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9. The global diffusion of U.S. legal thought: changing influence, national security and legal education in crisis

Fernanda Nicola

Law is spread as much by literature as by legislation. Commerce, education and religion may be as important conduits as governmental action in bringing about legal change.¹

I. LEGAL DIFFUSION AND MULTIDIRECTIONAL WINDS

During the twentieth century, the center of production of legal ideas shifted from France to Germany and then to the United States. Here, the dominant legal reasoning framed the law as a phenomenon of social organization that was not confined to a specific legal system.² There were both external and internal factors influencing U.S. legal thought which explain this change of wind from continental Europe to the United States. Externally, after World War II the United States garnered influence by positioning itself for political and economic global leadership. Internally, the critique of social purpose functionalism articulated by the legal realists provided new problem-solving approaches integrated in a reconstructive and pragmatic understanding of law called positive-sociology functionalism.³ Finally, legal diffusion occurred through public law disciplines based on U.S. constitutional law theories of rights, neo-formalism, and balancing conflicting policy analysis.⁴

¹ See William Twining (2006), “Diffusion of law: A global perspective”, *J. Comp. L.*, **1**, 237, 238.

² See Ugo Mattei (1993), “Why the wind changed: Intellectual leadership in western law”, *Am. J. Comp. L.*, **42**, 195, 195–96.

³ See Fernanda Nicola (2010), “Family law exceptionalism in comparative law”, *Am. J. Comp. L.*, **58**, 777, 795.

⁴ See Duncan Kennedy (2006), *The Globalizations of Law and Legal Thought*, in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development*:

The diffusion of legal education takes place through law schools, non-governmental organizations (NGOs), international financial institutions (IFIs) and other avenues, and with different political agendas, often in conjunction, for instance, with law and development reforms or more broadly due to the prestige of U.S. legal training and academia.⁵ U.S. legal thought reached Latin America, Asia, Europe and Africa through the transplant of legal institutions. The diffusion of U.S. legal styles often changed the process rather than the content of legal education, which resulted in local curriculum reforms that reflected the more pragmatic U.S. education style.⁶ Some scholars have harshly criticized the export of U.S. legal thought for its distinct adversarial judicial process that decentralizes power and privatizes disputes while creating advantages for the powerful and wealthy, expanding inequality and social stratification.⁷ Others have instead claimed that the diffusion of teaching methods geared to the adoption of U.S.-based clinical legal education aims at informing, adapting, and promoting social justice in a way that addresses the contextual realities of the importing country.⁸

A. Legal Diffusion through Legal Education

Since the beginning of the twentieth century the United States has been a successful recipient of European legal ideas.⁹ However, by the end of World War II, the direction changed as the United States became a major center of production of the global legal consciousness, or the *langue*, used by transnational legal elites.¹⁰ In the post-war era, law schools played an important role in the diffusion of U.S. legal thought around the world often driven by law and development goals.¹¹ Cosmopolitan law schools

A Critical Appraisal, pp. 19, 57 (Cambridge/New York: Cambridge University Press).

⁵ See Michele Graziadei (2009), "Legal transplants and the frontiers of legal knowledge", *Theoretical Inquiries in Law*, **10**, 723, 724.

⁶ See William Twining (2005), "Social science and diffusion of law", *J.L. Soc'y*, **32**, 203, 204; John H. Merryman (2000), "Law and development memoirs: The Chile Law Program", *Am. J. Comp. Law*, **48**, 481, 484.

⁷ See Ugo Mattei and Laura Nader (2008), *Plunder: When the Rule of Law Is Illegal* (Chichester: John Wiley & Sons).

⁸ See Richard Wilson (2012), "Clinical legal education in Latin America", symposium hosted by the Drexel Law Review, 12 October.

⁹ See Mattei (n 2), at 195–96.

¹⁰ See Kennedy (n 4), at 57.

¹¹ See Mark Galantier and David Trubek (1974), "Scholars in self-estrangement: Some reflections on the crisis in law and development studies", *Wis. L. Rev.*, **4**, 1062, 1067.

in North America received many Jewish *émigré* law professors who maintained their European ties after the war. U.S. law schools developed graduate programs initially influenced by European doctoral models, but later on switched gears to influence legal elites around the globe.¹² In past decades, graduate programs in North America educated lawyers who became part of global legal and political elites working in transnational firms or international organizations.¹³ U.S.-based academics increasingly served as legal advisors to draft, interpret, and reform the constitutions of countries in transition, or to lead neoliberal market reforms legitimized by the Washington consensus ideology in allegedly corrupt governments in need of constant legal reform.¹⁴ In either case, U.S. law schools and their professors became important agents of legal change exporting either the mainstream or the critiques to U.S. legal thought to the rest of the world.¹⁵

Even though the diffusion of U.S. legal education has been studied more systematically by social scientists than lawyers, lawyers remain central agents of legal change.¹⁶ Positivists' accounts of law and development have addressed the reforms in legal institutions rather than the change in legal reasoning and culture of the receiving groups. Critical scholars, however, have shown resistance to legal transplants when the transfer of foreign legal doctrines might create irritation in the receiving system, when the transfer only partially penetrates depending on the commitment to its adoption by legal and political elites,¹⁷ or when the transfer is accepted, albeit with continuous suspicion, by post-colonial elites shifting from the reception of European to U.S. legal thought.¹⁸

The difficulty in mapping the diffusion of U.S. legal thought, rather than the reception of a particular institution or a judicial/legislative rule, is

¹² See Gail Hupper (2007), "The rise of an academic doctorate in law: Origins through World War II", *Am. J. Legal Hist.*, **49** (1), 1.

