

HAPPENSTANCE AND MEMORY: A LEGACY OF LAW AND DEVELOPMENT SCHOLARSHIP AND POLICY IN LEGAL EDUCATION

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INTRODUCTION

The field of law and development is substantially different from what it was in the 1960s, when it first became a cohesive field of study, as is the training of its prospective scholars and policy makers.¹ Today, an interested law student should have taken advantage of educational opportunities, and meet certain professional expectations, in order to find a job in law and development following graduation.² By contrast, in the 1960s, young lawyers could practically stumble into the field, finding a place for themselves by chance. Some were choosing between a civilian job and military service, while others were invited by a foreign government to consult on rule of law issues. These lawyers were

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¹ For a description of law and development as a field, see *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds., 2006). For a review of law and development theory with regard to current analysis by practitioners and academics, see John K.M. Ohnesorge, *Developing Development Theory: Law and Development Theories and the Northeast Asian Experience*, 28 U. PENN. J. INT'L ECON. LAW 219 (2007) (highlighting contradictions among the theories of law and development and historical experience).

² Career service offices in law schools highlight the need for international experience and preparation in seeking career opportunities in international law, which includes law and development opportunities. See, e.g., *Career Opportunities in International Law*, Johns Hopkins University School of Advanced International Studies, available at http://www.sais-jhu.edu/studentservices/career_services/Students_Alumni/sector_profiles/international_law.pdf ("For every job in international law, analytical ability, research and writing skills, and the knowledge of the basic differences in the world's legal systems as well as their political and cultural contexts is essential.").

knowledgeable about U.S. law, and went abroad to countries such as Brazil, the Sudan, or Ethiopia to share this knowledge with governments apparently eager to build legal capacity.

While many of these lawyers later ended up working in other places and fields, many joined the faculty at the University of Wisconsin Law School. Of those, some continue to participate in the intellectual and policy debates on law and development, while others have moved on to strictly domestic foci. Whatever their current occupations, however, all members of the Wisconsin law and development cadre recognize that their experiences in the law and development period forty years ago continue to inform their perspectives on scholarship, teaching, and the role of American lawyers in developing countries. This journal issue is filled with their reflections and personal experiences over the span of law and development from the 1960s to the present.

Law and development is now experiencing renewed attention throughout policy-making bodies and academic publications. This resurgence brings the history of the law and development field into sharp relief, and the University of Wisconsin Law School is seen to possess a unique connection to the field. The faculty's experiences provide the opportunity to reflect upon and evaluate the link between law and economic development, and to offer perspective on current law and development trends.

This Article is based in part on the personal experiences and memories of the Wisconsin faculty, some of whom have contributed to this volume with individual essays. Rather than retell the stories that they tell best, this Article instead seeks to offer a link between the choices these faculty made and the choices available to newly minted lawyers now wishing to join the ranks of law and development participants. First, it analyzes the differences between law and development preparation in the 1960s and today through the reflections of the Wisconsin Law School faculty cadre who composed part of that first wave, and evaluates how those differences occurred by tracing the historic arc of the field over the last fifty years. The second section focuses on the current period of law and development in education at American law schools generally, and particularly at Wisconsin under the influence of the Wisconsin law and development cadre. Next, the Article analyzes the value in these changes for the student seeking a career in law and development and places into the current legal educational context the long-term implications of the changes and the legacy of the first wave. The conclusion describes the legacy of the Wisconsin law

and development faculty, and considers what lies ahead for new law and development practitioners.

I. HISTORICAL ARC OF LAW & DEVELOPMENT: PRACTICE, SCHOLARSHIP & LEGAL EDUCATION

Q: "Why did you decide to go to Ghana?"

A: "It was happenstance."³

Current opportunities to engage in the law and development field differ significantly from those available when the Wisconsin law and development faculty first began their careers. Globalization, for good or ill, has greatly increased informational and financial exchanges across borders. International organizations have gained importance; participating in these organizations as a state demands a certain level of legal technical capacity that developing countries may not have, such as a sizeable legal profession, or even a domestically functioning legal system.⁴ Legal markets in such countries have increasingly opened to international law firms, but this does not entirely fill the vacuum because those firms seek profitable markets, not a developing country's need. Furthermore, implementation of international legal norms still often requires a certain degree of expertise in local laws, which international law firms may or may not have.⁵ As a result, new graduates with an interest in international or comparative legal work should take advantage of the international educational opportunities in law school to better prepare themselves for entry to the employment market.⁶

In the 1960s, by contrast, it was simply expertise in American law that was required and expected.⁷ The purpose of the American

³ Interview with Walter Dickey, Evjue-Bascom Professor, Associate Dean of Academic Affairs, Faculty Director of Frank J. Remington Center, University of Wisconsin Law School, in Madison, Wis. (Feb. 27, 2007).

⁴ See generally Gregory Shaffer, *Can WTO Technical Assistance and Capacity Building Serve Developing Countries?*, 23 WIS. INT'L L.J. 643 (2005).

⁵ John Tagliabue, *European Law Firms Learn to Adapt to an Open Market*, INT'L HERALD TRIBUNE, July 24, 2007, available at <http://www.iht.com/articles/2007/07/24/business/lawyers.php>.

⁶ *Career Opportunities in International Law*, *supra* note 2.

⁷ Interview with Joseph Thome, Professor Emeritus, University of Wisconsin Law School, in Madison, Wis. (Feb. 27, 2007); Interview with David Trubek, Voss-Bascom Professor of Law &

lawyer exodus to developing countries during that period was to spread U.S. legal theory and structures.

