialist road." Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751, 756, 791 (1991).

57. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

58. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1969).

59. CCBE CODE Preamble, reprinted in DALY & GOEBEL, *supra* note 52 at 379. In England, a joint committee of the Law Society and the General Council of the Bar similarly observed:

In certain respects the legal profession occupies a position which differs from that occupied by other professions. Lawyers must always act in their clients' best interests and must refuse to act if a conflict of interest occurs; lawyers have a duty to the court; they are sometimes required to represent clients in unpopular causes; they have a duty to uphold the rule of law; for all these reasons the ordinary commercial considerations cannot always be decisive if the traditional character and functions of an independent legal profession are to be preserved.

John Flood, *Megalaw in the United Kingdom: Professionalism or Corporatism? A Preliminary Report*, 1989 IND. L.J. 569, 585.

practice, etc.). Professionalism dilemmas represent ideological tugs-of-war, triggered by the rules lawyers put in place in order to project and protect the image of the profession in society at large (*e.g.*, restraints on advertising and solicitation, minimum fee schedules, bars on partnerships with lay persons, restrictions on ancillary businesses, etc).

Resolving structural and professionalism dilemmas is likely to provoke less controversy and dissent than resolving core-function dilemmas. Structural and professionalism dilemmas are more readily perceived as cultural artifacts which can be remade to meet the evolving needs of society. For example, contingent fee arrangements were long considered the *bete noir* of the legal profession outside the United States. Today, they are legal in Germany and in the United Kingdom under limited circumstances.

Just as I am confident that a consensus on a cross-border code of professional responsibility can be reached, I am also confident that a cross-border admissions and disciplinary system can be implemented. The system I envision would not be terribly different from the one that exists today. Initially, lawyers would be licensed by a single jurisdiction. If they wanted to engage in cross-border representation of clients in another jurisdiction, they would have to register with the local regulatory authority. By registering, they would consent to limiting their representation of clients to cross-border transactions, to the authority's investigation of future complaints of unethical conduct, and to the imposition of discipline. The primary licensing jurisdiction would retain the right to investigate complaints and impose discipline for wrongful conduct that occurred in any jurisdiction where the lawyer had registered.

V. CONCLUSION

William French Smith, the former Attorney-General of the United States, is credited with the observation, "The United States has been successful in exporting blue jeans, rock and roll, and American lawyers." The globalization of capital, financial, and commercial markets accompanied by stunning technological advances in telecommunications assures that legal services will remain at the top of the Commerce Department's list of highest grossing export businesses and professional services well into the 21st century. U.S. law firms and legal educators should not take too much comfort, however. Foreign law firms will not cede their markets without a fight. Now is the time, as cross-border practice is in its infancy, to begin to think seriously about drafting a cross-border code of professional responsibility and establishing a regu-

latory framework for cross-border practice. National borders will not matter to lawyers a century from now.