¹³ See Yvez Dezalay and Bryant G. Garth (2012), *Lawyers and the Construction of Transnational Justice* (Abingdon/New York: Routledge).

¹⁴ See Jorge Esquirol (2008), "The failed law in Latin America", *Am. J. Comp. L.*, **56**, 75; Noah Feldman (2005), "Imposed constitutionalism", *Conn. L. Rev.*, **37**, 857, 860.

¹⁵ See Wendy Brown and Janet Halley (eds) (2002), *Left Legalism/Left Critique* (Durham: Duke University Press), p. 10.

¹⁶ See Twining (n 6), at 204.

¹⁷ Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard (2003), "The transplant effect", *Am. J. Comp. L.*, **51**, 163–203.

¹⁸ See Sylvia Wairimu Kang'ara (2012), "Beyond bed and bread: Making the African state through marriage reform-constitutive and transformative influences of Anglo-American legal thought", *Hastings Race & Poverty L.J.*, **9**, 353; Gunther Teubner (1998), "Legal irritants: Good faith in British law or how unifying law ends up in new differences", *Mod. L. Rev.*, **61** (1), 11.

how to measure the influence of U.S. legal ideas in another country's legal reasoning style. Legal education is an excellent starting point because law schools provide the necessary training which every lawyer must undertake. Since the 1990s, U.S. law schools have developed graduate programs including masters or doctorates in law that have educated professors in Canada, Israel, Korea, Colombia, and Taiwan.¹⁹

The prestige of U.S. legal education went hand in hand with the predominance of Western legal ideas such as the promotion of democracy and the rule of law. For instance, China's increasing geopolitical power and economic performance in the last twenty years led to dramatic changes in its traditional and post-communist legal system slowly committing to introduce Western rule of law principles.²⁰ The prestige of being involved in institutions such as the World Trade Organization (WTO), as well as maintaining the prized most favored nation trade status, nudged China towards reforming its legal system in a way that was more in line with Western principles, at least on the surface.²¹ Legal change in China was prompted also by the dramatic expansion of its legal education. Universities in the United States are the sites where many Chinese legal scholars regularly visit through U.S. legal assistance programs and funds for cooperation.²² U.S. law literature is ample in law libraries of Chinese universities and the highest numbers of citations of foreign literature are directed to American scholarly works, cases and legislation. Chinese scholars are familiar with many law terms which originated from or were affected by U.S. law, such as: administrative regulations and deregulation, public choice and game theory, disclosure of government information and certainly the due process principle and hearings.²³ Increasingly, China's lower court judges are experimenting with plea bargaining, using informal precedent, and hearing an increasing number of rights-based claims.²⁴

¹⁹ See Gail Hupper (2008), "The academic doctorate in law: A vehicle for legal transplants?", *J. L. Educ.*, **58**, 413, 415.

²⁰ See William Alford (2000), "Exporting "the Pursuit of Happiness" Aiding Democracy Abroad: The Learning Curve by Thomas Carothers (book review)", *Harv. L. Rev.*, **113**, 1677, 1683.

²¹ See Donald S. Clarke (2003), "China's legal system and the WTO: Prospects for compliance", *Wash. U. Global Stud. L. Rev.*, **2**, 97.

²² See Jacques DeLisle (1999), "Lex Americana? United States legal assistance, American legal models, and legal change in the post-communist world and beyond", *U Pa. J. Int. L.*, **20**, 179, 180.

²³ See Haibo He (2008), "The dawn of the due process principle in China", *Colum. J. Asian L.*, **22**, 57.

²⁴ See Benjamin L. Liebman (2008), "China's courts: Restricted reform", *Colum. J. Asian L.*, **21**, 1.

By focusing on the legal diffusion of U.S. legal thought through legal education, this chapter aims to go beyond the binary interaction between borrower and lender in a fixed direction. Rather than a wind going in a unilateral direction replacing another one, legal diffusion should be understood as a multidirectional change in winds pointing to an overlap of legal practices in which one becomes predominant at a certain point and time in legal education without substituting the other.²⁵

B. Signs of the Waning Influence of U.S. Legal Thought

The emerging influence of BRICS (Brazil, Russia, India, China and South Africa) over international trade and their convergence on governance models has created resistance and counter-harmonization processes to U.S. foreign trade hegemony,²⁶ especially with the erratic trade policy in the Trump era. In testing the limits of the diffusion of U.S. legal thought around the world – from public to private law – U.S. legal doctrines, ideas, and policies appear as retro rather than avant-garde compared to emerging global models. For instance, South African transformative constitutional law principles embedded in its Constitution of 1996 have allowed the South African Constitutional Court to engage in a comparative constitutional discourse that has become a model in a diverse number of legal subjects, from socio-economic rights to same sex marriage.²⁷ In a similar way Brazilian trade strategies within the multilateral forum of the WTO have carved their own policy autonomy in order to challenge issues such as exchange rate misalignments through antidumping measures.²⁸

The successful advancement of U.S. legal ideas after World War II

²⁵ See Twining (n 1), at 238.