What we needed were “problem-solving lawyers.” However, I worried that this could be transformed into wheelers, dealers and operators. If we could reform Chilean legal education to make it just like ours, it was assumed that this would provide what was wanted. Again, I worried that we produced problem-solving lawyers in spite of and not because of three years of dissecting appellate opinions. They romanticized the problem-solving lawyer only to be faced with [some lawyers] whose problem-solving looked a tad too unsavory.⁸

Thus the decision to engage in the law and development field did not require the same preparation and specialization in extra-American law, politics, and economics that it does now. It remains unclear, however, if the purpose or practice of focusing on U.S. legal norms has changed substantially. There was an assumption that U.S. law and legal institutions could or should be exported to developing countries in the 1960s.⁹ In the current period, however, there continues to be a tendency toward the same assumption.¹⁰ It is therefore important to consider what experience and improved comparative education can and should contribute to training and practice in law and development.

A. THE WISCONSIN CADRE AND LAW AND DEVELOPMENT TRAINING IN THE 1960S

Following the success of the Marshall Plan to rebuild the European economies devastated by World War II, international scholars and policy makers in the United States began to see an expanded role in international development efforts, generally.¹¹ Europe had benefited enormously from the United States’ active involvement through the Marshall Plan; it may have seemed that the United States was in a good position to bring about similar miracles of development in other countries, particularly those countries that had newly established

Senior Fellow, Center for World Affairs and the Global Economy, University of Wisconsin Law School, in Madison, Wis. (Feb. 6, 2007).

⁸ Interview with Stewart Macaulay, John and Rylla Bosshard Professor of Law and Professor of South Asian Studies, University of Wisconsin Law School, in Madison, Wis. (Feb. 23, 2007).

⁹ See generally James A. Gardner, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1981); see also Trubek, *supra* note 7.

¹⁰ Trubek, *supra* note 7.

¹¹ David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 1, at 95.

independence.¹² When law and development first gained traction as a viable field in the 1950s and '60s, the United States had just begun to exert its power in what would finally be called the "American Century."¹³ The cadre of young lawyers who would later join the Wisconsin Law School faculty was well-versed in American law.¹⁴ The shift in focus from Western Europe to Asia, Africa, and Latin America stemmed from this confidence, though it was not merely U.S. interests dictating this shift, but in some cases, direct requests from the governments of these countries.¹⁵ The United States Peace Corps provides a prime example of the supply of and demand for American involvement and expertise with limited prerequisites. When President Kennedy called for volunteers, he was not imposing callow volunteers on reluctant host countries.

The Wisconsin cadre's reasons for going abroad varied. For example, David Trubek could have followed his military service with a job at a law firm, but he chose to work for the State Department in Washington, D.C.¹⁶ After two years in D.C., the State Department sent him to Rio di Janeiro. Lawrence Church saw the Peace Corps as an opportunity to explore the world while his life was sufficiently flexible to travel abroad.¹⁷ Joseph Thome, who had been born in Costa Rica and spoke Spanish fluently, was recruited by the Land Tenure Center and the Law School of the University of Wisconsin to conduct research on land tenure in Colombia, after a Fulbright grant-supported year in Brazil.¹⁸

Although the reasons varied, the motivations were similar: all the faculty members interviewed were curious about the world outside the U.S., and hopeful that they could contribute in a positive way through sharing their knowledge and skills as American lawyers or teachers. Professor Church, who served as a volunteer immediately after the founding of the Peace Corps, describes it this way:

They were glad to have us. The students wanted to learn, and Haile Selassie . . . used to come by the law school with his dog, and no

¹² Trubek, *supra* note 7.

¹³ See, e.g., HAROLD EVANS, *THE AMERICAN CENTURY* (1998).

¹⁴ Thome, *supra* note 7; Interview with Lawrence Church, Sherwood R. Volkman-Bascom Professor, University of Wisconsin Law School, in Madison, Wis. (Feb. 23, 2007).

¹⁵ Thome, *supra* note 7.

¹⁶ Trubek, *supra* note 7.

¹⁷ Church, *supra* note 14.

¹⁸ Thome, *supra* note 7.

guards, to see how things were going. It was a wonderful, optimistic time. And the volunteers and the law students were a community.¹⁹

None of the Wisconsin law and development cadre, however, had been trained in comparative or international law before leaving the United States. The cadre had graduated from law school mostly in the late 1950s and early 1960s, and had already begun their respective forays into the field before law and development became a part of the curriculum. They learned on the job about the political, economic, and cultural factors that created unpredictable outcomes when exporting American-style jurisprudence.²⁰ It was not until the mid-1960s, when many of the first wave had returned to teach, that the law and development curricular category began, derived as a legal parallel to the sociological, anthropological, and economic development classes that were already a part of the curriculum in other departments.²¹ Most law schools then only had a generic law and development course²² that was closely tied to the social sciences and did not address regional distinctions. It is not clear how many of these courses produced law and development practitioners, but it is likely that very few did; the money for law and development projects from the Ford Foundation (a major source of funding at that time), academia, and government had already begun to disappear.

This period was the “first moment” of the modern law and development timeline,²³ and of law and development in legal education. There was a focus on developing legal capacity: training lawyers and judges, founding law schools, and writing new laws to foster economic growth. It was characterized to a large degree by optimism, mostly on the side of the young legal professionals who were invited directly by host countries or who worked for American agencies and organizations, such as the United States Agency for International Development

¹⁹ Church, *supra* note 14.

²⁰ Anne-Marie Slaughter, *Breaking Out: The Proliferation of Actors in the International System*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION AND IMPORTATION OF A NEW LEGAL ORTHODOXY 12, 14 (Yves Dealay & Bryant G. Garth eds., 2002).

²¹ Trubek, *supra* note 7.

²² Interview with David Trubek, Voss-Bascom Professor of Law & Senior Fellow, Center for World Affairs and the Global Economy, University of Wisconsin Law School, in Madison, Wis. (Aug. 5, 2006).