²⁶ See Lucia Scaffardi (2013), “BRICS a multi-centre ‘legal network?’”, *Beijing L. Rev.*, 5, 140–48; Amy Kapczynski (2009), “Harmonization and its discontents: A case study of TRIPS implementation in India’s pharmaceutical sector”, *Calif. L. Rev.*, 97, 1571, 1576.

²⁷ See Macarena Saez (2015), “Which side of the aisle? The coming divide between marriage and family law” “Transforming family law through same-sex marriage: Lessons from (and to) the western world”, *Duke J. Comp. & Intl. L.*, 25, 125; Karl E. Klare (1998), “Legal culture and transformative constitutionalism”, *SALJ on Human Rights*, 14, 146.

²⁸ See Alvaro Santos (2012), “Carving out policy autonomy for developing countries in the World Trade Organization: The experience of Brazil and Mexico”, *Va. J. Int’l L.*, 52, 551, 553; see also Vera Thorstensen, Emerson Marçal and Lucas Ferraz (2012), “Exchange rate misalignments and international trade policy: Impacts on tariffs”, *J. World Trade*, 46, 597.

went hand in hand with neoliberal policies that were promoted globally by the Washington Consensus in the 1990s. From the mid-1990s until 2005, neoliberalism was waning as a result of disappointment with the neoliberal market shock therapy in Russia and Latin America and opposition to structural adjustment policies across the Global South. This changed law and development strategies to include civil society as well as human and social goals in the post-neoliberal development agenda.²⁹ The rising legal and political elites from the peripheries and semi-peripheries of China, Africa, and Latin America were moving from straightforward neoliberal economic recipes and rights-based approaches to a more selective reception of U.S. legal thought.

The gap created by the demise of the Washington Consensus allowed both Left and Right to experiment with their approaches to economic development. Both approaches, recently revamped by the populist agendas of Maduro, Orban and even Trump, include attention to localism, paying respect to differing capabilities, and tailoring reforms to the context in which they take place depending on local elites and social recipients.³⁰ Although legal realism, legal process, and rights neo-formalist insights of U.S. legal thought were successfully globalized elsewhere, these no longer satisfied the needs of rising legal elites from the Global South, the semi-peripheries of China, Africa and Latin America who were seeking to integrate global and native styles, and even more recently the Brexit and Trump supporters who felt left out from economic globalization and the rise of neoliberalism.³¹

C. The Decline of One Kind of U.S. Constitutionalism

During the 1980s, the diffusion of U.S. legal thought went hand in hand with neoliberal policies not only in law and development circles, but also in private and regulatory law circles in the European Union (EU). The diffusion of U.S. mainstream law and economics was central to the engineers of the internal market in Europe reforming product liability law.³²

²⁹ See David Kennedy (2006), “The ‘Rule of Law’, political choices, and development common sense”, in Trubek and Santos (n 4).

³⁰ See Amartya Sen (2009), *The Idea of Justice* (Cambridge: Belknap Press of Harvard University Press).

³¹ Duncan Kennedy (2017), “A left of liberal interpretation of Trump’s ‘big’ win, Part One: Neoliberalism”, *Nev. L.J. Forum*, 1, 98.

³² See Daniela Caruso and Roberto Pardolesi (2012), “Per una storia della direttiva sulla responsabilità da prodotto difettoso”, *Danno e Responsabilità*, 9 (Special Issue on product liability).

U.S. law and economics was appealing to European elites for its combination of rights neo-formalist approaches and analytics borrowed from neoliberal economics. The idea of Kaldor–Hicks efficiency provided a target not only for legislatures, but also for judges driven by economic efficiency rationales.³³ With the increasing political and legal divide across the Atlantic marked by the Iraq war and other regulatory conflicts over privacy protection, Right v. Left approaches to U.S. law and economics were no longer taken at face value. Instead, for European private lawyers, the selective reception of U.S. law and economics became part of their strategies in relation to European integration.³⁴

Praise for U.S. constitutional law by its liberal and cosmopolitan elites appears in decline. For example, sounding almost defeated, Anne-Marie Slaughter stated that “[o]ne of our great exports used to be constitutional law.”³⁵ According to Harold Hongju Koh, today foreign courts in well-established democracies prefer to cite the case law of the European Court of Human Rights in cases concerning equality, liberty and prohibitions against cruel treatment, rather than U.S. case law. This downturn in U.S. dominance is often explained as a result of the increasing sophistication of transnational elites all over the world. Additionally, these courts appear more liberal than their U.S. counterparts. As journalist Adam Liptak noted, “American ideas are for export, and there’s very little effort in the U.S. legal system to import ideas.” In this respect, the Scalia-Breyer debate in the United States illustrates the difficulty in importing liberal legal ideas into U.S. constitutional law when justices are profoundly divided over the use of comparative law in constitutional adjudication.³⁶ Perhaps more important to the lessening impact of U.S. jurisprudence is “the adamant opposition of some Supreme Court justices to the citation of foreign law in

³³ Duncan Kennedy (1998), “Law and economics from a critical legal studies perspective”, in Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law* (London/New York: Palgrave Macmillan/Stockton Press).