²³ David Trubek, *The “Rule of Law” in Development Assistance: Past, Present and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 1, at 74. See also David Trubek, *The Owl and the Pussy-cat: Is there a Future for “Law and Development”?*, 25 WIS. INT’L L.J. 235-42.

(USAID), or funded by projects run by the Ford Foundation. New law and development practitioners ended up participating in this wave largely through “happenstance,” general interest, or the choice between working for the U.S. government and serving in the military.²⁴ The Wisconsin contingent found themselves in law and development work through some combination of these influences; by contrast, their respective legal educations had little to no effect on these preliminary paths. They had not necessarily enrolled in law school with the intention to build legal capacity in developing countries, and they could not have studied for it, even if they had had that intention. Most law schools at that time were oriented towards the study of case law and legal philosophy, not to the practice of law.²⁵ As a result, they found that their legal training

was inadequate for what [we] were trying to do during the [first wave of law and development]. We were very naïve when we started, about America and its intentions. Ill-prepared to study complex social systems. But there was no choice. There was no “law and development school.”²⁶

B. IN THE INTERIM: LAW AND DEVELOPMENT “SELF-ESTRANGEMENT”

By the mid-1970s, interest and opportunity in law and development decreased significantly. The early optimism had given way to a new perspective on the role of law in the politics of oppression.²⁷ In some countries, chaos and civil war rendered laws and legal expertise irrelevant.²⁸ Questions about American motivations were raised; the activities of the CIA and the Vietnam War had tainted American presence abroad.²⁹ Although there continued to be opportunities to engage in law and development, there were generally fewer countries that either welcomed the American lawyers, or were sufficiently stable. In Ethiopia, for example, the legal structures and capacity built in the 1960s were rendered useless by a military coup in the 1970s.³⁰ Students lost interest in law and development, and the funding sources that had

²⁴ Dickey, *supra* note 3; Trubek, *supra* note 7.

²⁵ Trubek, *supra* note 22.

²⁶ Trubek, *supra* note 7.

²⁷ Marc Galanter & David M. Trubek, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974).

²⁸ Church, *supra* note 14; Thome, *supra* note 7.

²⁹ Trubek, *supra* note 7.

³⁰ Church, *supra* note 14.

supplied much of the support for law and development projects in the earlier part of the decade had shifted away toward human rights issues. This shift undercut any further projects following the re-evaluation of the role of law and development projects in developing countries.

The Wisconsin cadre of law and development practitioners had gained experience and a certain cynicism. While some continued to work with and study developing countries, others found themselves moving away. When Trubek and Galanter published “Scholars in Self-Estrangement,” it was with differing degrees of concern.³¹ Galanter’s work to that point had been within the tradition of area studies, focusing on India’s legal system rather than on the relationship between law and economic development.³²

I had never had the sense of being [a part of law and development]—my animus came from a different place. I was an area person and I was looking at these law and development people . . . [It appeared] they [didn’t actually] know much about the places that they were talking about.³³

He had, however, already begun to reflect on the limits of law as a tool of reform. In 1974, Galanter wrote, “The [legal] system has the capacity to change a great deal at the level of rules without corresponding changes in [the] everyday . . . distribution of tangible advantages. Indeed rule-change may become a symbolic substitute for redistribution of advantages.”³⁴ By contrast, Trubek considered the piece a personal self-critique. He had become disenchanted with both the current trend of law and development scholarship and some of the results of his own work in Brazil.³⁵

This “self-estrangement” had an impact on legal education. Many of those best equipped to teach courses about law and development shifted their focus.³⁶ As a result, there continued to be a lack of training for interested students, and the experiences of the first period became somewhat irrelevant as these former practitioners moved

³¹ Interview with Marc Galanter, John and Rylla Bosshard Professor of Law and Professor of South Asian Studies, University of Wisconsin Law School, in Madison, Wis. (Feb. 23, 2007).

³² *Id.*

³³ *Id.*

³⁴ Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95, 149 (1974-75).

³⁵ Trubek, *supra* note 7.

³⁶ *Id.*

away from law and development towards other areas of law.³⁷ Economic and social scholars had not yet fully embraced law and development as a multi-disciplinary field—as they would later do—and thus this shift by legal scholars rendered law and development essentially moribund for that period.³⁸

C. NEOLIBERALISM: INTERNATIONAL BUSINESS AS THE IMPETUS FOR INTERNATIONAL LEGAL EDUCATION

Neoliberalism revived interest in law and development in the 1980s. The emphasis on free and unfettered markets to drive development, while not new, became extremely popular.³⁹ Laws existed to protect the market from interference, not to control the market itself.⁴⁰ During this period, there was also a significant increase in interest in law and development in academia, but from a business perspective.⁴¹ This trend reflected the prevailing hypothesis that free trade and free markets were better for all, and that law's only role was to foster the institutions that supported these markets.⁴²

Interest in the field of law and development was thus renewed, but not necessarily by legal specialists. Instead, neoliberalism, a philosophical expansion of Adam Smith's "invisible hand," was the purview of economists.⁴³ Accordingly, it was economists who began to dominate the study and practice of the law and development field at this time. However, law ironically became a tool to limit development laws and policies, in that the unfettered markets had to be protected from an interfering government, particularly in developing countries. Thus neoliberalism co-opted law and development, engendering a new field of expertise and debate: how law could simultaneously protect and support the free market, and stay out of its way.

At this point, funding again appeared, but it focused on "rule of law" projects that supported the neoliberal view: a stronger and more consistent legal system in a developing country would provide greater

³⁷ *Id.*

³⁸ *Id.*

³⁹ JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT 191-210* (2d ed. 2004).

⁴⁰ Kennedy, *supra* note 11.