³⁴ See Fernanda Nicola (2008), “Transatlanticisms: Constitutional asymmetry and selective reception of U.S. law and economics in the formation of European private law”, *Cardozo J. Int’l & Comp. L.*, **16**, 101; James Q. Whitman (2004), “Two western cultures of privacy: Dignity versus liberty”, *Yale L.J.*, **113**, 1151, 1156.

³⁵ See Adam Liptak (2008), “U.S. Court is now guiding fewer nations”, *The New York Times*, 17 September, available at: <http://www.nytimes.com/2008/09/18/us/18legal.html? r=0> (accessed 14 September 2017).

³⁶ See Sujit Choudry (2006), “Migration as a new metaphor in comparative constitutional law”, in Sujit Choudry (ed.), *The Migration of Constitutional Ideas* (Cambridge/New York: Cambridge University Press).

their own opinions.”³⁷ For example, Israeli Supreme Court Chief Justice Aharon Barak has publically stated that the U.S. Supreme Court “is losing the central role it once had among courts in modern democracies”.³⁸ Meanwhile, even American Supreme Court justices have noticed the chilling effect that isolationist judicial thought can create. For example, Justice Ginsburg noted, “the failure to engage foreign decisions had resulted in diminished influence for the United States Supreme Court.” The Canadian Supreme Court, she said, is “probably cited more widely abroad than the U.S. Supreme Court.” There is one reason for that, she said: “You will not be listened to if you don’t listen to others.”³⁹ Foreign Supreme Courts could be looking less at U.S. courts due to the reputation of their government abroad as a result of an imperialist foreign policy. In a similar vein, other constitutional courts will position themselves at the opposite side of the legal spectrum than the U.S. Supreme Court in an attempt to broadly reject a Western individualist notion of rights, like in the case of the Plurinational Constitutional Court in Bolivia.⁴⁰

An empirical finding about such attitudes can be found in a David S. Law and Mila Versteeg article showing how in the last couple of decades a large number of countries explicitly refused to borrow or transplant from the U.S. constitutional arrangement and its rights-related provisions.⁴¹ Through sixty years of comprehensive data on the content of the world’s constitutions, the authors reveal that there is a generic component to global constitutionalism characterized by rights and institutional arrangements that appear in nearly all formal constitutions. Their general thesis, however, is that such a global constitutional toolkit is no longer influenced by U.S. constitutionalism and we are witnessing the end of an American hegemony. In recognizing that the U.S. constitution might have lost its appeal as a model to inspire constitutions in other countries, the authors go even further. They explain that the study of U.S. legal culture aims to avoid mistakes like the ones incurred in American jurisprudence. At times, U.S. law can become the anti-model. For instance, India’s Constitution drafters specifically rejected importing American

³⁷ See Liptak (n 35).

³⁸ See Aharon Barak (2002), “A judge on judging: The role of a supreme court in a democracy”, *Harv. L. Rev.*, **116**, 19.

³⁹ See Liptak (n 35).

⁴⁰ See Diego Eduardo Lopez-Medina (2013), “Rights discourse and theory in the new plurinational constitutional court of Bolivia” at Harvard Law School in the IGLP program on comparative law (June).

⁴¹ See David S. Law and Mila Versteeg (2012), “The declining influence of the American Constitution”, *N. Y. U. L. Rev.*, **87**, 762, 767.

due process jurisprudence to avoid the consequences of the *Lochner* case.⁴² In a similar way, the drafters of the South African abortion legislation were indirectly influenced by the U.S. experience in the aftermath of *Roe v. Wade*.⁴³ On the other hand, the fact that the negative model is something that scholars and lawyers would want to study and understand, but not necessary adopt, shows that the U.S. remains an influential cultural model.⁴⁴

II. LEGAL DIFFUSION UNDER NEW CLOTHES

Legal scholars have suggested that the global diffusion of U.S. constitutional law and the discipline of comparative constitutional law appear in decline.⁴⁵ This chapter posits that what is changing is not the preeminence of U.S. legal thought around the globe but its means of diffusion. Rather than under the guise of comparative constitutional law, legal scholars have engaged in the diffusion of U.S. national security law post 9/11.⁴⁶ National security lawyers have carved an independent doctrinal canon and an analytical skillset for global professionals that are readily exportable. Rather than promoting global justice and critical thinking, under the attacks of legal reformers U.S. legal academia is turning inwards to training lawyers for Bar passage and local business transactions.

A. The Rise of National Security Law

The declining influence of comparative constitutional law (CCL) in U.S. legal academia has provided the opportunity for national security law

⁴² *Lochner v. New York*, 198 U.S. 45 (1905). See Heinz Klug (2000), “Model and anti-model: The United States Constitution and the ‘rise of world constitutionalism’”, *Wis. L. Rev.*, **3**, 597, 606.