⁴¹ *Id.*

⁴² *Id.*

⁴³ CYPHER & DIETZ, *supra* note 39.

protection for free markets. The World Bank, USAID, European governments, and Japan made large financial contributions to the new Rule of Law projects, a much greater amount than had occurred even at the peak of the first law and development period. However, as before, the money and practitioners were being sent out with lawyers who had had no opportunity to study or train in the nuances of law and development. Like the first wave, the legal academy trailed behind the interest in the field. It was not until a “critique of second wave projects started—and some second wave practitioners went into teaching—that the law schools started to offer courses on law and development as such.”⁴⁴

Nevertheless, interest in general international legal education experienced a boom during the neoliberal period. The Uruguay Round of the General Agreement on Tariffs and Trade produced the World Trade Organization, which placed a premium on lowering trade barriers, and necessitated a greater body of international regulation for governing trade agreements. This demand for expertise in international business law was increasingly reflected in the curricular offerings of American law schools. The augmented role of international organizations such as the World Bank and the International Monetary Fund also gave rise to a greater demand for preparatory international law classes. An educational background in international law helped launch the careers of new lawyers. Law schools began to recognize not only the need for international legal training, but also that students were increasingly entering law school with the expectation that they would be able to study international law and go into an international career.

In the 1990s, in the post-Washington Consensus period, there was another shift in the perceptions of the role of law in developing countries.⁴⁵ In *Development as Freedom*, Amartya Sen provided a clear definition for this shift in perceptions.⁴⁶ At the World Bank, James D. Wolfensohn produced his “Comprehensive Development Framework.”

⁴⁴ Interview with David Trubek, Voss-Bascom Professor of Law & Senior Fellow, Center for World Affairs and the Global Economy, University of Wisconsin Law School, in Madison, Wis. (Aug. 17, 2007).

⁴⁵ Kennedy, *supra* note 11.

⁴⁶ AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999). Sen’s book also was credited by many as the source for the new perspective on development work generally, but law and development had already re-emerged with the chastened paradigm before the book was published. See, e.g., David Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 1, at 1.

International organizations began to view law as a key tool to protect and foster those human rights linked to development, rather than as a framework to prevent any interference in the markets.

Although there continues to be disagreement as to whether development work has, in fact, shifted away from neoliberalism, or even if it should, the World Bank has made clear that it views “rule of law” as a necessary condition for sustainable and fair economic development.⁴⁷ Rule of law has also become the scapegoat where the markets fail.⁴⁸ This dual and sometimes contradictory role currently informs the breadth of law and development work and scholarship. Scholars are trying to find unifying themes within the present moment, but it is not clear that such unifying themes exist. Globalization of technology, markets and communication have amplified the scope of international awareness, and the opinions concerning the relationship between legal systems and economic development are accordingly varied.

III. INTERNATIONALIZATION OF LEGAL EDUCATION IN THE CURRENT PERIOD

Some people speculate that the reforms [in law and development theory] have made a difference and some speculate that they have made no difference at all, but we have very little proof of either until it becomes a genuine evidence-based interdisciplinary project, it is not going to be robust as it should. So this means you need a whole new generation of people with interdisciplinary skills.⁴⁹

Law and development in legal education has followed a similar trend to that of the field itself, in that it has been recognized as a part of the broader and increasing focus on international legal studies, but it perhaps no longer can be considered a distinct field. Thus it becomes necessary to consider international law as a source for law and development studies. There is significant variation and overlap between international law and comparative law. International law, by definition, has an impact on developing countries through the World Trade

⁴⁷ World Bank, *Rule of Law and Development*, <http://www.worldbank.org/> (follow “Topics” hyperlink, then follow “Law and Justice Institutions” hyperlink; then follow “Rule of Law and Development” hyperlink) (last visited Aug. 20, 2007).

⁴⁸ See, e.g., Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF. 77, no. 2 (Mar./Apr. 1998).

⁴⁹ Trubek, *supra* note 7.

Organization, the International Criminal Court, and topical international agreements, such as the Kyoto Protocols.

There has been a clear surge in the number of classes offered in international, transnational, and comparative law. This change is not only occurring within individual law schools; law school faculties across the country are working together to analyze and actually improve the presence of transnational law. In May 2004, the American Association of Law Schools (AALS) held a conference in Oahu, Hawaii, titled "Educating Lawyers for Transnational Challenges."⁵⁰ At the conference, professors from law schools around the world presented papers and held discussions to analyze the extent of transnational law incorporated in the practice of law, the need for transnational coursework to prepare lawyers-to-be, and the characteristics of the best methods for incorporating a transnational consciousness into the curriculum.

Forty-seven countries participated in the conference, including sixty-five scholars and professors from developing countries. There was a unanimous resolution to create a new International Association of Law Schools to foster comparative legal education everywhere. Although no other schools have yet gone as far as the University of Michigan, for example, in requiring a specific basic course in Transnational Law,⁵¹ many schools have focused on improving their currently existing course offerings.

Carl Monk, Executive Director of the AALS, wrote an article concerning international, comparative, and transnational law in American legal curricula.⁵² According to Monk, there is a need to educate law students to cope with the reality of an increasingly globalized world, whether the globalization is tied to developed or developing countries. As a result, many law courses have become comparative through necessity. He pointed out that it is now impossible to discuss many types of law without recognizing other legal systems and their differences.⁵³ He stated:

⁵⁰ A list of papers presented at the conference is available at <http://www.aals.org/international2004/papers.html> (last visited Aug. 4, 2007).

⁵¹ Mathias W. Reimann, *Taking Globalization Seriously: Why We Need to Make International Studies Mandatory, and How One American Law School Did It*, available at <http://www.aals.org/international2004/Papers/Reimann.pdf>.

⁵² Carl Monk, *A Push to Think Globally*, LEGAL TIMES, Sept. 6, 2004.

⁵³ Telephone Interview with Carl Monk, Executive Director of the Association of American Law Schools (Sept. 9, 2004).