⁴³ *Roe v. Wade*, 410 U.S. 113. See Rachel Rebouche (2011), “The limits of reproductive rights in improving women’s health”, *Ala. L. Rev.*, **63**, 1.

⁴⁴ See Kim Lane Scheppelle (2003), “Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models”, *Int’l J. Const. L.*, **1**, 296, 297.

⁴⁵ See David Fontana (2011), “The rise and fall of comparative constitutional law in the post-war era”, *Yale J. Int’l L.*, **36**, 1.

⁴⁶ See Kim Lane Scheppelle (2006), “The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency”, in Sujit Choudry (ed.), *The Migration of Constitutional Ideas* (Cambridge/New York: Cambridge University Press).

(NSL) to play a leading role in U.S. law schools' curriculum.⁴⁷ In the past decades, many American law schools have replaced CCL and international law classes with courses on NSL and U.S. foreign relations.⁴⁸

The internal mode of diffusion of CCL was grounded in two dimensions based on U.S. constitutional thinking: a formalist and a functionalist one. The formalist dimension relied on a universalist and rights-based approach to fundamental rights, whereas the functionalist dimension addressed the structure of government, which reflected on how federalism should deal with social tensions in balancing individual freedoms and socio-economic benefits.⁴⁹

In contrast, the mode of diffusion of NSL has a formalist dimension based on habeas corpus rights and the distinction between citizens and aliens as well as civilian law versus laws of war. In its functionalist dimension, NSL scholarship balances state security with the privacy and civil liberties of targeted individuals.⁵⁰

Despite the structural parallels between the CCL and NSL, there are some differences due to the formation and the politics of the different legal elites. U.S. lawyers and academics involved in NSL are no longer part of a cosmopolitan liberal elite, but they are criminal lawyers, immigration lawyers, or international and foreign relations lawyers committed to studying counter-terrorism and military commissions. The mode of diffusion is no longer a discourse among constitutional or supranational courts from different countries or regions of the world, but the study of national executives and their relation to federal/military courts.⁵¹

B. From Crisis to the Changes in U.S. Legal Education

U.S. legal education is in the midst of a "crisis," for lack of a better term, based on the financial crisis: skyrocketing student debt, in part financed by the government, the downturn in law school applications, and the

⁴⁷ See William C. Banks (2005), "Teaching and learning about terrorism", *J. Legal Educ.*, 55, 35.

⁴⁸ See Michael J. Glennon (2005), "Teaching national security law", *J. Legal Educ.*, 55, 49.

⁴⁹ See Kennedy (n 4), at 57.

⁵⁰ See Mathew C. Waxman (2012), "National security federalism in the age of terror", *Stan. L. Rev.*, 64, 289, 290.

⁵¹ See Richard H. Fallon Jr and Daniel J. Meltzer (2007), "Habeas corpus jurisdiction, substantive rights, and the War on Terror", *Harv. L. Rev.*, 120, 2029, 2037; Anne-Marie Slaughter (2005), *A New World Order* (Princeton: Princeton University Press); James E. Pfander (2004), "Article I tribunals, Article III courts, and the judicial power of the United States", *Harv. L. Rev.*, 118, 643, 644.

high unemployment rates for lawyers. One approach to solving the crisis, which is supported by scholars and practitioners, aims at transforming U.S. law schools from intellectual global hubs into localized training schools for lawyers proposing to shift from a three- to two-year JD (Juris Doctor) program and to open pro bono practice firms in law schools. Due to a sharp decrease in student enrollment, U.S. law schools are cutting resources for their international programs to strengthen local practice and Bar passage. Many predict a long-term crisis for law schools spurred in part by the global financial crisis, the high legal unemployment rate, and the skyrocketing debts carried by students in legal education. It is too early, however, to determine the real consequences of the current crisis in legal education ranging from structural changes in the employment market for lawyers to the lavish expenditures of law schools in fancy buildings and high faculty salaries.⁵² Yet this second more simplistic narrative appears to have more traction by severely impacting law schools' reputations and allowing quick-fix solutions that might have a disastrous impact on the long-term intellectual output of law schools.

The reformist approach to such crisis aims at transforming U.S. law schools from intellectual global hubs into localized, low-cost training schools for transactional lawyers driven by Bar passage.⁵³ Reformists promote the privatization of legal education, transforming the nature of U.S. law schools with changes such as: deregulating law schools, eliminating expensive clinical or outward-looking legal training, and favoring the on-going attempts by the American Bar Association to eliminate professorial tenure.⁵⁴ As a result, the diffusion of U.S. legal consciousness will increasingly take place beyond U.S. law schools, often under the auspices of U.S. legal education abroad. What changes is the vehicle of legal diffusion rather than its message.

Legal reformers attacking U.S. legal education are pushing for privatization through the emergency of student debt and a critique of interdisciplinary and theoretical scholarship not geared to form local lawyers.⁵⁵ In offering such an inward-looking solution of legal education curriculum, legal reformers are missing the point for many reasons.

Foremost, it is not clear that the recipe offered by legal reformers to transform the legal curriculum through privatizing law schools will

⁵² Brian Z. Tamanaha (2012), *Failing Law Schools* (Chicago/London: University of Chicago Press).

⁵³ Paul Campos (2012), "The crisis of the American law school", *University of Michigan Journal of Law Reform*, 46 (1), 177–224.

⁵⁴ Tamanaha (n 52).

⁵⁵ Tamanaha (n 52).

improve the job opportunities of their students.⁵⁶ On the contrary, empirical studies have shown that after obtaining law degrees, students have a median increase of income earnings that varies according to various historical factors.⁵⁷ In addition, empirical studies have disproven the so-called “buyers’ remorse” among law graduates, which reformers connect to student debt from law school.⁵⁸

Additionally, the actual crisis of legal education ought to be understood in its historical perspective and narrowed to the job crisis of an elite Bar while many legal services to the poor or the middle class are still in demand and overpriced. Through a historical analysis of various legal crises over time, scholars have shown how the legal profession tends to adapt to new market needs.⁵⁹

Lastly, legal reformers claim that law students are failed by law schools that use their resources to advance legal scholarship rather than to teach legal skills, and propose to shorten the time of law school education from three to two years.⁶⁰ Not only have many studies shown that the correlation between failing law students and legal scholarship is largely flawed and unproven, but its result would dramatically alter the nature of U.S. law schools at home and abroad as sites offering critical thinking and social justice visions to young lawyers.⁶¹ An example at the local level is what Jamie Raskin has undertaken at the Washington College of Law, and law schools around the country, with the Marshall Brennan Constitutional Literacy Project. This bottom-up and outward-looking training strategy aims to engage law students to raise the consciousness of young students in local public high schools as a form of “popular constitutionalism in action”.⁶² At the global level, U.S. law schools have emerged

⁵⁶ See Jennifer S. Bard ((2012), “Failing law schools”, *J. Legal Educ.*, **33**, 417, 420.

⁵⁷ Michael Simkovic, and Frank McIntyre (2013), “The economic value of a law degree”, American law and economics conference, 18 May. See also Frank McIntyre and Michael Simkovic (2014), “The economic value of a law degree”, *J. Legal Stud.*, **43**, 249.

⁵⁸ See Ronit Dinovitzer, Bryant G. Garth, and Joyce Sterling (2013), “Buyers’ remorse? An empirical assessment of the desirability of a legal career”, *J. Legal Educ.*, **63**, 211, 212.

⁵⁹ See Bryant Garth (2013), “Crises, crisis rhetoric, and competition in legal education: A sociological perspective on the (latest) crisis of the legal profession and legal education”, *Stan. L & Pol’y Rev.*, **24**, 503, 504.

⁶⁰ See Brian Z. Tamanaha (2006), *Failing Law School* (Chicago/London: University of Chicago Press).

⁶¹ See Bard (n 56), at 420.

⁶² See Jamie B. Raskin (2013), “The Marshall-Brennan constitutional project: American legal education’s ambitious experiment in democratic constitutionalism”, *Denv. U. L. Rev.*, **90**, 834, 838.

as sites in which legal elites have the resources to monitor the democratic failures even in Western countries,⁶³ or they can train the students and the future elites committed to advancement of the Inter-American Human Rights System.⁶⁴

Beyond the current debate spurred by the crisis, in U.S. legal education, the consequences on law schools are severe and the curricular changes or the lack of funding have impacted primarily the interdisciplinary and global approach promoted by legal academia. With the increasing competition from Europe, China, Brazil and India offering competitive and often less costly legal education, U.S. law schools are challenged to reform and rethink their curriculum for global elites.⁶⁵ For instance, the EU was spurred by economic and legal integration to rethink and reform; various EU soft and hard law initiatives are creating dynamic and competitive law schools aiming at creating a transnational legal elite of lawyers.⁶⁶

C. U.S. Legal Education Reproducing Legal Elites Abroad

It is no longer clear whether the production of transnational legal elites will continue taking place in U.S. law schools through their pricy graduate programs offering skills tailored to local rather than global legal practice. For instance, the average cost of a graduate EU degree is \$16000 for an LL.M. degree, against the \$50000 average in the U.S., and there are at the moment 173 E.U. programs offering such degrees. Since 2003, in Europe there have been at least 36 new international LL.M. programs established in 27 different law schools in Europe.⁶⁷ In addition, issues of prestige are at stake when the perception of the Parisian Bar is that those who skipped the *École du Barreau* and circumvented the local exam to pass the New York Bar took a shortcut trying to circumvent the more demanding French Bar passage regime. Before taking the allegedly “easier” route

⁶³ Kim Lane Scheppele (2016), “Enforcing the basic principles of EU law through systemic infringement procedures”, in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press).

⁶⁴ See Claudio Grossman (2009), “The inter-American system and its evolution”, *Inter-Am. and Eur. Human Rts. J.*, **2**, 49.

⁶⁵ See Claudio Grossman (2010), “Raising the bar: US legal education in an international setting”, *Harv. Int’l L. J.*, **32**, 16, 17.