Three years is not enough time for us to teach 1 percent of the law that exists. We can only teach students how to address problems and think critically. By adding comparative study to a curriculum, you not only introduce new ideas, but also, as was pointed out in a conference paper, “help students [and professors] think critically about the status quo, and present alternatives to consider.”⁵⁴

Monk went on to say that the need to be familiar with other cultures and legal systems will not confront every lawyer. Some of the traditionalist curricula reflect this and will have served those future lawyers well, though those clinging to strictly domestic law are few, and becoming scarcer.⁵⁵

Neither the lawyers and professors at the conference nor Mr. Monk, however, made a clear differentiation between transnational law in general, and courses that focus specifically on the role of law in developing countries. Indeed, there appeared to be a certain reluctance to do so. Nevertheless, in evaluating how an interested student might proceed, this process of parsing where and how to pursue studies in law and development is important. General transnational law, for example, is not commensurate with law and development, but it is related. At present, there are many areas of legal education with which law and development overlaps. These areas can be loosely grouped into three major categories: international legal systems, comparative legal studies, and regional legal studies. The old law and development category from the 1960s appears to have been incorporated into to all three of these areas, but no longer seems to be a central organizing theme. Subject matter and the order of course additions to the curricula at the various schools also underline the distinctions. At the strongest internationally-oriented schools, there is a depth to the curriculum that includes all three, where the more traditional schools have only some of the first and maybe a few in the second category. The three “new” categories include topics which used to be restricted to the law and development rubric, but they also include subjects which have little or no relation to the study of the role of law in developing countries. Therefore, although all three are expanding at a tremendous rate in law schools across the United States, this phenomenon does not strictly represent the same rise in courses concerning the role of law in developing countries. Indeed, the greatest focus is on business and trade law. However, in many cases, these

⁵⁴ *Id.*; see also Oscar G. Chase & Helen Herschkoff, *Civil Procedure in the Transnational Curriculum*, <http://www.aals.org/international2004/Papers/ChaseHerschkoff.pdf>.

⁵⁵ Monk, *supra* note 53.

courses address the legal systems of developing countries: it would be difficult to exclude China from a discussion about trade law, for example.

A. LAW AND DEVELOPMENT AS A SUBSET OF INTERNATIONAL AND COMPARATIVE LAW

The first, a general international law theme, is the best-established and most common category present in law school curricula. This category includes international law, international human rights, international business, and other topics that skim the surface of the internationalization of law and other norms. There is not a single American law school that does not provide at least one class in this area, probably because would-be law firm attorneys, lawyers for governments, and lawyers for non-governmental organizations have been operating at this level for the greater part of a century.⁵⁶ Furthermore, the advent of the United Nations, as well as the League of Nations to some extent, institutionalized the necessity of understanding treaties and other legal customs or norms. Because such international bodies include developing country participants, they necessarily include to some degree law and development themes.

The second category speaks to the more recent trends toward globalization of the economy: thematic comparative law. As companies have spread around the world, they need their lawyers to know how to advise them on financial legal concerns; the lawyers must be prepared to cope with differences in contract law between, for example, France and the United States. This category includes comparative property law and comparative constitutional law, among many others. This has an impact on law and development because the emphasis on the need for private international law led to comparative themes focusing largely on developed countries (where the majority of financial activity was occurring); however, no country, even a developed one, acts in isolation from its neighboring states, and comparative law has thus required increasing knowledge of developing countries' legal systems. There has also been a greater degree of hybridization, such that the boundary between developed and developing has been rendered less distinct. The

⁵⁶ After extensive research, the author was unable to find a single U.S. law school that did not offer at least one class in international law.

former Soviet republics and China, for example, have legal and financial characteristics that could place them in either category.

The third category is a focus on the legal systems of an individual country or region. This is the most rarely taught category of those mentioned, possibly because it requires regional expertise, and there are few professors that can yet offer this expertise. It may also be that globalization has perforated the boundaries of interaction between private international organizations and public international organizations, and all those countries within which they operate. Since organizations such as the World Bank, and certainly a company such as Coca-Cola, both have interests in a developing country such as Burkina Faso, for example, lawyers and scholars must better understand how Burkina functions, no matter whether the focus is private or public.

These three categories work for less traditional coursework and programs in the legal curriculum (“traditional” meaning lecture-style teaching and learning) in addition to lecture-style instruction, which is useful for the practical training of those who wish to pursue careers in the law and development field. Nevertheless, the non-traditional educational programs remain relatively scarce in law and development, as compared with other legal education topics such as criminal law and neighborhood law programs, likely because of limited access to the local interaction and to a particular region’s people or organizations.

Basic international law courses have become common, although they remain electives, and are rarely well integrated into the curriculum at large. Comparative law remains on the edge of the mainstream, and certainly courses addressing the rule of law in developing countries, even when such courses are listed, are not yet widely taught with any consistency. The result of this is that “law and development” has become too small, or even too general a category to encompass the range of courses now being taught at American law schools. Nevertheless, it remains a part of the general expansion. The status of courses on transitioning economies, emerging markets, and new democracies is constantly improving upon the former law and development classification. Part of this trend is due to globalization—teaching a course on intellectual property law without addressing the internet would be impossible, and since the internet has no borders, the course must address international and foreign domestic laws. Another part of the trend is likely due to countries that straddle the developed and developing world. China’s markets are increasingly attractive for businesses, and show no sign of slowing their growth. Nevertheless,

China is still a developing country in many respects, and faces many of the same problems as the smaller economies. Russia and the countries of former Soviet Union also blur the lines.

Is it possible that the distinctions between legal systems in developing countries and legal systems in developed ones are becoming less distinct? If so, the trajectory of increasing awareness of developing countries in legal education and the increasing similarities between the two categories will be interesting to observe. In the end, however, this is clearly a dynamic field of legal education, and “law and development” may no longer be sufficient to describe it.

B. CURRENT OPPORTUNITIES IN LAW AND DEVELOPMENT EDUCATION AT AMERICAN LAW SCHOOLS

Overall, there are some extraordinary programs, and some ordinary efforts. Much as in other areas of law, international legal coursework has benefited from a series of programs and centers that supplements the coursework and pulls it together. There are a number of ways law schools have done this. The majority have put together an official or unofficial concentration (the difference being whether or not they award a certificate). Some schools provide cross-listing with other schools in the same university system, and some provide dual-degree options. These efforts can be made relatively easy, since none require a reshuffling of school resources. Other programs and symposia are also available at many schools, and in many cases there are student efforts, such as international law societies and student-run international law journals. Advanced degrees providing the opportunity for students to specialize in some area of international law are also popular, such as the L.L.M. Program in Sustainable Development of the University of Washington.⁵⁷ One of the more interesting trends is the development of clinics. Many schools, including the University of California-Berkeley, the University of Arizona, and American University, manage to provide practical experiences for their students without study abroad experiences (although study abroad options also exist). The University of Arizona, for example, has the Indigenous Peoples Law & Policy Program, which

⁵⁷ University of Washington School of Law, *Law of International Development*, <http://www.law.washington.edu/SID/admissions.html> (last visited Aug. 12, 2007).

includes a clinic where students and faculty work as advocates for the Mayans in Belize.⁵⁸

There have also been greater efforts to coordinate classes and the research projects of the faculty into programs in which students participate, creating an international law identity or central organizing theme. In most cases, the program consists of a concentration, a list of available courses to fulfill said concentration, other academic options (joint degrees or advanced degrees), as well as clinics, research projects, symposia, and other ongoing events. New York University, Columbia, Georgetown, American University, Harvard, Stanford, Cornell, and the University of Washington are prime examples of law schools that have taken international law very seriously. They all have a wide range of offerings that touch on law and development in some fashion, but vary in their strengths. Stanford's Rule of Law Program, for example,

examines critical dimensions of the relationship between economic development and economic rights in rule of law-based systems. The purpose of the research is to move beyond assumptions associated with both the rule of law and with traditional and modern substitutes for the rule of law to understand their current and prospective role in risk management, especially in developing Asian countries. The Rule of Law Program also examines the role of legal institutions in transitional countries.⁵⁹

This program addresses the more traditional "law and development" theme. New York University Law School has a well-entrenched international worldview, "sometimes criticized by faculty at other schools for taking globalization too far."⁶⁰ Cornell University has two unique programs/funding sources that directly address the rule of law in developing countries: Clarke East Asia and Clarke Middle East Legal Studies Funds, and the Cornell Law School/Peace Corps Lawyers in Africa Program. The Clarke funds provide programmatic and curricular resources related to the study of East Asian and Middle Eastern legal systems, supporting conferences, professional travel, visiting and adjunct faculty members who teach courses related to East Asia and the Middle East, scholarships for exceptional students from these areas, additional library materials dedicated to East Asia and the

⁵⁸ University of Arizona James E. Rogers College of Law, *Indigenous Peoples Law & Policy Program*, <http://www.law.arizona.edu/depts/iplp/> (last visited Aug. 4, 2007).

⁵⁹ Stanford Law School, *Rule of Law Program*, <http://www.law.stanford.edu/programs/academic/ruleoflaw/> (last visited Aug. 4, 2007).

⁶⁰ U.S. NEWS & WORLD REPORT, *America's Best Graduate Schools 2005*, at 19.

Middle East, and speakers who address current legal issues facing these regions.⁶¹ The University of Washington has an emphasis on Asia, which might be expected, given its geographical location. However, in addition to its L.L.M. Program in Sustainable Development it also has an affiliation with Uplift International, a not-for-profit organization that provides humanitarian aid and technical assistance to developing country programs in the areas of health and human rights.⁶² This program functions in conjunction with the Global Health & Justice Project.⁶³

These programs demonstrate a multidisciplinary approach to the increasingly diverse field of law and development, in part because legal systems and economic development have become part and parcel of other issues. The Global Health and Justice Center, for example, illuminates this interdependence. For students who work in this center, concerns about access to healthcare are inextricably connected to socio-economic influences, particularly in developing countries. Thinking about healthcare in terms of justice has already brought law and legal systems into the mix. Thus these new innovations and opportunities differ substantially from what was previously available for those seeking training and experience in the field of law and development.

C. WISCONSIN AS A CENTER OF LAW AND DEVELOPMENT SCHOLARSHIP: THE LEGACY

Among some of these schools well-known for their international bent, Wisconsin may not appear to be a natural fit. Universities and colleges located in major urban centers, particularly those in Washington, D.C, and New York City, have a natural advantage in creating international opportunities and curricula for incoming students. They also easily attract adjunct faculty whose main careers might be as consultants for comparative and international policy, or who work in international aid agencies or for the United Nations. These schools are generally recognized as leaders in international and comparative education.

⁶¹ Cornell Law School, *Clarke Program in East Asian Law and Culture*, http://www.lawschool.cornell.edu/international/clarke_program/index.cfm (last visited Aug. 12, 2007).

⁶² Uplift International, *Advancing Equity in Global Health*, <http://www.upliftinternational.org/> (last visited Aug. 12, 2007).

⁶³ University of Washington Law School, *Global Health & Justice Project*, <http://www.law.washington.edu/HealthLaw/GHJ/> (last visited Aug. 4, 2007).

The University of Wisconsin, by contrast, has none of the geographical advantages; there is no easy access to a major city from Madison. Furthermore, a large proportion of Madison's population consists of the university's student body and those associated with the university. International opportunities in Madison, yet external to the university, are relatively few.