⁶⁶ See Julian Lonbay (2012), “The changing regulatory environment affecting the education and training of Europe’s lawyers”, *J. Legal Educ.*, **64**, 479, 481.

⁶⁷ See Memorandum from the Office of Global Opportunities for Rachel Gordon to the faculty of Am. Univ. Wash. Coll. of Law Eur. LL.M Programs (11 February 2013) (on file with the author).

of finishing an undergraduate law degree in Europe or in Asia, and then getting an American LL.M., students should consider that the New York Bar is viewed as a shorter and less difficult route than the arduous one of going to Bar School and passing the Bar back at home. In both Asia and Europe, studying for the Bar or practicing before taking the Bar exams requires several years to prepare for and has a much lower passage rate than the New York Bar.

The shift in influence of U.S. legal education, as a mean of diffusion, has therefore affected law schools in the U.S. rather than abroad. In the United States, law schools are turning inwards, cutting the funding to teach international law courses for JD students in favor of “real” courses, i.e. private and transactional law, rather than public international law which is perceived as impractical for obtaining a “real legal job” and as nurturing “unrealistic expectations.”⁶⁸ The mode of diffusion of U.S. legal education is therefore changing. Law schools that shape the consciousness of the students committed to social justice at home or abroad through a mix of pragmatic, analytical, and interdisciplinary training skills are being replaced by problem-solving programs narrowly committed to local transactional practice. With respect to the subject’s thoughts rather than comparative constitutional and global human rights classes, the external focus of U.S. legal education happens increasingly through the lens of NSL and U.S. foreign policy or foreign relations.

Even though it might become unattractive or too expensive to pursue legal education in the United States, the prestige of its pedagogy does not appear undermined. On the contrary, the use of the Socratic method in the classroom, the adoption of the Bluebook Law Review style and the shift from treatise to case method, are spreading throughout the Europe, Asia, and Latin America. Another example of the spreading of American style in judicial deliberations is the increasing use of dissenting and concurring opinions introduced by the European Court of Human Rights.⁶⁹ The academic push towards introducing U.S. style dissenting and concurring opinions in the Court of Justice of the EU is justified to address a stifling and cryptic judicial reasoning, or to create more visibility in its human rights jurisprudence.⁷⁰ Finally, the transplant of U.S. legal education

⁶⁸ See Eric A. Posner and Jack L. Goldsmith (2005), *The Limits of International Law* (Oxford/New York: Oxford University Press).

⁶⁹ Ugo Mattei (1993), “Why the wind changed: Intellectual leadership in western law”, *American Journal of Comparative Law*, 42 (1), 195–219.

⁷⁰ See Grainne de Burca (2013), “After the EU Charter of Fundamental Rights: The Court of Justice as a human rights adjudicator?”, *Maastricht J. Eur. &*

abroad is facilitated by the fact that its legal elites speak the language that in turn contributes to the global norm-production of legal regimes.⁷¹

Questions remain as to which legal elites and which ends are served by the push towards U.S. style legal education. The increasing emergence of U.S.-style law schools created by non-U.S. academic institutions have become part of the U.S. legal discourse. However, there is little research on how U.S. legal education and legal style are advanced by non-U.S. academics or institutions that are located beyond U.S. borders. Americanization is not necessarily a neocolonial and imperial strategy, but it might serve local elites different purposes, often departing from the U.S. underlying goal.⁷²

Yet the diffusion of U.S. legal education continues by other complex and indirect means, especially abroad where U.S. law schools in Asia, Europe, and Latin America are engaged in spreading legal education that is often underexplored.⁷³ For instance, U.S. law schools have committed to transitional and global legal education with summer or semester programs abroad, trying to modernize and make more attractive their curriculum to law students. However, once explored more closely, such attempts come at a high cost because they consolidate a model that reproduces the power structures of the global political economy.⁷⁴ Finally, the unintended consequences that academic globalization of U.S. education abroad encounters when going to authoritarian and non-democratic regimes can be seen in the case of the Yale University's establishment of an undergraduate college in Singapore. There, limits on campus-free expression, freedom of assembly, and other civil and political rights affect Yale's ability to deliver U.S.-style education.⁷⁵ Similar issues were raised in the New York University Abu Dhabi campus in relation to discrimination of sexual orientation and the overall dilution of human rights standards.⁷⁶

Comp. L., 20, 168, 169; Vlad Perju (2009), "Reason and authority in the European Court of Justice", *Va. J. Int'l L.*, 49, 307, 308.

⁷¹ See Graziadei (n 5), at 724.

⁷² See Bret Stancil and Larry Catá Backer (2013), "Beyond colonization: globalization and the establishment of programs of U.S. legal education abroad by indigenous institutions", *Drexel L. Rev.*, 5, 317, 318.

⁷³ See Anil Kalhan (2013), "Thinking critically about international and transnational legal education", *Drexel L. Rev.*, 5, 285.

⁷⁴ See Vasuki Nesiah (2013), "A flat earth for lawyers without borders? Rethinking current approaches to the globalization of legal education", *Drexel L. Rev.*, 5, 371, 372.