Nevertheless, the academic field of law and development enjoys a long and extensive history at the University of Wisconsin Law School. Long before the recent explosion of international law courses and opportunities at law schools around the country, the future faculty members of Wisconsin were practitioners and scholars of law and development in South America, Africa, and South Asia, although these faculty members themselves cannot agree on how this phenomenon occurred. Some argue it was chance, while others point to previously existing relationships with mentors who recruited them. Galanter offered that the academic environment at Wisconsin welcomed innovation and a more "contextualized" approach; faculty "were not penalized for exploring different approaches . . . people could come and do this sort of study without any sense of jeopardy."⁶⁴

Stewart Macaulay, most interestingly, cites the Wisconsin Idea.⁶⁵ The Wisconsin Idea, that the university's primary goal is to serve the community, shapes the university's mission by tying it to the service to the state at large. Involvement in the greater community is at a premium, and university faculty members are encouraged to engage with the outside world.⁶⁶ According to Macaulay, it is the Wisconsin Idea that makes Wisconsin an ideal center for law and development practitioners. In addition, the Law and Society Movement, also founded here at Wisconsin, provided a foundation for pursuing law and development interests in the middle of the 20th century.⁶⁷

But even before our faculty entered the law and development field, the Madison campus had already attracted international development scholars interested in the education offered through the Department of Applied Agricultural Economics.⁶⁸ It was precisely Wisconsin's development of domestic industries, specifically the agricultural resources, that attracted international attention. Countries

⁶⁴ Galanter, *supra* note 31.

⁶⁵ Macaulay, *supra* note 8.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

who had recently achieved independence were eager to build up their own nascent agricultural industries, and sought knowledge from the University of Wisconsin's AAE Department. And, in accordance with the philosophy of the Wisconsin Idea, the university welcomed and fostered a diverse and international community through which relationships between the university and governments and academic institutions in other countries were cultivated. Thus, when newly returned law and development practitioners sought a law-and-development-friendly academic community, Wisconsin beckoned.⁶⁹

The original Wisconsin law and development cadre is composed of David Trubek, Stewart Macaulay, Walter Dickey, Lawrence Church, Joseph Thome, Gerald Thain, Marc Galanter, Charles Irish, William Whitford, and Clifford Thompson. All of them have or had long and successful careers at Wisconsin, although only about half have continued to focus on law and development issues. Trubek, Thome, and Galanter have officially retired, while continuing to teach students and participate in academic symposia. In general, however, all continue to be active and accessible members of the law school community.

Their contributions to and involvement in law and development scholarship and practice vary significantly. Other essays in this volume describe the varying perspectives and experiences of Trubek, Whitford, Irish, and Thompson.⁷⁰ Whether they continued in the field or not, however, all of the cadre cite their experiences in law and development as part of the motivation for certain projects or practices. Professor Dickey, for example, who has subsequently focused on criminal law and sentencing, attributes his support as Dean of Academic Affairs for certain research approaches by the faculty in law and development to his own experiences and understanding of the field.⁷¹ He uses Kathryn Hendley's approach as a primary example: Professor Hendley is an expert in Russia's court system, speaks Russian fluently and travels regularly to Russia to perform primary research herself.⁷² Among those of the original cadre who have continued in the field, Trubek and Thompson have made significant efforts to increase the number of

⁶⁹ Trubek, *supra* note 7; Church, *supra* note 14; Thome, *supra* note 7.

⁷⁰ See generally Trubek, *The Owl and the Pussy-cat*, *supra* note 23; Cliff Thompson, *Sharing the Heat*, 25 WIS. INT'L L.J. 255-59; Charles Irish, *Reflections on the Evolution of Law and Legal Education in China and Vietnam*, 25 WIS. INT'L L.J. 243-54; William Whitford, *Changing Ambitions for Law in East Africa*, 25 WIS. INT'L L.J. 261-67.

⁷¹ Dickey, *supra* note 3.

⁷² *Id.*

international courses, students, study abroad programs at the university, as well as supporting collaborative efforts with other universities throughout the world, both through their appointments as professors and as deans. Thome has maintained ties and access to his original work, and continues to bring scholars to the University of Wisconsin. These professors also continue to engage in projects in developing countries.⁷³ Charles Irish founded the Center for East Asian Legal Studies. The Center provides grants to interested students to travel to East Asia for research. In addition, it supports up to two to three week-long opportunities for Wisconsin law students to travel to China, Thailand, and Japan to attend classes with local law students taught jointly by local faculty and Wisconsin faculty. The Center has also created several programs to build legal capacity in China, including one that brings Chinese judges to Madison to train them in civil procedure. These programs are reminiscent of the legal capacity building of the 1960s.

Furthermore, Wisconsin has made a concerted effort to expand the faculty and programming to include a new generation of law and development scholars and practitioners, in addition to Hendley, and many have contributed essays to this volume as well. Heinz Klug, who helped develop water rights law and participated in the construction of the new constitution in South Africa following the fall of apartheid there, heads the Global Legal Studies Center, which emphasizes and supports the study of law and society in developing countries. John Ohnesorge is the Assistant Director of the East Asian Legal Studies Center, and practiced law in South Korea for several years before returning to the United States to teach and research law and development in Northeast Asia. Allison Christians specializes in international tax, and has done substantial research on the impact of international tax regimes on developing countries. Adjunct faculty member Brady Williamson has been involved in constitutional and election law projects in Iraq, Sudan and Ukraine, traveling to Baghdad and East Africa to work with the committees drafting new national and regional constitutions. These scholars/practitioners, among several others, are Wisconsin's new cadre, and the original law and development cadre played a pivotal role in bringing them in. Thus, at Wisconsin, at least, there has been an extraordinary legacy created by the first law and development wave through the experiences and choices of those who were part of it, and

⁷³ Trubek, *supra* note 7; *see also* Trubek, *The Owl and the Pussy-cat*, *supra* note 23; Thompson, *supra* note 70.

they have ensured that their legacy continues here. It is also clear that the Wisconsin cadre has had an impact on the approach of scholars at other schools. Their work continues to be cited, and there is a vibrant community of law and development scholarship around the world in which many of them play an important role. Even if it is not the law and development field that has driven the larger-scale increase of international focus, it has been integrated in the U.S. legal education system to a greater degree than was the case in the past few decades.

IV. FROM EDUCATION AND TRAINING TO CHANGING THE LAW AND DEVELOPMENT FIELD

The manner in which the educational foundation for future law and development researchers and policy makers has shifted requires that those who participate in the field to ask, "Is this a better approach?" After all, it is not clear how the shift came about. Understanding the pressures that created this change will give those involved a better sense of where and how to proceed in order to improve training and preparation. Has it been driven by the acquired experiences of earlier participants, thus building on those experiences to improve training? Or have the more external globalization pressures, including international business and politics, had a greater impact? While clearly a combination of both, the balance between these two influences changes depending on whether one focuses on education or on practice.

In education, the Wisconsin cadre represents a clear example of how law and development practitioners have had a varied and strong impact on the long-term pattern of law and development in academia. This impact is being driven by those who have first-hand experience in the field and continue to study and research long-term results, which benefits the field immensely. As active faculty members, they also continue to guide the approaches of up-and-coming practitioners, at least those that go into the field through law school. Training now is significantly more outcome-oriented. With the increased recognition of how different cultures change the true impact of imported laws, it is hard to focus on law and development without addressing the problems of

systemic legal exportation.⁷⁴ There is a substantial amount of scholarship from the last fifty years that continues to be useful. Perhaps most importantly, the education and training in place has become far broader, offering an interdisciplinary approach with accompanying tools for improved analysis.

We've gotten past just narrowly looking at economics [as development] and are really now looking at the whole process of economic, social and political transformation . . . and where law fits into all these things . . . expanding the scope and the range of interest. . . . The interdisciplinary, programmatic focus on legal change in developing and transitional countries is now much more deeply imbedded and intellectually binding, vibrant.⁷⁵

Finally, it seems, training is occurring simultaneously to an expanded need in the field for well-equipped new lawyers, in contrast to the first two waves where training lagged behind interest and funding. Though training appears to have improved, however, it is not entirely clear that practice has improved as well. This is due, at least in part, to that shift in the field itself. Before, it was specialized and marginalized, now it has been mainstreamed and generalized. The forces which have greatly increased law school focus on international legal issues, such as globalization of trade and communications, have also been the driving force in persuading international organizations to start increasing the scrutiny of legal systems in developing countries. This scrutiny is not necessarily guided by newly trained lawyers, but by career policy analysts who may or may not have been exposed to the training provided in many American law schools. Much as the economists have absorbed law and development as an economic lesson and made it their own in the post-Washington Consensus period, policy makers in the international organizations have adopted law and development language, but not necessarily the experiences of those who participated in the first law and development wave. While it is likely that not all of the first-wave group ended up in academia, and that many stayed in the policy world, their direct influence in individual projects is uncertain.

Such an evaluation is very difficult, however, because many law projects at international organizations, the World Bank in particular,

⁷⁴ BRYANT G. GARTH & YVES DEZALAY, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 163-250 (2002).

⁷⁵ Trubek, *supra* note 44.

remain opaque.⁷⁶ There does appear to be a greater degree of variation among projects, both in scale and approach, than there used to be, but it is very difficult to find evaluative assessments for projects already completed. Consequently, those dissatisfactions voiced by members of the Wisconsin cadre concerning the local outcomes of their work may not have been resolved. As Thome points out, one sees projects which “[try] to reform the legal process, but the reforms have suffered from the same problems as before, in the sense of not really looking at the context but still trying to impose formalist models, even as they pay lip service to the context.”⁷⁷ Furthermore, actual opportunity in the field for well-trained law and development personnel may not be congruent with availability; because practices are not clear, in spite of the spectacular funding, we cannot know whether those individuals best trained to run or work in legal reform projects are the ones selected to do so. So, while the legal education system has certainly improved the training and education available for those pursuing careers or research in law and development, newly graduated lawyers may find that the practice has not changed at all. In addition, being well trained in the field does not guarantee employment opportunities; it is entirely likely that this increasing pool of qualified scholars and practitioners will have no immediate effect on law and development policy.

V. CONCLUSION

In reflecting on the last several decades of law and development, it is difficult to quantify the legacy of those who came in the first wave, and who, in their own way, continue to contribute. They are a resource for those of us who plan to engage in law and development in the future. As law and development becomes less distinct but also less marginalized as a field, it is important to remember the experiences and advice of those who first ventured into the field, many by chance. There is no question that legal education has been enriched by their contributions. At Wisconsin, with its law and development cadre, we are very lucky, and need to take advantage of their familiarity with the field. The lack of

⁷⁶ Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 1, at 203.

⁷⁷ Thome, *supra* note 14.

connection between training and practice is merely a challenge that those of us entering the field will have to confront; at least we will be better equipped with the tools we need to be effective if we can get there.

The law school has made a concerted effort recently to hire and retain faculty with international experience, most of whom have personal or professional connections to developing countries.⁷⁸ In this, Wisconsin is not particularly unique; as mentioned previously, there is a growing market in legal education for faculty with this type of expertise. As the old law and development guard retires, one by one, however, most of them remain active, mentoring new professors, and participating in the formulation of law school goals.

When asked how he would describe his current participation in the law and development field, Professor Trubek offered, “[The students] are my legacy. I am teaching you so you can go out and improve it.”⁷⁹ This is a powerful legacy, and we appreciate it.

⁷⁸ Trubek, *supra* note 7.

⁷⁹ *Id.*