⁷⁵ See Martin S. Flaherty (2013), "'But for Wuhan?': Do law schools operating in authoritarian regimes have human rights obligations?", *Drexel L. Rev.*, 5, 296, 297.

⁷⁶ See Zvika Krieger (2013), "The Emir of NYU: John Sexton's Abu Dhabi debacle", *The Atlantic*, 13 March.

The shift in modes of diffusion of U.S. legal education, namely the inward-looking business practice coupled by an understanding of international and comparative law through the national security lens will impact the consciousness of future transnational legal elites. The change in consciousness that U.S. law schools are witnessing is elucidated by two graduation speeches delivered at different times at American University, Washington College of Law. These two speeches reflect the change in the way our young graduates should perceive their future role as transnational legal elites distributing legal services.

In his graduation address at the Washington College of Law in 1986, Professor Duncan Kennedy began his commencement speech saying:

Try your best, oh graduating students of the WCL, to avoid doing harm with your lawyer skills. [. . .] If you — if most lawyers — took the choice of clients seriously according to the vacuous piety that you should avoid doing harm with your lawyer skills, it seems likely that some clients would have to pay more for less legal service, and other people would get more service for less money. Your moral intuitions would influence the distribution of legal talent, through the market, along with the buying power of clients. Would that be better or worse than the current situation? I think it would be better.⁷⁷

Addressing the Washington College of Law in 2013, Harold Hongju Koh gave his graduation speech starting with his family story and in particular how his father was an ambassador for Korea in the U.S. Later in his life Koh found himself representing the U.S. at the UN and when an ambassador from another country sits beside him and hears his story, he says these words that Koh proudly echoes:

So your father was an ambassador to the U.S. and in one generation you are an ambassador from the U.S. America is the only country where that could happen, that is why you are the greatest nation. It is not your weapons, it is not your money, he said, it is your openness, your diversity, your commitment to law and Human Rights that is the source of your leadership [. . .] A first distinctive feature global [. . .] (Y)ou must understand international law because you belong to the first genuinely global generation, unlike your parents, the defining image of your era is not a world divide by the Berlin Wall, it is a world connected by world wide web [. . .].⁷⁸

⁷⁷ See Duncan Kennedy (1987), “The responsibility of lawyers for the justice of their causes”, *Tex. Tech L. Rev.*, **18**, 1157, 1160.

⁷⁸ See Harold Hongju Koh (2013), Address at the Am. Univ. Wash. Coll. of Law commencement, 19 May, available at: <http://media.wcl.american.edu/Media/site/Play/c6b0c0f75d8a4bb48d6e8aab280edf451d> (accessed 14 September 2017).

The moral position presented by Kennedy at the 1986 graduation was based on the premise that, even in an adversarial situation, when you are asked to represent a client you disapprove of, as a lawyer, you can make a choice based on the moral belief that you have a commitment towards yourself and the entire society not to take your client's case when he is "using" his legal rights in a bad case.⁷⁹ The idea is that lawyers have a conscience based on different political or moral beliefs and they can make bad or good choices to distribute legal privileges accordingly.

Almost twenty years later, Koh praises two important features of the Washington College of Law, namely its public interest commitment and how international law and human rights courses are a fundamental part of the law school's curriculum. Today protecting our sovereignty, according to Koh, means engaging with the world through a framework of international law to promote the global public interest. Like Kennedy, Koh addressed the fact that a good lawyer is not just a counselor but they have a moral conscience that will prevent her from making bad choices based on her sense of justice. However, he goes further, explaining how in his career he has condemned torture as a human rights advocate but he has also legitimized the use of drones in war as a government lawyer, for which he has been harshly criticized.⁸⁰ On this note he finished his speech with "you are entitled to speak your mind [and] so is everyone else[.] [A]ll you can do is work your hardest, do your best [. . .] all you can do is live your life with integrity[.] [I]f you do they should judge you fairly."⁸¹

In both speeches there is the sense that the skills law schools impart to young lawyers should not take over their moral conscience when making their professional choices. In this respect, there is not much change in the message that U.S. legal education offers to its young practitioners. Both speakers address the notion of public interest that changes from housing and poverty law to human rights and NSL according to the historical period of their legal education. While Kennedy's speech is geared toward incorporating social justice into professional choices or everyday lawyers, in Koh's speech the global public interest is advanced through the practice of human rights and NSL. By comparing these graduation speeches, almost twenty years apart, we can appreciate how U.S. legal education has influenced and at the same time is becoming an integral part of a global legal consciousness in which ethical choices made by U.S. lawyers

⁷⁹ See Kennedy (n 77), at 1160.

⁸⁰ David Cole (2013), "How we made killing easy", *The New York Review of Books* blog, 6 February, available at: <http://www.nybooks.com/blogs/nyrblog/2013/feb/06/drones-killing-made-easy/> (accessed 14 September 2017).

⁸¹ Koh (n 78), at 1.

bear consequences both for national and international settings. Yet the discourse on how U.S. legal thought is reproduced through these graduating lawyers has somehow changed in focusing on a different type of legal practice, from tort law addressing social injustice, to NSL posing very hard questions for lawyers that will inevitably affect a global audience.